

# OM4::

## TERMS OF SERVICE

v2.4





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# 1. DEFINITIONS AND INTERPRETATION

## 1.1 Definitions

Accept	means the acceptance by you of this Agreement by the review and completion of an electronic form, accessed online through a link on the internet, which is provided by us.
Accredited Mediator	means a mediator accredited by the National Mediator Accreditation System.
Agreed Fees	means the fees we will charge you for our Services, as agreed between you and us and set out in our Offer to you.
Agreement	means this Terms of Service Agreement document and, where applicable, our Offer to you.
Australian Consumer Law	means Schedule 2 of the <i>Competition and Consumer Act 2010</i> .
Content	means text, documents, fonts, images, graphics, audio files, video files or any other information being capable of being published on the internet.
Deliverables	means a Website, an Email Newsletter, any written copy (including web pages, posts or articles), design components – such as images, graphics, or audio or video files and computer software or programs that we have produced as part of our Services to you.
Domain Name	means a unique name used for identifying a resource on the internet, such as a website.
DNS	means Domain Name System, which is the naming system for domain names used for functionality on the internet.
DNS Records	means the DNS entries that define how the internet manages website, email and other requests.





Email	means the sending/receiving of emails between a sender and an addressee and optional carbon copy recipients.
Email Newsletter	means a third party service allowing the creation and sending of email newsletters to lists of contacts.
Excused Downtime	means scheduled outages, Force Majeure Events, emergency maintenance (for example to address a security vulnerability) or maintenance performed on any day of the week between 11.00am and 5.00pm Australian Western Time that affects Website availability.
Fixed Price	means the fee payable for a defined scope of work in relation to our Services, excluding fees for Project Management, Working Sessions, Options and other itemised fees and additional work outside the defined scope of work.
Force Majeure Event	means any circumstances beyond our reasonable control which impacts on our ability to perform this Agreement, including, but not limited to, acts of God, acts of civil or military authority, civil disturbance, war, strikes, industrial disputes, fire, flood, natural disasters, legislation and malicious hacking.
Hosting Provider	Means a third party hosting provider of internet hosting services for website, email, email newsletter or DNS.
Hourly Rate	means a fee payable for the actual time it takes for us to provide our Services to you.
Internet Relay Chat	means an application protocol which facilitates the sending of real time messages in text, including data transfer and file sharing.
IP	means intellectual property.
Notice	means as defined under the heading 5.3 "Notice" below.



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Parties	means you and us as parties to this Agreement. When used in the singular, it means either you or us, depending on the context of the sentence.
Personal Information	means information or an opinion (including information or an opinion forming part of a database), whether true or not, and whether recorded in a material form or not, about a natural person whose identity is apparent, or can reasonably be ascertained, from the information or opinion.
Project Management	means the management of the project brief, materials, financials and scheduled milestones, including status reports to you.
Offer	means a written document setting out the precise nature of our Services to be provided to you, including the Agreed Fees, scope of work and Deliverables, which forms part of this Agreement.
Options	means any services that we provide as part of our Services that may be offered to you in addition and outside the defined scope of work for our Fixed Price fees.
Services	means any service provided by us to you, as set out in our scope of work and referred to in our Offer and Agreed Fees, and includes, but is not limited to: <ul style="list-style-type: none"><li>- design, development and consulting work for Websites, Email Newsletters and related internet services;</li><li>- education and training;</li><li>- Web Assist;</li><li>- Service Desk;</li><li>- Project Management;</li><li>- Options;</li><li>- arranging a Hosting Provider for you;</li><li>- facilitating third party services; and</li><li>- writing or developing software.</li></ul>





Service Availability	means the hosting service provided via the Hosting Provider with respect to your Website, will be available 98.95% or more of the time, calculated on the total number of minutes the hosting service is available in a calendar month divided by the total number of minutes in a calendar month, less Excused Downtime.
Service Desk	means an OM4 contact facility allowing email communications about service issues, including help or troubleshooting, forming part of our Services and comprises of a ticket based support system.
Spam	means unsolicited bulk email or junk mail.
us/we	means OM4.
Video Streaming	means video media that is constantly received and presented to an end user, whilst being delivered by a provider via the internet.
Web Assist	means a service that provides access to the OM4 Service Desk and other technical services, forming part of our Services.
Website	means a page or collection of pages accessible via the internet created by us.
Working Sessions	means billable meetings we have with you to obtain your instructions regarding our Services, brief and any other materials or documentation.
you	means the person or entity who has entered into this Agreement with us and to whom we agree to provide our Services.

## **1.2 INTERPRETATION**

Except where the context otherwise requires:

- (a) words importing a gender include any other gender;
- (b) words in the singular number include the plural and words in the plural number include the singular;





- (c) clause headings are for convenient reference only and have no effect in limiting or extending the meaning of the provisions to which they refer;
- (d) where any word or phrase is given a defined meaning, any other form of that word or phrase has a corresponding meaning; and
- (e) a reference to a person or entity includes a partnership and a body corporate or body politic.

## **2. SERVICES**

### **2.1 DESIGN, DEVELOPMENT AND DELIVERABLES**

Our Services include design, development and consulting for Websites, Email Newsletters and related internet services, the product of which is the Deliverables.

Unless otherwise agreed, most design and development projects require at least two Working Sessions. In the first session, you will provide us with a Website brief, including any materials, such as artwork, images or logos. In the second session, we will review your supply of the materials, prior to commencing any Fixed Price elements of our Services.

### **2.2 DOMAIN AND DNS**

For you to operate a Website and for us to provide you with our Services, you will need a Domain Name and to have DNS records configured in accordance with your Domain Name.

Our Services do not include registering, renewing or managing your Domain Name or arranging for the correct configuration of your DNS records.

Although we can provide you with advice as to how to register or renew a Domain Name or how to configure your DNS records, you are entirely responsible for your Domain Name and the configuration of your DNS records.







You acknowledge and agree that if you fail to renew your Domain Name, you may lose it and you may not be able to regain it again, which will prevent you from being able to use our Services or prevent us from providing our Services to you.

## **2.3 BROWSER AND DEVICE SUPPORT**

When developing websites or email newsletters for clients as part of our Services, content is targeted to display clearly on the latest version of popular internet browsers, email readers and devices including IOS devices, Outlook, Hotmail, Apple Mail, Yahoo! Mail, Gmail, Android, Internet Explorer, Firefox and Safari.

You acknowledge and agree that older versions of internet browsers, email readers and devices may not display websites and newsletters the same way.

You also acknowledge and agree that mobile devices, such as ipads/tablets or mobile telephones will in most cases render websites and newsletters differently to desktop browsers. Some visual effects will display one way on modern browsers and newsletter readers, but differently on older versions.

Unless explicitly requested by you and agreed to by us, as part of our Services:

- (a) we do not support display of images at the full resolution available on Apple Retina devices;
- (b) your Website or Email Newsletter will function, but may not display the same way as other browsers when viewed in Internet Explorer Version 8 or earlier;
- (c) your Website or Email Newsletter may not comply with accessibility standards and guidelines;
- (d) your Website or Email Newsletter may not validate against HTML, XHTML, CSS or other standards; and
- (e) variations in the display of Websites and Email Newsletters may occur relative to the approved design as part of normal usage and new browsers and devices may emerge that do not present Website or Email Newsletter content as anticipated.





## **2.4 WEB ASSISTANCE AND SUPPORT**

As part of our Services, we can provide you with support for your Website. Support services incur a fee and include Web Assist, Service Desk or arranging a Hosting Provider for you.

## **2.5 EDUCATION AND TRAINING**

As part of our Services, we provide education and training through web based delivery channels.

It is, however, possible, for you to attend a training session at our premises, subject to the availability of our team members.

## **2.6 CONSULTING AND ADVICE**

As part of our Services, we can provide consulting and advice with respect to website design and function. You agree and acknowledge that such advice is limited, in scope, to the process of building or modifying the DNS, Website, Email or Email Newsletter. It is not intended to be relied on as business advice or marketing advice.

## **2.7 HOSTING BY THIRD PARTY HOSTING PROVIDER**

We do not provide internet hosting ourselves and all hosting is arranged through a Hosting Provider. You can independently arrange your own Hosting Provider to host your DNS, Website, Email or Email Newsletter.

Alternatively, as part of our Services and for an additional monthly fee, we can arrange a Hosting Provider on your behalf.





## **2.8 SERVICE AVAILABILITY AND EXCUSED DOWNTIME**

If we have arranged a Hosting Provider for you, we will provide you with a guarantee of Service Availability with respect to your Website, subject to Excused Downtime. Our guarantee of Service Availability does not extend to downtime which is caused or due to you:

- (a) breaching the terms of this Agreement;
- (b) exceeding your plan's capacity; or
- (c) changing your Website or allowing parties, other than us to make changes to your Website.

In the event that downtime does occur, we will restore your Website hosting within 5 business days.

You agree and acknowledge that any data restored in such circumstances may be up to 3 business days old.

## **2.9 VARIATION TO OUR SERVICES**

Any request for a variation of our Services must be made in writing to us by you.

Any variation to our Services will be at our discretion and, depending on the nature of the variation, different fees or charges may be payable by you.

## **2.10 FEES AND PAYMENTS FOR OUR SERVICES**

You agree to pay us for our Services as per our Agreed Fees.

Our fees may be charged from the day you Accept this Agreement.

Any estimate of hours for Hourly Rate services is only an estimate, and actual hours may exceed the estimate.

Fixed Price services are offered to you with a defined scope of work for our Services. Changes to the scope of work may result in a variation to the Fixed Price.





As part of our Services, we may charge you a periodic Project Management fee, which is applicable for the duration of the project. If the project duration extends beyond the planned duration of the project for reasons not directly under our control, the period Project Management fee will apply for the additional duration of the project.

Working Sessions are billed at our prevailing hourly rate and are payable in addition to fixed price elements of a project. We will provide estimates for the duration of planned Working Sessions and bill actual hours. Additional Working Sessions may be scheduled to address any changes to the scope of work.

Our Services are billed, due and payable in advance unless otherwise specified.

We accept payments via Credit Card, PayPal and Bank Transfer.

Manual or non-automated payments (including manual bank transfer payments) for recurring services will incur a standard manual processing fee for each invoice.

Invoices that remain unpaid 7 days or more past their due date may incur a standard late payment fee.

## **2.11 ASSIGNMENT OF RIGHTS**

Upon the final payment of the Agreed Fees, the rights to use and modify the Deliverables are assigned to you. This, however, does not include any rights to use our registered name, business marks or logos or other IP that belongs to us.

Failure to pay the Agreed Fees in full or requesting and receiving a refund of the Agreed Fees for the Deliverables shall result in all rights to the Deliverables remaining with or returning to us.

We retain the right to a copy of any source material used in the preparation and finalisation of the Deliverables and to display the final Deliverables and any key source documents as an example of our Services for our own marketing purposes.





## **2.12 THIRD PARTY SERVICES, SOFTWARE AND IP**

### **2.12.1 Third Party Services**

Our Services to you may include facilitating free or low/medium value services that are provided by a third party, or software with IP rights owned by a third party.

Free or low/medium value third party services may include (but are not limited to) services of the following general nature:

- web analytics
- webmaster tools
- web fonts
- web hosting
- email services and
- payment services.

### **2.12.2 Third Party Software and IP**

Our Services may include third party software or third party IP rights such as the WordPress content management system, WordPress themes and plugins and other open source or licenced software.

This Agreement does not transfer to you any third party IP, including, but not limited to WordPress themes or WordPress Plugins. All rights, title and interest in and to such property will remain (as between the parties) solely with us or the third party. Some trademarks, service marks, graphics and logos used in connection with our Services may be the trademarks of other third parties. Your use of our Services does not grant you any right or license to reproduce or otherwise use any third-party trademarks.

Your rights to use our Services is also without prejudice to any IP of a third party. The rights you may have to access open source IP will, at all times, be limited to the same rights we have to access the IP and, through the relevant third party licensing, our ability to pass on such rights to you.



The rights you have to access other licensed IP will be constrained by the terms of this Agreement, and your rights to use software accessible through rights passed on to you by us will cease when this Agreement ceases.

On termination of this Agreement, you agree that you will deactivate, or provide assistance to deactivate, any licence keys, API keys or similar codes that provide access to a third party service using our rights.

We contribute to the open source community and use open source software, in part, for our Services. Software we develop or configure, including, but not limited to, software prepared as part of our Services, may be published under an open source licence such as the GNU General Public Licence ("GPL"). Rights granted to you to use, modify and distribute this type of software are not exclusive.

## **2.13 SUSPENSION, CANCELLATION AND TERMINATION**

We may, at our discretion, suspend or terminate our Services for any breach of this Agreement by you.

We may, at our discretion, immediately suspend or terminate our Services to you should our Agreed Fees remain unpaid after the due date of our invoice to you.

Termination of this Agreement may be initiated by either party.

You may terminate this Agreement and our Services at any time, with or without cause, by providing Notice to us.

We may terminate this Agreement and our Services at any time, with or without cause, by providing Notice to you.

Provisions of this Agreement that by their nature should survive Termination, shall survive Termination. This includes your entitlement to the payout of any credits owing to you under your account, and a refund of any unused portion of our Services. It also includes our entitlement for our Services where you engaged us for a committed term where the fee for the full term is due and payable to us immediately (for example, where our Services are provided on a monthly basis with a commitment by you to a number of months where higher



costs of service delivery may be incurred by us in the early stages of the defined term). It also includes, but is not limited to, ownership provisions, warranty disclaimers, indemnity and limitations of liability.

## **2.14 GUARANTEES, LIABILITY AND REFUNDS**

### **2.14.1 Guarantees**

We guarantee that we will provide our Services to you with due care and skill, that our Services will be fit for the specified purpose, and be delivered within the time frame specified or a reasonable time frame if no time is set.

### **2.14.2 Liability**

We agree to provide our Services to you subject only to the terms, conditions and warranties contained within this Agreement and any non-excludable rights you have under the Australian Consumer Law.

If we do not meet our Services guarantee, where we are permitted to limit our liability for such a breach under the Australian Consumer Law, our liability for our Services is limited to us:

- (a) re-supplying our Services and meeting the cost of the re-supply of our Services to you; and
- (b) providing you with a refund or, where agreed, a credit.

### **2.14.3 Search Engine Presentation**

In using our Services, you acknowledge and agree that search engines, such as Google, Yahoo or Bing, may change the way your Website is presented in search results at any time, for reasons that are beyond our control and through no fault of ours.

You further acknowledge and agree that, even with due care and skill being applied, sometimes search engines may not respond in the anticipated way. This may be due to changes to your content, links from third party websites, changes to the hosting environment, requests from search engine tools, planned or unplanned website downtime, hacking events or other reasons.





You agree that if you instruct us make any modifications to the elements of your Website, we will not be liable for the way search engines may present your Website as a result.

#### **2.14.4 Content and Hosting**

If you publish, instruct us to publish on your behalf or allow Content to be published by a third party via a Website, blog, newsletter or other medium facilitated in some way by our Deliverables, you agree that you are the publisher of that Content and that you are entirely responsible for all of the Content including comments and other third party materials thereby published, and any harm or illegality resulting from that Content.

We operate as an Internet Content Host (ICH) under the *Australian Broadcasting Services Amendment (Online Services) Act 1999*.

We do not monitor the nature of the Content published by you, as a user of our Services, on your Website. You agree that we can take down or otherwise modify Content on your Website should we need to comply with a directive from the Australian Broadcasting Authority.

#### **2.14.5 Force Majeure**

We shall not be in breach of this Agreement due to a Force Majeure Event.

If either Party to this Agreement becomes aware of a Force Majeure Event that may lead to a failure or delay in meeting their obligations under this Agreement, they shall provide Notice to the other of the event, and any estimated period that a failure or delay may last.

Both Parties agree that they will take reasonable steps to mitigate the effect of the Force Majeure Event.

#### **2.14.6 Refunds and Credits**

We do not provide refunds with respect to our Services if you change your mind about their delivery, their purpose, or for issues that relate to personal preference or subjective judgement.







In situations where a refund is applicable, we will provide a refund on the following basis:

- for monthly based services, refunds are processed for the monthly amount for the unused period after you identified a problem with our Services;
- for advance payments of multiple months, refunds are processed for the period you identified a problem with our Services and the unused periods thereafter; or
- for monthly based payments with a stipulated contract period, refunds are processed for the period you identified a problem with our Services and for the unused period prior to the end of the contract period - after taking into account the amount that would have been paid, had a stipulated contract period not been selected.

In a situation where you are eligible for a refund, you may elect to receive a credit for our Services, rather than a refund. Should you elect to receive a credit, you must provide us with Notice and any such credit will then be applied to your next invoice.

## **3. ACCEPTABLE USE**

### **3.1 HARMFUL CONTENT**

You may not use our Services to violate any local, State or Federal laws or regulations, including, but not restricted to, laws relating to copyright, patent, trademarks, trade secrets, distribution of child pornography, non-consensual sex acts, bestiality, gambling, defamation, discrimination, harassment or false or misleading advertising.

Further, you may not use our Services in connection with any Content which promotes, incites or threatens violence or contains hate speech.

### **3.2 SPAM**

You may not use our Services to send or transmit Spam. Should you do so, we have the discretion to suspend or terminate our Services to you.





### **3.3. OVERUSE**

You may not overburden our Services by placing excessive burdens on a Hosting Provider, which includes, but is not limited to:

- Excessive disk space usage;
- Excessive CPU usage;
- Excessive memory usage;
- Excessive bandwidth usage;

You may not use our Services in relation to a Hosting Provider, by providing open proxies or Internet Relay Chat.

Further, you may not use our Services in relation to a Hosting Provider for Video Streaming other than a Hosting Provider specifically providing video hosting.

### **3.4 COPYRIGHT AND TRADEMARK INFRINGEMENT**

We ask you to respect our IP rights, as we respect your IP rights and the IP rights of others.

If you believe that material published by us violates your copyright, trademark or other intellectual property, we encourage you to provide us with Notice of any such breach.

When we receive Notice with respect to a breach of IP, we will respond, including, where required or appropriate, by removing the infringing material or disabling all links to the infringing material.

In the case that you or a visitor may infringe or repeatedly infringe the copyrights or other intellectual property rights of ours or others, we may, at our discretion, terminate or deny access to and use of our Services.





## 4. SECURITY, PRIVACY AND CONFIDENTIALITY

### 4.1 SECURITY

If you use a website or newsletter or related communication tool as part of our Services, you are responsible for maintaining the security of your Website and Email Newsletter and related accounts, and you are fully responsible for all activities or actions that occur in connection with them.

You must immediately Notify us of any unauthorised uses of your Website, Email Newsletter or your accounts or any other breaches of security.

We will not be liable for any acts or omissions by you with respect to security, including any damages of any kind incurred as a result of such acts or omissions.

We take steps to reduce the likelihood of unauthorised access to our information, Websites and our Services, however we do not warrant against unauthorised access occurring.

You are responsible for any misuse of your account, even if the inappropriate activity was committed by a client of yours, a friend, a family member, or a guest or employee of yours. You must take steps to ensure that others do not gain unauthorised access to your account. In addition, you may not use your account to breach security of another account or attempt to gain unauthorised access to another network or server.

Your password provides access to your account and it is your responsibility to keep your password secure.

We will not be responsible or liable for the consequences of you sharing your password with unauthorised users. You should prevent others from using your account since you will be held responsible for such use, and you should adopt adequate security measures to prevent or minimise unauthorised use of your account.

You may not attempt to bypass user authentication or security of any system or account. This includes, but is not limited to, accessing data not intended for



you, logging into or making use of a server or account you are not expressly authorised to access, or probing the security of other networks.

## **4.2 PRIVACY**

We agree that we will:

- (a) use Personal Information held in connection with the performance of our Services under this Agreement only for the purposes of fulfilling our obligations under this Agreement;
- (b) take all reasonable measures to ensure that Personal Information in its possession or control in connection with this Agreement is protected against loss and unauthorised access, use, modification or disclosure;
- (c) comply with the *Privacy Act 1988 Cth* (to the extent that Act applies to us); and
- (d) comply with any relevant privacy law of State or Territory (to the extent that such law applies to us);

## **5. GENERAL**

### **5.1 ACCEPTANCE OF TERMS OF SERVICE AGREEMENT**

If you are not an existing client of ours, before we provide you with our Services, you must Accept this Agreement. By doing so, you agree to be bound by the terms and conditions of this Agreement.

If you are an existing client, once we have provided you with Notice of this Agreement and you continue to use our Services, by doing so, you agree to be bound by the terms and conditions of this Agreement.

### **5.2 AUTHORITY TO ACT AND WARRANTIES**

By entering into this Agreement, you warrant that:

- (a) you are 18 years old or more;





- (b) if you act on behalf of an entity, that you have the authority, power and legal right to enter into this Agreement on behalf of that entity and to bind that entity to this Agreement; and
- (c) Each Party is aware and recognises that the other Party is relying on the warranties in this clause in entering into this Agreement.

### **5.3 NOTICE**

Notice from and to either Party to this Agreement must be in writing and may be by email, post, courier or via the OM4 Client Area site ([my.om4.com.au](http://my.om4.com.au)).

Unless it can be shown otherwise, Notice from one Party to the other will be deemed to be effective in the following circumstances:

- (a) if by email: one business day after Notice is sent;
- (b) if by ordinary post: three business days from the day Notice is posted;
- (c) if by express post: one business day after Notice is posted;
- (d) if by courier: the time the Notice is delivered to the recipient Party; or
- (e) if by using the online OM4 Client Area: one business day after Notice is transacted on the online site;

provided that:

- (f) If Notice is sent by you, you have used the contact details that appear on our Website at the time Notice was sent; and
- (g) If Notice is sent by us, we have used the latest contact details for you that we have recorded for your account at the time Notice was sent.

### **5.4 CHANGES TO THE AGREEMENT**

We may update, modify, amend, delete, replace or make inclusions to any part of this Agreement at any time and we will give you Notice when this occurs.

Your continued use of our Services following a change to this Agreement without you providing Notice to us within 14 days of us providing Notice to you of any changes, constitutes an acceptance by you to those changes.

We may, in the future, offer you new services and/or features including the release of new tools and resources. Such new features and/or services will form part of our Services and be governed by the terms of this Agreement.





## **5.5 ASSIGNMENT OF AGREEMENT**

This Agreement cannot be assigned by either Party, whether in whole or in part, without the other Party's written consent and the written acceptance of the assign.

Where such written consent and acceptance is provided, this Agreement shall be binding on the assign and the other Party.

## **5.6 MEDIATION**

Before resorting to external dispute resolution mechanisms (except for urgent interlocutory relief) the Parties must attempt to settle by negotiation any dispute in relation to this Agreement, including by referring the matter to persons who may have authority to intervene and direct some form of resolution.

If a dispute is not settled by the Parties within twenty business days of one Party first sending to the other Party Notice of the dispute, the dispute must be submitted to some alternative dispute resolution mechanism as may be agreed in writing between the Parties, or failing such agreement, an Accredited Mediator.

If we have failed to meet one or more of the consumer guarantees, you may suffer consequential losses such as financial loss, lost time or productivity. If this is the case, you agree to directly negotiate with us and, in the event that an agreement cannot be reached between the Parties, you agree to participate in a formal dispute resolution process, as set out in this section above.

## **5.7 WAIVER**

A waiver by us of any term or condition of this Agreement or any breach thereof, in any one instance, will not waive such term or condition or any subsequent breach thereof.





## **5.8 SEVERANCE**

If at any time, any provision of this Agreement becomes illegal, invalid or unenforceable in any respect under the law of any jurisdiction, that will not affect or impair the:

- (a) legality, validity or enforceability in that jurisdiction of any other provision of this Agreement; or
- (b) legality, validity or enforceability under the law of any other jurisdiction of that or any other provision of this Agreement.

## **5.9 NO RELIANCE AND ENTIRE AGREEMENT**

The Parties agree that neither Party has made any promise, representation or inducement to the other Party or has engaged in any conduct with respect to the other Party, so as to cause that Party to rely on any such communication or conduct when entering into this Agreement, other than as set out in this Agreement;

This Agreement contains the entire understanding between the Parties as to the subject matter of this Agreement and no oral explanation or information provided by one Party to another:

- affects the meaning or interpretation of this Agreement; or
- constitutes any collateral agreement, warranty or understanding between the Parties.

## **5.10 GOVERNING LAW**

This Agreement is governed by the laws of Western Australia.

The Parties submit to the non-exclusive jurisdiction of the courts of Western Australia and any court which may hear appeals from those courts in respect of any proceedings in connection with this Agreement.