

# Terms

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## Background

- A The Customer wishes for the Supplier to provide the Services.
- B The parties have agreed that the Supplier will provide the Services to the Customer on the terms of this agreement.
- C The Customer may only exercise the Intellectual Property Rights licensed to it under clause 2.1 for no other purpose than distributing email newsletters to third parties at the Customer's discretion using the Customer's MailChimp account.

## Agreed terms

### 1 Supply of the Services

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#### Supply

- 1.1 Subject to the Customer paying the Fees as required by clause 7, the Supplier will provide the Services to the Customer in accordance with the terms of this agreement.
- 1.2 The Customer must:
  - (a) give the Supplier the information and assistance necessary to enable the Supplier to provide the Services; and
  - (b) cooperate with the Supplier and act reasonably in connection with this agreement and receipt of the Services.
- 1.3 The Customer acknowledges and agrees that the Customer must not resupply the Services to third parties, or permit third parties to access the Services.

### 2 Licence

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- 2.1 Subject to third party rights, the Supplier grants to the Customer a worldwide, non-exclusive, non-sublicensable, non-transferable licence during the Term, to use:
  - (a) the Supplier Material; and
  - (b) the Newsletters;solely for the Permitted Purpose and for no other purpose.

#### Licence of Customer Material

- 2.2 The Customer grants to the Supplier a non-exclusive, perpetual, irrevocable, global licence to exercise the Intellectual Property Rights in:
  - (a) any Customer Material in connection with the Supplier providing Services to the Customer;
  - (b) the Customer's trade marks or logos (whether registered or unregistered).
- 2.3 The licence granted under clause 2.1 includes the right to sublicense to third parties.

### 3 Photographs

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- 3.1 Clauses 3.2 to 3.6 inclusive apply to Supplier Material that are photographs (**Photographs**).
- 3.2 Photographs may be cropped or have text overlaid, but editing beyond this (e.g. adding or removing items from the photograph, changing colours etc.) is not permitted.
- 3.3 Photographs must not be passed off as the Customer's original creation (e.g. claiming the photograph is their own) or used as a visual depiction of a recipe the Customer has created.

- 3.4 Photographs may not be used for resale, download, merchandising or re-distribution.
- 3.5 The Customer must utilise the Photograph(s) in such manner that will not harm the professional reputation of the photographer. The Customer must not utilise the Photograph(s) in any pornographic, illegal, libellous, scandalous, or such other manner that would tend to damage the image and reputation of the photographer.
- 3.6 The Customer must only use the Photographs for the Term.

### 4 Distribution of Newsletters

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- 4.1 The Customer acknowledges and agrees that it may only distribute Newsletters from its designated MailChimp account (**MailChimp Account**).
- 4.2 The Customer acknowledges and agrees that in order to deliver the Services, the Supplier must be authorised to use the Customer's MailChimp Account.
- 4.3 The Customer must do all things reasonably requested by the Supplier to give effect to clause 4.2.

### 5 Suspension Cancellation or Modification

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- 5.1 Without limiting any other remedy the Supplier may have under this agreement or at law, the Supplier may suspend, cancel, replace or modify the Customer's access to the Services at any time (in the Supplier's discretion) including for failure to pay any amounts due and payable under this agreement.

### 6 Warranties

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#### Customer warranty

- 6.1 The Customer represents and warrants that:
  - (a) use of the Customer Material by the Supplier as specified in this agreement will not infringe the Intellectual Property Rights of any third party;
  - (b) it has obtained relevant and necessary consent to use any personal information in Customer Material for the Permitted Purpose;
  - (c) it will comply with all privacy laws and laws relating to spam (including the *Spam Act 2003 (Cth)* and the *Privacy Act 1988 (Cth)*);
  - (d) it has the right to assign the rights contemplated under clause 9; and
  - (e) it has the right and all necessary consents to authorise the Supplier as a user of the Customer's MailChimp account under clause 4.
- 6.2 The Customer represents and warrants that it will not use the Services:
  - (a) to engage in fraudulent behaviour;
  - (b) to defame or harass any third party;
  - (c) to distribute, view or create any material that is or may be pornographic, defamatory, offensive, obscene, illegal or unlawful;
  - (d) in a way that infringes any third party's Intellectual Property Rights;
  - (e) in any other manner that is unacceptable to the Supplier.

### **Acknowledgment**

- 6.3 The Customer acknowledges that the Supplier is relying on the representations and warranties of the Customer under clause 6 in entering into this agreement.

### **Repeating warranties**

- 6.4 The representations made and warranties given in clause 6 are regarded as repeated each day during the Term with respect to the facts and circumstances then subsisting.

### **No warranty**

- 6.5 Subject to clause 12.6, the Supplier makes no representation and gives no warranty:
- (a) that the Services, any hardware, software or other goods supplied in connection with this agreement will be uninterrupted, error free, meet the Customer's requirements or be fit for any particular purpose;
  - (b) that the Services will be available at all times; or
  - (c) this agreement is complete, accurate or sufficient to explain the operation of any software used to facilitate delivery of the Services.

### **Acknowledgment**

- 6.6 The Customer acknowledges and agrees that:
- (a) the Supplier makes no representation and gives no warranty that the Services will not infringe the Intellectual Property Rights or other rights of any third party;
  - (b) subject to clause 12.6, the Supplier makes no representation and gives no warranty that the Services will be free from errors or defects, fit for any particular purpose or function as specified in this agreement;
  - (c) the Services may not be available from time to time;
  - (d) the Supplier reserves the right to remove from the Services any of the Customer's Materials or content that the Supplier considers to be inappropriate or otherwise in breach of this agreement; and
  - (e) the Supplier may but is not obliged to update or modify the Services from time to time.

### **Prohibited conduct**

- 6.7 The Customer must not:
- (a) perform any illegal or unlawful acts in connection with receipt or use of the Services;
  - (b) send unsolicited emails from another network that appear to have been sent using the Services or from hardware the Supplier uses to provide the Services;
  - (c) decompile, disassemble, reverse compile or otherwise reverse engineer all or any portion of the Services;
  - (d) modify, translate, or create derivative works based on the Supplier Material or Services; and
  - (e) remove, modify or obscure any copyright, trade mark or similar notices on the Services.

## **7 Fees**

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- 7.1 The Customer must pay the Fees to the Supplier monthly in advance.

## **8 Term and termination**

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- 8.1 This agreement commences on the Commencement Date and continues for the Initial Period and each Rollover Period.

### **Termination for convenience**

- 8.2 The Customer acknowledges and agrees that the Supplier may amend the terms of this agreement from time to time. The Customer may terminate this agreement by ceasing its payments of the Fees to the Supplier in which case this agreement and all Customer's rights under this Agreement terminate immediately.

### **After termination or expiry**

- 8.3 On termination or expiry of this agreement:
- (a) accrued rights or remedies of a party are not affected; and
  - (b) the Customer must give to the Supplier any of the Supplier's Confidential Information or other property in the Customer's care, custody or control.

### **Survival**

- 8.4 Termination or expiry of this agreement will not affect clauses 6, 8.3, 9, 10, 11, 12, 13, or 17 or any provision of this agreement which is expressly or by implication intended to come into force or continue on or after the termination or expiry.

## **9 Intellectual property**

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### **Intellectual Property Rights**

- 9.1 The parties acknowledge and agree that:
- (a) all Intellectual Property Rights and other proprietary rights in the Supplier Material, the Supplier Platform and the Services remain the property of the Supplier;
  - (b) all Intellectual Property Rights and other proprietary rights in the Customer Material remains the property of the Customer; and
  - (c) no Intellectual Property Rights are granted to either party under this agreement except as set out in this clause 9.

### **Intellectual Property Rights in Newsletters**

- 9.2 To the extent that Intellectual Property Rights are created in any Newsletters, the Customer acknowledges and agrees that:
- (a) all such Intellectual Property Rights will be owned by the Supplier;
  - (b) the Customer immediately assigns any and of all of its right, title and interest in the Newsletters to the Supplier upon creation; and
  - (c) the Customer must sign all documents and do all things necessary to give effect to clause 9.2(b).

### **No use of the Supplier's marks**

- 9.3 Except as expressly set out in this agreement, the Customer must not, and must ensure that its officers, employees, agents and subcontractors do not, use the trade marks or logos of the Supplier without the prior written consent of the Supplier.

### **Third party infringement claims**

- 9.4 If any third party claims the Supplier has infringed its Intellectual Property Rights by supplying the Services, the Supplier may modify, limit, suspend or cancel the Services at the Supplier's discretion.

## **10 Moral Rights**

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- 10.1 The Customer must ensure that each author of the Customer Material genuinely and irrevocably consents to any acts or omissions of any person, including the Supplier, in connection with the Customer Material, whether occurring before, on or after the Commencement Date, which might otherwise infringe the Moral Rights of the author.

## Reliance

- 10.2 The Customer warrants and represents that the Customer did not rely upon any statement or representation made by the Supplier before obtaining the consent contemplated by clause 10.1.

## 11 Confidential Information

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### Obligations of confidence

- 11.1 Each party agrees to keep confidential, and not to use or disclose, other than as permitted by this document, any Confidential Information of the other party provided to or obtained by that party before or after entry into this document.

### Exclusions

- 11.2 The obligations of confidence in clause 11.1 do not apply to Confidential Information:
- (a) that is required to be disclosed by applicable law, or under compulsion of law by a court or government agency or by the rules of any relevant stock exchange or regulator;
  - (b) that is in the public domain except as a result of a breach of this document or other obligation of confidence; or
  - (c) that is already known by, or rightfully received, or independently developed, by the recipient of that Confidential Information free of any obligation of confidence.

### Restriction on disclosure

- 11.3 Each party may use and disclose Confidential Information of the other party only:
- (a) with the prior written consent of the other party; or
  - (b) to that party's directors, agents, professional advisors, employees, contractors and permitted sub-contractors solely for the exercise of rights or the performance of obligations under this document.
- 11.4 If either party discloses Confidential Information under clause 11.3, that party must ensure that the information is kept confidential by the person to whom it is disclosed and is only used for the purposes of performing the Services under this document.

## 12 Limitation of liability

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### Limitation

- 12.1 Subject to clauses 12.4 and 12.6, any liability of the Supplier for any loss or damage, however caused (including by the negligence of the Supplier), suffered by the Customer in connection with this agreement is limited, at the election of the Supplier to:
- (a) the Fees paid by the Customer to the Supplier under this agreement in the 12 months before the Customer first suffered loss or damage in connection with this agreement; or
  - (b) re-performance of the Services.
- 12.2 The limitation set out in clause 12.1(a) is an aggregate limit for all claims, whenever made.
- 12.3 Subject to clause 12.6, any claim by the Customer against the Supplier for loss or damage however caused (including by the negligence of the Supplier), suffered by the Customer in connection with this agreement must be made within one month of the Customer becoming entitled to make the claim and any claim not made within one month is absolutely barred.

### Consequential loss

- 12.4 Subject to clause 12.6, the Supplier is not liable for any Consequential Loss however caused (including by the negligence of the Supplier), suffered or incurred by the Customer in connection with this agreement.

## Seriousness or nature

- 12.5 For clarity, and without limiting clauses 12.1 and 12.4, the parties agree that clauses 12.1 and 12.4 are to apply in connection with a breach of this agreement, anticipated breach of this agreement and other conduct regardless of the seriousness or nature of that breach, anticipated breach or other conduct.

## Liability for consumer guarantees

- 12.6 If the *Competition and Consumer Act 2010* (Cth) or any other legislation states that there is a guarantee in relation to any good or service supplied by the Supplier in connection with this agreement, and the Supplier's liability for failing to comply with that guarantee cannot be excluded but may be limited, clauses 12.1, 12.4 and 13.1 do not apply to that liability. Instead, the Supplier's liability for that failure is limited to (at the election of the Supplier), in the case of a supply of goods, the Supplier replacing the goods or supplying equivalent goods or repairing the goods, or in the case of a supply of services, the Supplier supplying the services again or paying the cost of having the services supplied again.

## Application to indemnities

- 12.7 For clarity and without limiting clause 12, the limitations and exclusions of liability in clause 12 apply to liability of the Supplier under any indemnity given by the Supplier under this agreement.

## 13 Indemnity

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### Customer indemnity

- 13.1 The Customer is liable for, and indemnifies the Supplier from and against, all loss or damage (including legal costs) incurred or suffered by the Supplier however caused in connection with any breach of this agreement by the Customer or any alleged or actual infringement of a third party's Intellectual Property Rights or other right in connection with the Customer Material, the Services or the Customer's Mailchimp account.

### Continuing obligation

- 13.2 Each indemnity in this agreement is a continuing obligation notwithstanding:
- (a) any settlement of account; or
  - (b) the occurrence of any other thing,
- and it is not necessary for the Supplier to incur expense or make payment before enforcing or making a claim under an indemnity.

## 14 Force majeure

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- 14.1 A party will not be:
- (a) in breach of this agreement because of; or
  - (b) liable for,
- any failure or delay in the performance of that party's obligations under this agreement to the extent that the failure or delay is wholly or partially caused, directly or indirectly, by a Force Majeure Event.

## 15 Costs and taxes

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### Costs payable by each party

- 15.1 Each party bears its own costs of the preparation and signing of this agreement.

### Costs payable by the Customer

- 15.2 The Customer must pay:
- (a) all stamp duty (including penalties and interest) assessed or payable in connection with this agreement; and

- (b) subject to clause 15, all taxes, duties and government charges imposed or levied in Australia or overseas in connection with the performance of this agreement.

## **GST**

- 15.3 Any words capitalised in clause 15 and not already defined in clause 17.1 have the meaning given to those words in the GST Act.
- 15.4 If a Supply made under or in connection with this agreement is a Taxable Supply, then at or before the time any part of the consideration for the Supply is payable:
- (a) the Recipient must pay the GST Act Supplier an amount equal to the GST for the Supply, in addition to, and in the same manner as the consideration otherwise payable under this agreement for that Supply); and
- (b) the GST Act Supplier must give the Recipient a Tax Invoice for the Supply.
- 15.5 For clarity, the GST payable under clause 15.4 is correspondingly increased or decreased by any subsequent adjustment to the amount of GST for the Supply for which the GST Act Supplier is liable, however caused.
- 15.6 If either party has the right under this agreement to be reimbursed or indemnified by another party for a cost incurred in connection with this agreement, that reimbursement or indemnity excludes any GST component of that cost for which an Input Tax Credit may be claimed by the party being reimbursed or indemnified, or by its Representative Member, Joint Venture Operator or other similar person entitled to the Input Tax Credit (if any).
- 15.7 Where a Tax Invoice is given by the GST Act Supplier, the GST Act Supplier warrants that the Supply to which the Tax Invoice relates is a Taxable Supply and that it will remit the GST (as stated on the Tax Invoice) to the Australian Taxation Office.
- 15.8 Where a Supply made under or in connection with this agreement is a Progressive or Periodic Supply, clause 15.4 applies to each component of the Progressive or Periodic Supply as if it were a separate Supply.

## **16 General**

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- 16.1 The laws of Queensland govern this agreement and each party irrevocably submits to the non-exclusive jurisdiction of the courts of Queensland and courts competent to hear appeals from those courts.
- 16.2 The Supplier may assign or transfer its interest under this agreement.
- 16.3 A clause or part of a clause of this agreement that is illegal or unenforceable may be severed from this agreement and the remaining clauses or parts of the clause of this agreement continue in force.
- 16.4 This agreement supersedes all previous agreements about its subject matter and embodies the entire agreement between the parties.
- 16.5 The Supplier may subcontract the performance of all or any part of the Supplier's obligations under this agreement.
- 16.6 A right under this agreement may only be waived in writing signed by the party granting the waiver, and is effective only to the extent specifically set out in that waiver.

## **17 Definitions and interpretations**

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### **Definitions**

- 17.1 In this agreement:

**Commencement Date** means the date the Customer agrees to the terms of this agreement.

**Confidential Information** of a party means any information:

- (a) about the business and affairs of that party;
- (b) about the customers, clients, employees, sub contractors or other persons doing business with that party;
- (c) which is by its nature confidential;
- (d) which is designated as confidential by that party; or
- (e) which the other party knows or ought to know, is confidential,

and all trade secrets, knowhow, financial information and other commercially valuable information of that party, and in the case of the Supplier, includes the Supplier Material.

**Consequential Loss** means one or more of: loss of bargain; loss of revenues; loss of reputation; loss of profits or actual or anticipated savings; lost opportunities; loss or damage in connection with claims against the Customer or the Supplier by third parties; and loss or corruption of data.

**Copyright Law** means the *Copyright Act 1968 (Cth)* and any other related regulations, copyright laws or binding judicial decisions.

**Corporations Act** means *Corporations Act 2001 (Cth)*.

**Customer** means the person who purchases the Services and enters into this agreement with the Supplier.

**Customer Material** means any material provided by or to which access is given by the Customer to the Supplier for the purposes of this agreement including articles, works, images, documents, reports, technical information, studies, plans, charts, drawings, calculations, tables, trade marks, logos, schedules and data stored by any means.

**Fees** means the fees listed on the Supplier's website as updated from time to time.

**Force Majeure Event** means any occurrence or omission outside a party's reasonable control, as a direct or indirect result of which the party relying on the event is prevented from or delayed in performing its obligations under this agreement (other than a payment obligation), and includes:

- (a) a physical natural disaster including fire, flood, lightning or earthquake;
- (b) war or other state of armed hostilities (whether war is declared or not), or declaration of martial law;
- (c) epidemic or quarantine restriction;
- (d) law taking effect after the date of this agreement; and
- (e) strike, lock-out, stoppage, labour dispute or shortage including industrial disputes that are specific to a party or the party's subcontractors.

**GST Act** means *A New Tax System (Goods and Services Tax) Act 1999 (Cth)*.

**GST Act Supplier** means the entity making the Supply.

**Initial Period** means the first 12 months following the Commencement Date.

**Insolvency Event** means any of the following events:

- (a) a controller (as defined in the Corporations Act) is appointed to the party, or over any of the property of the party;
- (b) the party becomes bankrupt;
- (c) a controlling trustee is appointed to the party, or over any of the property of the party;
- (d) the party is unable to pay its debts when they become due and payable;
- (e) the party ceases to carry on business; or

- (f) any event happens in Australia or any other country or territory in respect of a party that is similar to any of the events or circumstances referred to in this definition.

Any event that takes place as part of a solvent reconstruction, amalgamation, merger, or consolidation, on terms approved in writing by the other party beforehand and in compliance with those terms is excluded from this definition.

**Intellectual Property Rights** means all industrial and intellectual property rights owned or licensed by a party, both in Australia and throughout the world, and includes any copyright, moral right, patent, registered or unregistered trade mark, registered or unregistered design, trade secret, knowhow, trade or business or company name, indication or source or appellation of origin or other proprietary right, or right of registration of those rights.

**MailChimp** means the marketing service provider accessible at <https://mailchimp.com/>.

**Moral Rights** means:

- (a) the right of integrity of authorship;
- (b) the right of attribution of authorship; and
- (c) the right not to have authorship falsely attributed,

including those rights as conferred by the *Copyright Act 1968 (Cth)*, and rights of a similar nature anywhere in the world whether existing before, on or after the commencement of this agreement.

**Newsletter** means a document that may be created by the Customer using the tools and software available on the Supplier Platform during the course of provision of the Services by the Supplier.

**Progressive or Periodic Supply** means a Taxable Supply that satisfies the requirements of section 156–5 GST Act.

**Permitted Purpose** means:

- (a) distributing Newsletters to third parties at the Customer's discretion using the Customer's MailChimp account; and
- (b) publication of material on the Customer's social media platforms.

**Rollover Period** means each 12 month period following either the previous Initial Period or Rollover Period.

**Services** means the provision of access and use by the Supplier to the Customer of:

- (a) the Supplier Materials; and
- (b) the Supplier Platform,  
enabling the Customer to create Newsletters using the Supplier Materials in combination with Customer Materials.

**Supplier** means Dietitian Connection Pty Ltd ABN 70 155 488 565 of PO Box 120, Mount Gravatt QLD 4122.

**Supplier Material** means any material provided by or to which access is given by the Supplier to the Customer for the purposes of this agreement including any Literary Work or Artistic Work, documents, reports, technical information, studies, plans, charts, drawings, calculations, tables, schedules and data stored by any means.

**Supplier Platform** means the Supplier's online platform via the Dietician Connection website.

**Term** means the term contemplated by clause 8.1.

## Interpretation

17.2 In this agreement:

- (a) the meaning of any general language is not restricted by any accompanying example, and the words 'includes', 'including',

'such as' or 'for example' (or similar phrases) do not limit what else might be included;

- (b) a reference to this agreement includes the agreement recorded by this agreement;
- (c) this agreement is not to be interpreted against the interests of a party merely because that party proposed this agreement or some provision in it or because that party relies on a provision of this agreement to protect itself; and
- (d) a reference to a party is a reference to the Supplier or the Customer, and a reference to the parties is a reference to both the Supplier and the Customer.