

# Terms & Conditions

This Agreement sets out the terms and conditions on which GREGORY PAUL BONASERA trading as Porcelain Bear Australia ABN 84 465 180 146 (referred to in these terms and conditions as Porcelain Bear or we/us/our) provides goods and services to you (referred to in these terms and conditions Client or you) in relation to the Project referred to in the Quotation addressed to the Client and accompanying this Agreement. Unless Porcelain Bear and the Client enter into a separate agreement in relation to a future Project, this Agreement also governs any other Quotations for that Project or future Projects.

## 1 Definitions

Agreement means the terms and conditions set out in this document including any Quotations provided by us to the Client.

Business Day means a day other than a Saturday, Sunday, bank holiday or public holiday on which registered banks are open for business in the State of Victoria, Australia.

Client Supplied Material means all text, graphics, photos, designs, trade marks, imagery and other information or materials supplied by the Client to Porcelain Bear the use of which by Porcelain Bear is necessary for the provision of Services to the Client.

Confidential Information means all information about and details of Porcelain Bear's business that Porcelain Bear has or may give to the Client in the course of the Project, including any initial concepts presented to the Client but not selected for development into a final Product, any preliminary concepts, concepts created by Porcelain Bear but not ultimately included as part of a Product, in each case save where the information is in the public domain other than as a result of a breach of confidence owed to the Porcelain Bear by any person (including the Client).

Fees means any and all amounts payable to Porcelain Bear in respect of a Project.

GST means the goods and services tax chargeable under the A New Tax System (Goods and Services Tax) Act 1999 (Cth).

Intellectual Property means all rights to, and any interest in, any copyright, design, trade mark or trade name as may exist anywhere in the world at any time (whether capable of protection by registration or not), including all applications for any such rights.

Lead Time means the time specified in the Quotation, or if no time is specified, six weeks from receipt of payment of the initial invoice issues pursuant to clause 7.5.

Pre-Existing Intellectual Property means, in relation to a Project, any Intellectual Property of a party that existed before the date on which the relevant Quotation is accepted by the Client.

Product means any final product produced by Porcelain Bear for the Client as the deliverable product for a Project.

Project means a single project for delivery of Products which the Client wishes to engage the services of the Porcelain Bear, and includes the project referred to in the Quotation accompanying this Agreement.

Quotation means a written quotation for a Project, including as a minimum Porcelain Bear's estimated professional services fees for the Project, whether those fees are a fixed project cost or charged on a time and materials basis, and where relevant a payment schedule for Fees.

Services means, in relation to a Project, the specific design services set out in the relevant Quotation, and includes artwork delivered as the final design product, but for the avoidance of doubt excludes: any initial concepts presented to the Client but not selected for development into a final Product; any preliminary concepts, concepts created by Porcelain Bear but not ultimately included as part of a Product; any Intellectual Property in relation to a Product; and Porcelain Bear's working files.

## 2 Acceptance of Agreement

- 2.1 You are taken to have exclusively accepted and are immediately bound jointly and severally by this Agreement by:
  - (a) submitting a purchase order to Porcelain Bear;
  - (b) sending Porcelain Bear an email or other written communication confirming the Services and Products that you would like Porcelain Bear to supply to you; or
  - (c) any other method (including verbal) that identifies your acceptance of the Quotation.
- 2.2 By accepting a Quotation the Client agrees to these terms and conditions.
- 2.3 If a Client does not accept a Quotation, but has still received Confidential Information from Porcelain Bear, the Client agrees to these terms and conditions to the extent that they relate to the Confidential Information.

## 3 Provision of Services

- 3.1 When the Client accepts a Quotation, the terms of this Agreement together with the terms set out in the Quotation will govern the relevant Project and the parties' provision and receipt of Services the subject of the Quotation. If the terms of the Quotation contradict or are inconsistent with any of the terms of this Agreement, the terms of the Quotation will prevail.
- 3.2 In providing the Services, Porcelain Bear will ensure that the Services are provided with reasonable skill, care and diligence and to the standards reasonably expected of industrial designers performing services of a similar nature.
- 3.3 The Client must provide Porcelain Bear with all instructions and materials that Porcelain Bear needs to complete a Project, including any Client Supplied Material as and when required, and in the format requested by Porcelain Bear.
- 3.4 For each Project, the Client agrees to review Porcelain Bear's work, provide feedback and give final approvals in each case in a timely manner.
- 3.5 Porcelain Bear will use all reasonable endeavours to comply with any delivery timetables agreed between the parties and incorporated into a Quotation. Without limiting the foregoing, Porcelain Bear will not be responsible for delays or failures to deliver work by a particular date if the delay or failure was caused by circumstances outside the control of Porcelain Bear, including a failure by the Client to meet its obligations under this Agreement.
- 3.6 If the Client wishes to modify the scope of the Services to be provided for a Project (including initial concepts), it will notify Porcelain Bear of the changes sought. Unless and until the parties agree any modifications to the relevant Quotation, Fees and timetable, Porcelain Bear will be under no obligation to provide those Services as modified, but may decide to do so in which case Porcelain Bear will be entitled to charge for the additional work on a time and materials basis as set out in clause 7.

## 4 Change in ownership of Client

- 4.1 If the Client sells its business or part thereof or makes any other change to its business or business details such as contact people, address or phone numbers, it must give us prior notice of at least 14 days so that Porcelain Bear may provide the Services in an efficient and time effective manner. If the Client fails to do so, it agrees to be liable for any loss that it or Porcelain Bear may incur as a result.



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## 5 Delivery process and times of Products

- 5.1 While all effort is made to ensure that Products the subject of the Project will be delivered within the Lead Time specified in the Quotation, Porcelain Bear cannot guarantee processing times.
- 5.2 The Client agrees to pay for any storage costs or return delivery costs in the event that on delivery of the Products, any Products cannot be delivered to the Client due to:
  - (a) the Client's request for a delay in delivery of the Products;
  - (b) lack of access to the property; or
  - (c) the inability of the Products being able to fit in elevators at the property.
- 5.3 Porcelain Bear generally uses third party delivery companies to delivery your order. By placing an order for Products you agree that your details, such as name, contact numbers, delivery address, will be passed to those third parties.
- 5.4 Further, you agree that notwithstanding anything in this Agreement, Porcelain Bear is not liable with respect to any loss, damage, cost or expense you or any third party suffers as a result of a change in delivery times or delay in delivery.
- 5.5 If you ask Porcelain Bear to leave a Product at a delivery address, Porcelain Bear are not responsible for loss, damage or theft of Products once the Products are delivered to that address.
- 5.6 Further, if you require Products that you have ordered to be redirected to an address other than your original order address, Porcelain Bear may charge you a reasonable fee for doing this.

## 6 International orders

While Porcelain Bear accept orders from outside Australia, should the redirection be possible, you acknowledge and agree that Porcelain Bear will use a DHL express service to deliver Products and you agree to your details including your delivery address to be supplied to the agent for the purpose of delivering your Products.

- 6.1 Further, on delivery you may be required to sign a proof of delivery document. If you are not available to take delivery a calling card containing the relevant contact details will be left at the delivery address. It is your responsibility to follow the instructions stated on the calling card. If Products are required to be redelivered, you may be required to pay any associated fees for redelivery.

## 7 Fees and invoicing

- 7.1 Porcelain Bear's estimated fees for its Products and Services in relation to a Project are as set out in the relevant Quotations.
- 7.2 All other additional costs (including costs associated with samples, creation of mock-ups, or other materials needed for a Project) will be payable by the Client as a disbursement.
- 7.3 In consideration for Porcelain Bear providing the Services and the Products, the Client must pay the Fees.
- 7.4 The Client must pay the Fees in accordance with any timetable set out in the Quotation and payment of the total Project cost must be made in full before Porcelain Bear delivers the Products.
- 7.5 Without limiting the foregoing:
  - (a) For each Project, if the total Project cost is \$5,000 or under (including GST), Porcelain Bear may issue an invoice for 100% of the total Project cost upon commencement.
  - (b) For each Project, if the total Project cost exceeds \$5,000 (including GST), Porcelain Bear may issue an invoice upon commencement for an amount of 50% of the estimated total Project cost to be paid as a deposit (Deposit).

- 7.6 The Client must pay each invoice 7 days from the date of receipt. Payment of invoices on time is an essential term of this Agreement. Please be aware that Lead Time commences at time of receipt of payment of the initial invoice issues pursuant to clause 7.5.
- 7.7 The Client must pay an additional amount to Porcelain Bear that is equal to any GST payable on any supply that is made under this Agreement. The Client also is responsible for paying any other tariffs, withholding tax, income tax, payroll tax or other tax or levy associated with a Project or its receipt of the Services or Products.
- 7.8 All payments to be made to Porcelain Bear must be made in the full amount shown in each invoice, free of any deductions or withholdings, and without the Client exercising any right of set-off. If there is a mandatory withholding or deduction imposed by operation of law, the Client must increase the amount of the payment so that Porcelain Bear receives as the net amount the amount shown in each invoice. Any such grossing up of the payment will not count as part of the Fees.
- 7.9 If a payment is unpaid for 7 days after the due date for payment, then without limiting its other rights Porcelain Bear may charge interest at the "Cash Rate Target" set by the Reserve Bank of Australia plus 2% on the unpaid amount.

## 8 Personal Property Securities Act

- 8.1 Notwithstanding clause 7.4, Porcelain Bear may, in its sole discretion, allow for the Client to pay for the Products after delivery of the Products. In the event that Porcelain Bear supplies goods to you on credit, you acknowledge that, until full payment for those goods has been made:
  - (a) Porcelain Bear retains the ownership and title to the Products; and
  - (b) Porcelain Bear has a purchase money security interest in those Products, as defined by the Personal Property Securities Act 2009 (Cth) (the PPSA) and our rights and interests in any proceeds from these goods constitutes a security interest within the meaning of the PPSA.
- 8.2 If requested by us, you must sign all documents, provide all necessary information and do anything else required by us to perfect, register, maintain or enforce any security interest under the PPSA.
  - (a) For any goods supplied that are not goods that are used predominantly for personal, domestic or household purposes, the parties agree to contract out of the application of sections 95, 118, 121(4), 130, 132(4), 135, 142 and 143 of the PPSA.
  - (b) Specifically, you waive the requirements for us to provide the following:
    - (c) A verification statement under section 157 of the PPSA;
    - (d) Notices under section 95, 118, 121, 130, 132 and 135; and
    - (e) Information to interested persons under section 275 of the PPSA.

## 9 Payment

- 9.1 Porcelain Bear accepts all major credit cards, namely Visa, MasterCard, AMEX, PayPal, and direct bank transfer.
- 9.2 Porcelain Bear does not accept AMEX cards and also reserve the right to change our mode of payment at any time.
- 9.3 If you make payment by way of PayPal, you agree to pay us an additional amount of 3.6% of the invoiced amount (including GST).
- 9.4 If you make payment by Visa or MasterCard, you agree to pay us an additional amount of 2% of the invoiced amount (including GST).



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- 9.5 If you make payment by AMEX, you agree to pay us an additional amount of 4% of the invoiced amount (including GST).
- 9.6 Porcelain Bear uses the latest in Secure Sockets Layer technology from Comodo, TNS and PayPal secure payment gateway to secure our payment systems.
- 9.7 To the extent permitted by law, Porcelain Bear will not be held liable and responsible for any damages or consequential loss (whether direct or indirect) suffered by you as a result of any credit card fraud or unauthorised access to a PayPal account.
- 9.8 Porcelain Bear will not be held liable or responsible for any additional charges imposed by your credit card provider or bank, especially in the case where your purchase involves foreign exchange transactions.
- 9.9 If your payment is not received in full or is declined by your bank, credit card issuer or PayPal, Porcelain Bear will not hold the Products against your order.

## 10 Intellectual Property

- 10.1 Nothing in this Agreement affects the ownership of any rights in respect of each party's Pre-Existing Intellectual Property. Without limiting the foregoing, the ownership of all Intellectual Property in the Client Supplied Material remains at all times with the Client or its third party licensees.
- 10.2 By providing any Client Supplied Material to Porcelain Bear, the Client grants to Porcelain Bear a licence to use that Client Supplied Material to the extent necessary to enable Porcelain Bear to provide the Services or Products, including by incorporating that material into any Services or Products. The Client warrants and hereby represents that all Client Supplied Material is or will be at the time provided to Porcelain Bear either owned by the Client or licensed to the Client on terms that permit the Client to make the Client Supplied Material available for use by Porcelain Bear on the terms set out in this Agreement. Further, the Client warrants that all specifications or instructions that are given to us do not infringe the intellectual property rights of any third party.
- 10.3 Unless otherwise agreed between the parties in writing, all Intellectual Property in the Services and the Products and other materials created by Porcelain Bear in the course of this Agreement or providing Services will vest absolutely and automatically on creation, and remain thereafter, in Porcelain Bear.
- 10.4 Upon Porcelain Bear receiving full payment for a Project, Porcelain Bear grants to the Client a royalty-free licence for the Client to use all Intellectual Property in any work created as part of the Services created for that Project, solely for the Client's own use and without the right to sub-license use to third parties save as is strictly necessary to enable the Client's own use of those works.
- 10.5 The Client agrees that it will not use the Intellectual Property in the Services and the Products and other materials created by Porcelain Bear for the purpose of manufacturing or getting a third party to manufacture goods that are the same or similar to goods featured in the Services provided to the Client or goods that are the same or similar to the Products.
- 10.6 Porcelain Bear may, from time to time, release working files to the Client for the purposes of review and progress reporting. Unless otherwise agreed, such working files are supplied without any licence or other right on the part of the Client to modify such files, or to permit their use by third parties, and must be deleted or destroyed upon provision of the final work which is the subject of the Services.

## 11 Confidentiality

- 11.1 The Client agrees to:
- (a) keep the Confidential Information strictly confidential; and
  - (b) ensure, to the best of its ability, that:
    - (i) its employees, independent contractors, agents, volunteers, and any other persons acting or working on its behalf will keep the Confidential Information strictly confidential; and
    - (ii) other third parties who may come in contact with material belonging to Porcelain Bear, will keep the Confidential Information strictly confidential.
- 11.2 The Client must:
- (a) only access and use the Confidential Information for the purpose of the Project;
  - (b) take all reasonable steps to maintain the strict confidentiality of the Confidential Information;
  - (c) ensure that proper and secure storage is provided for Confidential Information while in the possession or under the control of the Client;
  - (d) take all precautions necessary to prevent disclosure of Confidential Information;
  - (e) not use or attempt to use the Confidential Information in any manner which may injure or cause loss, either directly or indirectly, to Porcelain Bear, or which may be likely to do so;
  - (f) take reasonable precautions to prevent any unauthorised use, disclosure, publication or dissemination of Confidential Information;
  - (g) promptly notify Porcelain Bear if it suspects, or becomes aware of, any loss or any unauthorised use, storage, copying or disclosure of the Confidential Information;
  - (h) immediately take all steps necessary to prevent or stop, and comply with all reasonable directions of Porcelain Bear in respect of, suspected or actual breaches of this Agreement; and
    - (i) if requested by Porcelain Bear, immediately return to Porcelain Bear, or destroy, delete and erase, all materials that contain Confidential Information.
- 11.3 The return, destruction, deletion, erasure or retention of Confidential Information does not relieve the Client from any of its other obligations under this Agreement.

## 12 Repairs, refunds and replacements

- 12.1 If the Products are damaged or not of acceptable quality, you may have rights under:
- (a) Schedule 2 of the Competition and Consumer Act 2010 (Cth) (the Australian Consumer Law); and/or
  - (b) Other consumer laws applying in each Australian State or Territory.

## 13 Australian Consumer Law

- 13.1 If there is a minor problem with your Products we may repair the Products instead of offering you a replacement or a refund.
- 13.2 If there is a major problem with the Products, a refund or a replacement may be available.
- 13.3 Unless Porcelain Bear are required to do so under the Australian Consumer Law, you will be responsible for the costs of returning the Products to Porcelain Bear.
- 13.4 If there is a minor failure to comply with the consumer guarantees in relation to Services Porcelain Bear limits its liability for failure to comply with the consumer guarantees to supplying the services again.



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## 14 Risk in the Products

14.1 Risk in the Products will pass to you when you take possession of them. You are considered to have taken possession of the Products if Porcelain Bear (or our delivery agent) leaves them at a delivery address as instructed by you or if you collect the Products from us. You may insure your Products if you wish.

## 15 Damaged Products

- 15.1 You must inspect the goods on delivery and you must notify us by emailing us at [showroom@porcelainbear.com](mailto:showroom@porcelainbear.com) of any issues with the Products within 24 hours of the Products being delivered to your address.
- 15.2 When notifying us of damage pursuant to clause 15.1 you will be required to provide an original receipt of purchase and send photos that show clearly what the damage or fault is. Porcelain Bear will conduct an assessment to confirm if the goods have been damaged in transit. You may be required to return all or some of the damaged Products or parts of the damaged Products to Porcelain Bear.
- 15.3 If you have damaged the Products yourself, or you have failed to take proper care of the Products Porcelain Bear may not be able to provide you with a repair, refund or replacement.

## 16 Damage which Porcelain Bear is not liable for

16.1 Porcelain Bear is not liable for any damage caused by or partly as a result of the Client's conduct including but not limited to using the Products in a way not intended, not storing or handling the Products in an appropriate manner; not following any applicable care instructions; misuse of the goods after they have been delivered to the Client; wear and tear; irregularities due to the nature of the materials such as glaze or clay body colour and texture variations, small anomalies in the porcelain due to any hand crafted aspects of the Products.

## 17 Limitation of liability

- 17.1 Under no circumstances, and howsoever arising, will a party be liable to the other party for any special, indirect, consequential or punitive damages, including, but not limited to, loss of profits, loss of business opportunities, or loss of goodwill, even if advised of the possibility of such damages.
- 17.2 To the fullest extent permitted by law, and notwithstanding any other provision of this Agreement, the aggregate liability of Porcelain Bear under or in connection with this Agreement, howsoever arising (including by reason of tort, negligence, breach of contract or otherwise), shall not exceed the sum of all Fees paid to Porcelain Bear in respect of the relevant Project or Projects giving rise to the liability.

## 18 Variations

18.1 The Client acknowledges that there may be variations in the Products including irregularities due to the nature of the materials such as glaze or clay body colour and texture variations, small anomalies in the porcelain due to any hand crafted aspects of the Products, minor irregularities in geometric forms (circular forms may be very slightly ovoid for example.) However, without limiting the foregoing, Porcelain Bear does destroy anything which, in its sole opinion, is considered badly deformed.

## 19 Termination

- 19.1 A party may terminate this Agreement by giving 10 Business Days written notice if:
- (a) the other party is in default in the performance of any of its obligations under this Agreement and the default is not capable of being remedied, or if the default is capable of being remedied the other party fails to remedy the default within 10 Business Days of notice by the first party specifying the default;
  - (b) the other party ceases to carry on business, ceases to be able to pay its debts as they become due, enters into a composition with its creditors, goes into liquidation, or a receiver and manager or statutory receiver is appointed, or any analogous event occurs.
- 19.2 Where the Client is in default in the performance of any of its obligations under this Agreement and that default relates solely to a particular Project, Porcelain Bear may elect to exercise its rights under clause 19.1 in respect of that Project alone, in which case this Agreement will continue to apply in respect of any other Projects that are currently on going.
- 19.3 In the event of termination of a Project or this Agreement as a whole pursuant to clause 19.1 or 19.2:
- (a) Porcelain Bear will return to the Client all Client Supplied Material associated with each Project affected by the termination;
  - (b) Porcelain Bear may retain any amounts paid to it by the Client or amounts that have been invoiced but not yet paid under clause 7, including the Deposit.
  - (c) the Client must reimburse Porcelain Bear for any costs (including any handling or administration fee) that have been incurred by Porcelain Bear up to the date of termination under each Project affected by the termination and for which Porcelain Bear has not yet been reimbursed by the Client;
  - (d) in respect of each Project affected by the termination, the Client also must pay Porcelain Bear for work completed up to the date of termination but not yet invoiced or paid, and:
    - (i) where the Fees for a Project are for Services costed on a time and materials basis, those Fees will be calculated in accordance with the amount of time that Porcelain Bear has spent on a Project;
    - (ii) any amount to reimburse Porcelain Bear for materials in relation to manufacture of the Products;
    - (iii) where the Fees for a Project are based on a fixed project cost, those Fees will be calculated as a percentage of the project cost that reflects the hours worked up to the date of termination compared against the total time estimate for the Project set out in the relevant Quotation, less any component of the project cost paid by the Client upon acceptance of the Quotation.
- 19.4 You acknowledge that once you place an order with Porcelain Bear, Porcelain Bear may order or manufacture goods especially tailored for you and Porcelain Bear may not permit you to vary or cancel the order unless you compensate Porcelain Bear for the losses Porcelain Bear incurs or it otherwise consents.
- 19.5 Porcelain Bear may terminate this Agreement by giving the Client 20 Business Days notice in writing.
- 19.6 In the event of termination of a Project or this Agreement as a whole pursuant to clause 19.5, Porcelain Bear will refund to the Client any money that the Client has paid to Porcelain Bear in respect of the Project which Porcelain Bear has terminated. Refund of the money paid to Porcelain Bear is the sole and exclusive remedy of the Client for termination of the Project or the Agreement by Porcelain Bear under clause 19.5 and the Client shall not be entitled to, and hereby waives, claims for lost profits and all other damages and expenses.



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## 20 Credit checks

Porcelain Bear reserves the right to obtain details about the Client's creditworthiness from a credit reporting agency and the Client agrees that Porcelain Bear can seek and obtain any personal credit information about the Client in relation to Credit provided by the Client to Porcelain Bear. Specifically, the Client agrees to allow Porcelain Bear to obtain from any credit providers information that it might require to assess the creditworthiness of the Client including the Client's credit standing, credit history and other information that credit providers are entitled to provide and exchange pursuant to the Privacy Act 1988 (Cth) and will to that end, sign any documentation or take any necessary steps to facilitate the credit checking process.

## 21 General

- 21.1 Each party warrants to the other that it has the power and authority to enter into this Agreement and the obligations contemplated by it.
- 21.2 Each party enters into this Agreement as an independent contractor. Nothing in this Agreement creates, constitutes or evidences any partnership, joint venture, agency, trust or employer/employee relationship between the parties, and a party may not make, or allow to be made, any representation that any such relationship exists between the parties. A party shall not have the authority to act for, or to incur any obligation on behalf of, any other party, except as expressly provided for in this Agreement.
- 21.3 This Agreement supersedes all previous agreements in respect of its subject matter and embodies the entire agreement between the parties in respect of its subject matter.
- 21.4 Any notice or document required to be given under this Agreement must be in writing and may be given by hand, post, email or facsimile as shown in the relevant party's contact details shown set out in a Quotation or otherwise notified by one part to the other.
- 21.5 Porcelain Bear may assign, license or sub-contract its rights and obligations under this Agreement without the Client's consent.
- 21.6 The Client must obtain Porcelain Bear's consent in writing to assign (including by way of a change of ownership of the Client), license or sub-contract its rights and obligations under this Agreement.
- 21.7 Any modification to or variation of this Agreement, including a Quotation, must be in writing.
- 21.8 If any provision of this Agreement is held to be invalid, illegal or unenforceable, it will be severed and the remainder of the Agreement will remain in full force and effect.
- 21.9 If there is a dispute between the parties in relation to any matter connected with this Agreement or a Project, the parties must meet in good faith to seek to resolve the dispute by agreement between them. The parties agree to follow this procedure before resorting to any legal proceedings, save that nothing in this clause prevents either party from seeking urgent injunctive relief.
- 21.10 This Agreement shall be construed in accordance with and governed by the laws in force in the State of Victoria, and each party irrevocably submits to the exclusive jurisdiction of the courts of Victoria, Australia.

