

Dynamism Software – Terms & Conditions of Trade

- 1. Definitions**
 - 1.1 "Contractor" means Dynamism Software Pty Ltd, its successors and assigns or any person acting on behalf of and with the authority of Dynamism Software Pty Ltd.
 - 1.2 "Client" means the person/s buying the Goods as specified in any invoice, document or order, and if there is more than one Client is a reference to each Client jointly and severally.
 - 1.3 "Goods" means all Goods or Services supplied by the Contractor to the Client at the Client's request from time to time (where the context so permits the terms 'Goods' or 'Services' shall be interchangeable for the other).
 - 1.4 "Software" shall mean the programs and other operating information (including documentation) used by a computer.
 - 1.5 "Price" means the Price payable for the Goods as agreed between the Contractor and the Client in accordance with clause 5 below.
- 2. Acceptance**
 - 2.1 The Client is taken to have exclusively accepted and is immediately bound, jointly and severally, by these terms and conditions if the Client places an order for or accepts delivery of the Goods.
 - 2.2 These terms and conditions may only be amended with the Contractor's consent in writing and shall prevail to the extent of any inconsistency with any other document or agreement between the Client and the Contractor.
 - 2.3 The Client acknowledges and agrees that any expected or estimated outcomes concerning increased sales or market share or penetration achieved by the Client derived from marketing activities undertaken by the Contractor, expressed in consultation or quotations, are speculative and in no way constitute a guarantee.
- 3. Confidentiality**
 - 3.1 Each party agrees to treat all information and ideas communicated to it by the other confidentially and agree not to divulge it to any third party, without the other party's written consent. The parties will not copy any such information supplied, and will either return it or destroy it (together with any copies thereof) on request of the other party.
- 4. Change in Control**
 - 4.1 The Client shall give the Contractor not less than fourteen (14) days prior written notice of any proposed change of ownership of the Client and/or any other change in the Client's details (including but not limited to, changes in the Client's name, address, contact phone or fax number/s, or business practice). The Client shall be liable for any loss incurred by the Contractor as a result of the Client's failure to comply with this clause.
- 5. Price and Payment**
 - 5.1 At the Contractor's sole discretion the Price shall be either:
 - (a) as indicated on any invoice provided by the Contractor to the Client; or
 - (b) the Price as at the date of delivery of the Goods according to the Contractor's current price list; or
 - (c) the Contractor's quoted price (subject to clause 5.2) which will be valid for the period stated in the quotation or otherwise for a period of thirty (30) days.
 - 5.2 The Contractor reserves the right to change the Price if a variation to the Contractor's quotation is requested. Any variation from the plan of scheduled works or specifications (including, but not limited to, any variation as a result of additional works required due to hidden or unidentifiable difficulties or due to fluctuations in the currency exchange rate or as a result of increases to the Contractor in the cost of materials and labour) will be charged for on the basis of the Contractor's quotation and will be shown as variations on the invoice. Payment for all variations must be made in full at their time of completion.
 - 5.3 The Contractor may submit a detailed payment claim at intervals not less than seven (7) days for work performed up to the end of each week. The value of work so performed shall include the reasonable value of authorized variations and the value of materials supplied to the Client but not yet installed.
 - 5.4 At the Contractor's sole discretion a non-refundable deposit may be required.
 - 5.5 Time for payment for the Goods being of the essence, the Price will be payable by the Client on the date determined by the Contractor, which may be:
 - (a) on delivery/completion of the Goods;
 - (b) before delivery of the Goods;
 - (c) by way of instalments/progress payments in accordance with the Contractor's payment schedule;
 - (d) the date specified on any invoice or other form as being the date of payment; or
 - (e) failing any notice to the contrary, the date which is seven (7) days following the date of any invoice given to the Client by the Contractor.
 - 5.6 Payment may be made by cash, cheque, bank cheque, electronic/on-line banking, credit card (plus a surcharge of up to three (3%) of the Price), or by any other method as agreed to between the Client and the Contractor.
 - 5.7 Unless otherwise stated the Price does not include GST. In addition to the Price the Client must pay to the Contractor an amount equal to any GST the Contractor must pay for any supply by the Contractor under this or any other agreement for the sale of the Goods. The Client must pay GST, without deduction or set off of any other amounts, at the same time and on the same basis as the Client pays the Price. In addition the Client must pay any other taxes and duties that may be applicable in addition to the Price except where they are expressly included in the Price.
- 6. Delivery of Goods**
 - 6.1 Any time or date given by the Contractor to the Client is an estimate only. The Client must still accept the Goods even if late and the Contractor will not be liable for any loss or damage incurred by the Client as a result of the Goods being late.
- 7. Risk**
 - 7.1 Any risk in any Goods or Services supplied by the Contractor to the Client, passes to the Client immediately upon the Software being transferred to the Client and/or the Website becoming activated or live, it shall be the Client's responsibility to insure the Goods or Services immediately if required.
 - 7.2 The Client acknowledges that Goods supplied may exhibit variations in shade, colour and finish, and may vary to colour specifications supplied by the Client. The Contractor will make every effort to match colour specifications, and to match batches of product supplied, in order to minimise such variations but shall not be liable in any way whatsoever where such variations occur.
- 8. Proof Reading**
 - 8.1 Whilst every care is taken by the Contractor to carry out the instructions of the Client, it is the Client's responsibility to undertake a final proof reading of the Goods. The Contractor shall be under no liability whatsoever for any errors not corrected by the Client in the final proof reading. Should the Client's alterations require additional proofs this shall be invoiced as an extra.
 - 8.2 When style, type or layout is left to Contractor's judgement, then the Client makes further alterations to the copy this will be invoiced as an extra.
 - 8.3 While every effort will be taken by the Contractor to match colours, the Contractor will take no responsibility for any variation due to substrates, half tones and/or detailed graphics between sale samples (including but not limited to virtual or physical samples) and the final product.
- 9. Title**
 - 9.1 The Contractor and the Client agree that ownership of the Goods shall not pass until:
 - (a) the Client has paid the Contractor all amounts owing to the Contractor; and
 - (b) the Client has met all of its other obligations to the Contractor.
 - 9.2 Receipt by the Contractor of any form of payment other than cash shall not be deemed to be payment until that form of payment has been honoured, cleared or recognised.
 - 9.3 It is further agreed that:
 - (a) until ownership of the Goods passes to the Client in accordance with clause 9.1 that the Client is only a bailee of the Goods and must return the Goods to the Contractor on request.
 - (b) the Client holds the benefit of the Client's insurance of the Goods on trust for the Contractor and must pay to the Contractor the proceeds of any insurance in the event of the Goods being lost, damaged or destroyed.
 - (c) the Client must not sell, dispose, or otherwise part with possession of the Goods other than in the ordinary course of business and for market value. If the Client sells, disposes or parts with possession of the Goods then the Client must hold the proceeds of any such act on trust for the Contractor and must pay or deliver the proceeds to the Contractor on demand.
 - (d) the Client should not convert or process the Goods or intermix them with other goods but if the Client does so then the Client holds the resulting product on trust for the benefit of the Contractor and must sell, dispose of or return the resulting product to the Contractor as it so directs.
 - (e) the Client irrevocably authorises the Contractor to enter any premises where the Contractor believes the Goods are kept and recover possession of the Goods.
- (f) the Contractor may recover possession of any Goods in transit whether or not delivery has occurred.
 - (g) the Client shall not charge or grant an encumbrance over the Goods nor grant nor otherwise give away any interest in the Goods while they remain the property of the Contractor.
 - (h) the Contractor may commence proceedings to recover the Price of the Goods sold notwithstanding that ownership of the Goods has not passed to the Client.
- 10. Personal Property Securities Act 2009 ("PPSA")**
 - 10.1 In this clause financing statement, financing charge statement, security agreement, and security interest has the meaning given to it by the PPSA.
 - 10.2 Upon assenting to these terms and conditions in writing the Client acknowledges and agrees that these terms and conditions constitute a security agreement for the purposes of the PPSA and creates a security interest in all Goods that have previously been supplied and that will be supplied in the future by the Contractor to the Client.
 - 10.3 The Client undertakes to:
 - (a) promptly sign any further documents and/or provide any further information (such information to be complete, accurate and up-to-date in all respects) which the Contractor may reasonably require to;
 - (i) register a financing statement or financing charge statement in relation to a security interest on the Personal Property Securities Register;
 - (ii) register any other document required to be registered by the PPSA; or
 - (iii) correct a defect in a statement referred to in clause 10.3(a)(i) or 10.3(a)(ii);
 - (b) indemnify, and upon demand reimburse, the Contractor for all expenses incurred in registering a financing statement or financing charge statement on the Personal Property Securities Register established by the PPSA or releasing any Goods charged thereby;
 - (c) not register a financing charge statement in respect of a security interest without the prior written consent of the Contractor;
 - (d) not register, or permit to be registered, a financing statement or a financing charge statement in relation to the Goods in favour of a third party without the prior written consent of the Contractor;
 - (e) immediately advise the Contractor of any material change in its business practices of selling the Goods which would result in a change in the nature of proceeds derived from such sales.
 - 10.4 The Contractor and the Client agree that sections 96, 115 and 125 of the PPSA do not apply to the security agreement created by these terms and conditions.
 - 10.5 The Client waives their rights to receive notices under sections 95, 118, 121(4), 130, 132(3)(d) and 132(4) of the PPSA.
 - 10.6 The Client waives their rights as a grantor and/or a debtor under sections 142 and 143 of the PPSA.
 - 10.7 Unless otherwise agreed to in writing by the Contractor, the Client waives their right to receive a verification statement in accordance with section 157 of the PPSA.
 - 10.8 The Client must unconditionally ratify any actions taken by the Contractor under clauses 10.3 to 10.5.
 - 10.9 Subject to any express provisions to the contrary nothing in these terms and conditions is intended to have the effect of contracting out of any of the provisions of the PPSA.
- 11. Security and Charge**
 - 11.1 In consideration of the Contractor agreeing to supply the Goods, the Client charges all of its rights, title and interest (whether joint or several) in any land, realty or other assets capable of being charged, owned by the Client either now or in the future, to secure the performance by the Client of its obligations under these terms and conditions (including, but not limited to, the payment of any money).
 - 11.2 The Client indemnifies the Contractor from and against all the Contractor's costs and disbursements including legal costs on a solicitor and own client basis incurred in exercising the Contractor's rights under this clause.
 - 11.3 The Client irrevocably appoints the Contractor and each director of the Contractor as the Client's true and lawful attorneys to perform all necessary acts to give effect to the provisions of this clause 11 including, but not limited to, signing any document on the Client's behalf.
- 12. Defects, Warranties and Returns, Competition and Consumer Act 2010 (CCA)**
 - 12.1 The Client must inspect the Goods on delivery and must within forty-eight (48) hours of delivery notify the Contractor in writing of any evident defect/damage, shortage in quantity, or failure to comply with the description or quote. The Client must notify any other alleged defect in the Goods as soon as reasonably possible after any such defect becomes evident. Upon such notification the Client must allow the Contractor to inspect the Goods.
 - 12.2 Under applicable State, Territory and Commonwealth Law (including, without limitation the CCA), certain statutory implied guarantees and warranties (including, without limitation the statutory guarantees under the CCA) may be implied into these terms and conditions (**Non-Excluded Guarantees**).
 - 12.3 The Contractor acknowledges that nothing in these terms and conditions purports to modify or exclude the Non-Excluded Guarantees.
 - 12.4 Except as expressly set out in these terms and conditions or in respect of the Non-Excluded Guarantees, the Contractor makes no warranties or other representations under these terms and conditions including but not limited to the quality or suitability of the Goods. The Contractor's liability in respect of these warranties is limited to the fullest extent permitted by law.
 - 12.5 If the Client is a consumer within the meaning of the CCA, the Contractor's liability is limited to the extent permitted by section 64A of Schedule 2.
 - 12.6 If the Contractor is required to replace the Goods under this clause or the CCA, but is unable to do so, the Contractor may refund any money the Client has paid for the Goods.
 - 12.7 If the Client is not a consumer within the meaning of the CCA, the Contractor's liability for any defect or damage in the Goods is:
 - (a) limited to the value of any express warranty or warranty card provided to the Client by the Contractor at the Contractor's sole discretion;
 - (b) limited to any warranty to which the Contractor is entitled, if the Contractor did not manufacture the Goods;
 - (c) otherwise negated absolutely.
 - 12.8 Subject to this clause 12, returns will only be accepted provided that:
 - (a) the Client has complied with the provisions of clause 12.1; and
 - (b) the Contractor has agreed that the Goods are defective; and
 - (c) the Goods are returned within a reasonable time at the Client's cost (if that cost is not significant); and
 - (d) the Goods are returned in as close a condition to that in which they were delivered as is possible.
 - 12.9 Notwithstanding clauses 12.1 to 12.8 but subject to the CCA, the Contractor shall not be liable for any defect or damage which may be caused or partly caused by or arise as a result of:
 - (a) the Client failing to properly maintain or store any Goods;
 - (b) the Client using the Goods for any purpose other than that for which they were designed;
 - (c) the Client continuing the use of any Goods after any defect became apparent or should have become apparent to a reasonably prudent operator or user;
 - (d) the Client failing to follow any instructions or guidelines provided by the Contractor;
 - (e) fair wear and tear, any accident, or act of God.
 - 12.10 Notwithstanding anything contained in this clause if the Contractor is required by a law to accept a return then the Contractor will only accept a return on the conditions imposed by that law.
- 13. Intellectual Property**
 - 13.1 Where the Contractor has designed, drawn or developed Goods for the Client, then the copyright in any designs and drawings and documents shall remain the property of the Contractor.
 - 13.2 The Client warrants that all designs, specifications or instructions given to the Contractor will not cause the Contractor to infringe any patent, registered design or trademark in the execution of the Client's order and the Client agrees to indemnify the Contractor against any action taken by a third party against the Contractor in respect of any such infringement.
 - 13.3 The Client agrees that the Contractor may (at no cost) use for the purposes of marketing or entry into any competition, any documents, designs, drawings or Goods which the Contractor has created for the Client.
 - 13.4 Sketches and dummies submitted by the Contractor on a speculative basis shall remain the property of the Contractor. They shall not be used for any purpose other than that notified by the Contractor and no ideas obtained therefrom may be used without the consent of the Contractor. The Contractor shall be entitled to compensation from the Client for any unauthorised use of such sketches and dummies.
 - 13.5 Disks, artwork and film supplied by the Client and/or other authorised persons remain the property of the Client. Unless otherwise indicated in writing the Contractor shall assume these disks, artwork and film to be duplicate copies of the original.
- 13.6** Where the Contractor has provided photographic (digital or otherwise) images for the Client, at the Contractor's sole discretion any such images may be subject to ongoing licence payments for use of such images. The period of any such licence is determined by the Contractor from time to time.
- 13.7** The Client shall indemnify the Contractor against any claims by third parties for patent, trademark, design or copyright infringement, directly or indirectly arising out of the design, workmanship, material, or use of the Goods or any other deficiency therein. Where the Client has supplied drawings, sketches, files or logos to the Contractor, the Client warrants that the drawings, sketches, files or logos do not breach any patent, trademark, design or copyright, and the Client agrees to indemnify the Contractor against any action taken by a third party against the Contractor.
- 14. Default and Consequences of Default**
 - 14.1 Interest on overdue invoices shall accrue daily from the date when payment becomes due, until the date of payment, at a rate of two and a half percent (2.5%) per calendar month (and at the Contractor's sole discretion such interest shall compound monthly at such a rate) after as well as before any judgment.
 - 14.2 If the Client owes the Contractor any money the Client shall indemnify the Contractor from and against all costs and disbursements incurred by the Contractor in recovering the debt (including but not limited to internal administration fees, legal costs on a solicitor and own client basis, the Contractor's collection agency costs, and bank dishonour fees).
 - 14.3 Without prejudice to any other remedies the Contractor may have, if at any time the Client is in breach of any obligation (including those relating to payment) under these terms and conditions the Contractor may suspend or terminate the supply of Goods to the Client. The Contractor will not be liable to the Client for any loss or damage the Client suffers because the Contractor has exercised its rights under this clause.
 - 14.4 Without prejudice to the Contractor's other remedies at law the Contractor shall be entitled to cancel all or any part of any order of the Client which remains unfulfilled and all amounts owing to the Contractor shall, whether or not due for payment, become immediately payable if:
 - (a) any money payable to the Contractor becomes overdue, or in the Contractor's opinion the Client will be unable to make a payment when it falls due;
 - (b) the Client becomes insolvent, convenes a meeting with its creditors or proposes or enters into an arrangement with creditors, or makes an assignment for the benefit of its creditors; or
 - (c) a receiver, manager, liquidator (provisional or otherwise) or similar person is appointed in respect of the Client or any asset of the Client.
- 15. Cancellation**
 - 15.1 The Contractor may cancel any contract to which these terms and conditions apply or cancel delivery of Goods at any time before the Goods are delivered by giving written notice to the Client. On giving such notice the Contractor shall repay to the Client any money paid by the Client for the Goods. The Contractor shall not be liable for any loss or damage whatsoever arising from such cancellation.
 - 15.2 In the event that the Client cancels delivery of Goods the Client shall be liable for any and all loss incurred (whether direct or indirect) by the Contractor as a direct result of the cancellation (including, but not limited to, any loss of profits).
 - 15.3 Cancellation of orders for Goods made to the Client's specifications, or for non-stocklist items, will definitely not be accepted once production has commenced, or an order has been placed.
- 16. Privacy Act 1988**
 - 16.1 The Client agrees for the Contractor to obtain from a credit reporting agency a credit report concerning personal credit information about the Client in relation to credit provided by the Contractor.
 - 16.2 The Client agrees that the Contractor may exchange information about the Client with those credit providers either named as trade referees by the Client or named in a consumer credit report issued by a credit reporting agency for the following purposes:
 - (a) to assess an application by the Client; and/or
 - (b) to notify other credit providers of a default by the Client; and/or
 - (c) to exchange information with other credit providers as to the status of this credit account, where the Client is in default with other credit providers; and/or
 - (d) to assess the creditworthiness of the Client.The Client understands that the information exchanged can include anything about the Client's creditworthiness, credit standing, credit history or credit capacity that credit providers are allowed to exchange under the Privacy Act 1988.
 - 16.3 The Client consents to the Contractor being given a consumer credit report to collect overdue payment on commercial credit (Section 18K(1)(h) Privacy Act 1988).
 - 16.4 The Client agrees that personal information provided may be used and retained by the Contractor for the following purposes (and for other purposes as shall be agreed between the Client and Contractor or required by law from time to time):
 - (a) the provision of Goods; and/or
 - (b) the marketing of Goods by the Contractor, its agents or distributors; and/or
 - (c) analysing, verifying and/or checking the Client's credit, payment and/or status in relation to the provision of Goods; and/or
 - (d) processing of any payment instructions, direct debit facilities and/or credit facilities requested by the Client; and/or
 - (e) enabling the daily operation of Client's account and/or the collection of amounts outstanding in the Client's account in relation to the Goods.
 - 16.5 The Contractor may give information about the Client to a credit reporting agency for the following purposes:
 - (a) to obtain a consumer credit report about the Client;
 - (b) allow the credit reporting agency to create or maintain a credit information file containing information about the Client.
 - 16.6 The information given to the credit reporting agency may include:
 - (a) personal particulars (the Client's name, sex, address, previous addresses, date of birth, name of employer and driver's licence number);
 - (b) details concerning the Client's application for credit or commercial credit and the amount requested;
 - (c) advice that the Contractor is a current credit provider to the Client;
 - (d) advice of any overdue accounts, loan repayments, and/or any outstanding monies owing which are overdue by more than sixty (60) days, and for which debt collection action has been started;
 - (e) that the Client's overdue accounts, loan repayments and/or any outstanding monies are no longer overdue in respect of any default that has been listed;
 - (f) information that, in the opinion of the Contractor, the Client has committed a serious credit infringement (that is, fraudulently or shown an intention not to comply with the Client's credit obligations);
 - (g) advice that cheques drawn by the Client for one hundred dollars (\$100) or more, have been dishonoured more than once;
 - (h) that credit provided to the Client by the Contractor has been paid or otherwise discharged.
- 17. General**
 - 17.1 The failure by the Contractor to enforce any provision of these terms and conditions shall not be treated as a waiver of that provision, nor shall it affect the Contractor's right to subsequently enforce that provision. If any provision of these terms and conditions shall be invalid, void, illegal or unenforceable the validity, existence, legality and enforceability of the remaining provisions shall not be affected, prejudiced or impaired.
 - 17.2 These terms and conditions and any contract to which they apply shall be governed by the laws of the state in which the Contractor has its principal place of business, and are subject to the jurisdiction of the courts in that state.
 - 17.3 Subject to clause 12 the Contractor shall be under no liability whatsoever to the Client for any indirect and/or consequential loss and/or expense (including loss of profit) suffered by the Client arising out of a breach by the Contractor of these terms and conditions (alternatively the Contractor's liability shall be limited to damages which under no circumstances shall exceed the Price of the Goods).
 - 17.4 The Client shall not be entitled to set off against, or deduct from the Price, any sums owed or claimed to be owed to the Client by the Contractor nor to withhold payment of any invoice because part of that invoice is in dispute.
 - 17.5 The Contractor may license or sub-contract all or any part of its rights and obligations without the Client's consent.
 - 17.6 The Client agrees that the Contractor may amend these terms and conditions at any time. If the Contractor makes a change to these terms and conditions, then that change will take effect from the date on which the Contractor notifies the Client of such change. The Client will be taken to have accepted such changes if the Client makes a further request for the Contractor to provide Goods to the Client.
 - 17.7 Neither party shall be liable for any default due to any act of God, war, terrorism, strike, lock-out, industrial action, fire, flood, storm or other event beyond the reasonable control of either party.
 - 17.8 The Client warrants that it has the power to enter into this agreement and has obtained all necessary authorisations to allow it to do so, it is not insolvent and that this agreement creates binding and valid legal obligations on it.

Please note that a larger print version of these terms and conditions is available from the Contractor on request.