

ABOVE Ground Level Ltd

Photographic Terms and Conditions of Engagement.

1. COPYRIGHT

Except as provided in clause 3, the copyright in all Photographic Works, ("Photographic Works" includes transparencies, negatives, prints, digitised images or images in electronic or any other form or medium furnished by ABOVE Ground Level Ltd) resulting from the Invoice or Licence remains the property of ABOVE Ground Level Ltd (hereafter known as AGL).

AGL does not accept commissions to create copyright works other than to agree to licence such parts of the works so created as selected by AGL for presentation to the Client. This overrides section 21(3) of the Copyright Act 1994 in accordance with section 21(4) of the Copyright Act 1994.

AGL grants the Client a Licence to reproduce and publish the Photographic Works for the purposes, territories and time period specified, and on the terms and conditions set out in the Licence and these Terms and Conditions of Engagement. The Photographic Works produced for an Advertiser named in the Licence, may only be used for the creative works of that Advertiser. AGL always retains the right to use the Photographic Works in any manner at any time and in any part of the world for the purposes of: **(a)** Entering the Photographic Works into photographic competitions or awards and for their use in any material published in connection with promoting those competitions or awards; and **(b)** Advertising or otherwise promoting AGL's Photographic Works; and **(c)** Submitting the Photographic Works for display at art galleries or other premises.

1.1. CONDITIONS OF LICENCE

1.1.1. The Licence to use the Photographic Works begins from the date of full payment of the Invoice. No use may be made of any Photographic Works before full payment of the Invoice without AGL's express permission.

1.1.2. The Licence is granted to the Client and must not be assigned to any third party without AGL's prior written permission, (which shall not be unreasonably refused), but may be sublicenced by the Client on the same terms and conditions to the Advertiser named in the Licence.

1.1.3. The Client is further licensed to do the following:

(a) Use only a portion of the Photographic Works, **(b)** manipulate, distort or make other alterations (including overprinting by text or other Photographic Works) of the Photographic Works, unless that right under the Licence is removed by marking the checkbox "No right to alter image" on the Licence.

1.1.4. Copyright in any new Photographic Works created from any manipulation, alteration, distortion or overprinting of text of the licensed Photographic Works shall remain with AGL and shall be licensed to the Client on the same terms and conditions in this agreement. Any breach of these conditions knowingly permitted by the Client which results in damage to the professional reputation of AGL, entitles AGL to compensation from the Client for that damage in addition to any other remedies available to AGL.

1.1.5. The Client shall not, without the prior written permission of AGL, digitally capture or store the Photographic Works in any form of electronic medium, except for the purpose of the Licence, and provided that the file or other medium in which the Photographic Works are captured or stored must be destroyed immediately after its use for that purpose.

1.1.6. Where so indicated on the Licence, each use of any Photographic Works by the Client must be accompanied by an adjacent credit line acknowledging AGL and our copyright of the Photographic Works.

2. COPYRIGHT OF THE WORKS

All copyrights that arise out of performance of the AGL's obligations under this contract shall arise not by commission but shall be the creation of AGL and AGL shall remain the first owner of the Photographic Works and the Client shall be supplied with the Photographic Works for copying on the basis of the Licence, marked by ticking the checkbox as either Exclusive or Non-exclusive. Where any material includes any trademark or "get up" of the Client the Licence shall be only for use of the copyrights for the purpose the copyrights were originally created for. The Client shall have the right to seek further licences for reuse of any copyright on agreement of a reasonable fee for that use.

3. COPYRIGHT ASSIGNED

Where the Licence specifies that copyright in the Photographic Works supplied pursuant to the Licence is to be assigned to the Client in consideration of the Client's payment for those Photographic Works, AGL assigns to the Client copyright in all Photographic Works supplied pursuant to the Licence. It is the responsibility of the Client to obtain all model releases and moral rights and privacy waivers necessary for the use of assigned copyright in the Photographic Works by that Client. As a condition of this assignment the Client agrees to indemnify AGL in respect of any liability to AGL arising from any use of the assigned copyright material.

4. MORAL RIGHTS

Unless indicated on the Licence, AGL's moral rights remain. Any waiver of such moral rights are waived only to the extent possible by AGL, and no waiver is implied with respect to any other persons interest in works included or which are a component of the Photographic Works.

5. PAYMENT

Fees are payable as outlined on the Licence or Invoice of AGL. Interest at the rate of 15% of the outstanding amount, per month, may be charged on the amounts unpaid from the due date for payment until payment is made.

5.1. JOB-RELATED COSTS

The Client shall reimburse AGL for all Job-related Costs ("Job-related Costs" means the costs and expenses incurred by AGL on the Client's behalf in providing Photographic Services to the Client and as detailed on any Invoice). Where AGL makes payment to others on behalf of the Client, AGL may add a service charge, determined at AGL's absolute discretion, to its invoiced costs. Unless otherwise arranged, the Client must pay all Job-related Costs and any service charges to AGL within 7 days of receipt of the Invoice. The Client is not entitled to any property in: **(a)** any authored or artistic works created by AGL to support the Photographic Works, or **(b)** any materials used for the creation of an authored or artistic work, as a result of plans or drawings, which are commissioned by AGL, or **(c)** any acquisition of goods for use in supporting the Photographic Works. Such goods, materials, authored or artistic works shall remain the property of AGL, unless otherwise agreed between AGL and the Client.

5.2. URGENT WORK

Any work required within 1 working day of the initial shoot, will incur a surcharge of 50% of the cost of the shoot. Where the Client wants Photographic Works on an urgent basis, which includes where AGL is unable to re-shoot or correct a shot because of an urgent deadline, AGL will not be liable for any losses or damages arising out of the inability to carry out a re-shoot or the costs of arranging a re-shoot.

6. CHANGES TO THE ESTIMATE

Statements of fees and Job related Costs are estimates and not firm quotations and are liable to alteration. AGL must bring any change to the estimate to the attention of the Client. Any change to the job specifications made by the Client may change the estimate of the fees and job related costs.

7. CANCELLATION FEES

7.1. When a booking is confirmed as definite, the Client becomes liable for payment to AGL and AGL becomes liable to complete the job.

7.2. Where the Client cancels the booking:

(a) Within 1 working day of the booked shoot day, the Client must pay all expenses incurred for the shoot and a fee of 100% of AGL's standard fee.

(b) And gives notice of cancellation of greater than 1 day and within 3 days of the booked shoot day, the Client must pay all expenses incurred for the shoot and a fee of 50% of AGL's standard fee.

8. POSTPONEMENT FEES

Where the Client postpones or changes the date of the shoot:

(a) Within 1 day of the booked shoot day, the Client must pay a fee of 50% of AGL's daily fee for each day, which is postponed.

9. WORK SUSPENDED ON CLIENT'S INSTRUCTIONS

Where the Client instructs that work is to be suspended for a period of 30 days or more, the Client must, at the time of suspension, pay AGL for all work in progress at that time.

10. RETURN OF PHOTOGRAPHIC WORKS

10.1 The Client must return all Photographic Works undamaged to AGL within 15 working days from the date of expiry of the Licence.

10.2. Where any Photographic Works have not been returned as required, the Client must pay a fee of \$50 per day for each of the Photographic Works for every day or part day after the due return date and upon written notification by AGL that the Photographic Works have not been returned.

10.3. For each of the Photographic Works that is lost or damaged, the Client must pay AGL NZ\$1,500.00 within 7 days from the date of the expiry of the Licence.

11. CLIENT CONFIDENTIALITY

The Client must advise AGL whether any material or information communicated to AGL for the purpose of the photography is confidential. AGL must keep any such confidential material or information confidential, except where it is reasonably necessary to do otherwise to enable AGL to carry out AGL's obligations, or exercise any of AGL's rights in relation to the Invoice.

12. RESPONSIBILITY FOR CONTRACTORS

12.1 The Client is responsible for making all payments (including rollover fees) and fulfilling all other obligations to person(s) ("Contractors") who supply any product or perform any service in respect of the shoot. Where Contractors are models, the Client is responsible for obtaining all necessary model releases. To ensure proper recording of others intellectual property rights, which may be part of the Photographic Works, the Client within 7 days, on a request by AGL, shall copy evidence of these model releases to AGL.

12.2 Where the Client requests AGL to contract Contractors on behalf of the Client, AGL acts as agent for the Client and the Client indemnifies AGL against all costs, disbursements and other obligations arising from AGL acting as agent for the Client.

13. INDEMNITY FOR BREACHES OF INTELLECTUAL PROPERTY

The Client fully indemnifies AGL against any claims, costs, or expenses arising out of any illegal or defamatory Photographic Works produced for the Client and any infringement of any intellectual property right of any person. The Client is responsible for obtaining any authorisation, clearance, licence or other form of approval necessary for the lawful use of third party intellectual property works.

14. CLIENT PROPERTY AND MATERIALS SUPPLIED

14.1. Client property and all property and material supplied to AGL by or on behalf of the Client is held at the Client's risk and AGL accepts no responsibility for the insurance of such property or material.

14.2 The Client must pay any sum charged by AGL for handling or storing property or material supplied by or on behalf of the Client. Where property and materials are left with AGL without specific instructions, AGL may dispose of them at the end of six months from the date of receiving them and retain the proceeds.

15. PHOTOGRAPHIC WORK OF UNACCEPTABLE QUALITY

15.1. Where Photographic Works are not of an acceptable technical quality, making it unfit for the purpose of its specified use, then no fee or Job-related Costs are due to AGL. AGL has the right to rectify the defect causing the rejection within a reasonable time, having regard to the urgency of the work, but may not charge the Client any extra fee or cost for rectifying the defect.

15.2. Where there is a representative of the Client at the shoot, the representative is responsible for the direction of the work. Acceptance of the work by this representative is confirmation that AGL has satisfied the artistic quality and interpretation requirements of the shoot. If the representative is not at the shoot then AGL's judgement is absolute within the limits imposed by any documented agreements on the nature of the intended work.

15.3. If AGL produces Photographic Works that are in the same style and structure as AGL's past work (by reference to AGL's portfolio), the Client is deemed to have accepted AGL's artistic interpretation.

15.4. If there is a dispute as to artistic interpretation or technical quality which is unresolved after negotiations between AGL and the Client, then the dispute shall be referred either to the President of the Advertising and Illustrative Photographers Association or the President New Zealand Institute of Professional Photography who shall appoint a suitably qualified person/s to determine the matter.

16. WEATHER CONDITIONS

A weather permitting booking must be agreed between the Client and Photographer prior to the shoot. Upon postponement or cancellation of a shoot due to bad weather the Client must pay AGL all expenses incurred up until the time that the shoot was postponed and 50% of AGL's fee which was to be charged for the shoot. The Client is responsible for taking out weather insurance.

17. DELAYS WITH AERIAL PHOTOGRAPHY

When any delays with aerial photography including weather and Air Traffic Control delays occur, any extra expense for aircraft flight times or accommodation will be met by the Client.

18. WHERE SUPPLY FOR BUSINESS PURPOSES, CONSUMER GUARANTEES ACT 1993 NOT TO APPLY

The Client acknowledges that where the Photographic Works or Photographic Services ("Photographic Services" means the provision by AGL of Services related to the producing of Photographic Works and includes the supply of any other goods or services by AGL) supplied under the Invoice and Licence are purchased for business purposes, the Consumer Guarantees Act 1993 shall not apply.

19. PHOTOGRAPHER NOT LIABLE FOR LOSSES

Except as provided for by the Consumer Guarantees Act 1993, AGL shall not be liable for:

- (a)** Any loss or damage arising by reason of any delay in the completion of the Photographic Works
- (b)** Any loss of profits

(c) Any indirect or consequential loss of whatever nature; or

(d) Any loss resulting from any errors or omissions arising from an oversight or a misinterpretation of a Client's verbal instructions.

(e) Any loss arising directly or indirectly from any breach by AGL of any of its obligations under these Terms and Conditions of Engagement or from any negligence on the part of AGL or its employees.

20. LIABILITY OF AGL LIMITED

Except where provided to the contrary by the Consumer Guarantees Act 1993, AGL's liability to the Client for any and all costs, loss or damage suffered by the Client, however caused, arising out of or connected with the performance or failure of performance of any Photographic Services by AGL, shall not exceed the full value of the payments made by the Client under the Invoice.

21. ACCEPTANCE OF TERMS AND CONDITIONS

When a booking is confirmed as definite, the Client has deemed to accept the Terms and Conditions and shall be bound by them.

22. CONTRACT MAY BE TERMINATED ON NOTICE

Effective termination of this Agreement by the Client must be in writing and give reasonable notice to AGL. The Client must compensate AGL for all fees and expenses incurred by AGL until the date of termination. Upon receipt of such notice from the Client, AGL must take immediate steps to bring the photographic services to a close and to reduce expenditure to a minimum.