

# Premium Advertising Terms & Conditions

## Background

1. Click Frenzy Pty Ltd (CF) owns, runs and promotes ecommerce webpages and e-newsletters and associated events which enables retailers to reach potential customers (CF Initiatives).
2. The Advertiser is a retailer and wishes to connect to potential customers using the CF Initiatives.
3. The Advertiser is the party which is listed in the Advertising Order and the Advertiser wishes to purchase from CF advertising services in connection with the CF Initiatives.
4. The terms and conditions set out in this Agreement are incorporated into the Advertising Order and govern the provision of services by CF to Advertiser.

## Agreement

### 1 Content placement

- 1.1.) Notwithstanding anything to the contrary in this Agreement, CF does not guarantee or promise any particular placement or position for any Content in connection with Click Frenzy or an Event and if Content is not provided by the Submission Deadline CF may without further recourse (or any liability) to Advertiser:
  - a) substitute alternate material held by CF, or
  - b) not provide the Advertising and replace the allocated positioning and time slots to a third party.

### 2 Refunds and cancellations

- 2.1.) Advertiser is eligible for a refund of 50% of the Agreed Advertising Fee in connection with an Event in the following circumstances:
  - a) where Advertiser is not in breach of any term of this Agreement and Advertiser cancels an Advertising Order with written confirmation more than 7 days before the start of an Event of Activity the Advertising Order relates to, and
  - b) where Advertiser is not in breach of any term of this Agreement and CF cancels an Advertising Order under clause 17(1)
- 2.2.) CF will not refund any amounts paid to it by Advertiser in connection with this document in the following circumstances notwithstanding the non-or part provision of the Services:
  - a) where Advertiser has breached any provision of this Agreement
  - b) where CF terminates this Agreement with cause
  - c) where all Content required by CF in order to provide the Services is not provided by Advertiser by the Submission Deadline

- d) where Advertiser cancels an Advertising Order less than 7 days before the start of an Event of Activity, and
- e) where Advertiser supplies incomplete or incorrect data, Content or information, or supplies data, Content or information that does not meet the CF™s specifications as set out by CF in advance and, Advertiser acknowledges it will have no claim for any refund of any amounts paid in such circumstances.

### **3 Charges**

- 3.1.) Advertiser will:
  - a) on signing an Advertising Order pay the Initial Fee, and the Agreed Advertising Fee as per the agreed payment terms on the Advertising Order, and
  - b) pay the Charges as invoiced and in accordance with this Agreement to CF.
- 3.2.) CF will submit to Advertiser invoices in relation to the Services.
- 3.3.) All sums due in connection with the Services must be paid by Advertiser within the payment terms indicated on the invoice issued by CF, which shall match the agreed terms on the Advertising Order. In the event that the Advertiser defaults on its payment obligations in advance of a Campaign, CF is entitled to withhold the Advertiser's Content from being featured in that campaign, without waiving any of CF's rights to full payment in accordance with the terms of the Advertising Agreement.
- 3.4.) Advertiser may not set off, deduct or withhold payments to CF for any reason whatsoever.
- 3.5.) CF will charge interest on any amount due and not paid in accordance with this Agreement at a rate of 5% above the Commonwealth Bank of Australia then current published variable rate and Advertiser acknowledges this interest charge is a fair and reasonable remedy for CF in connection with non-payment and is a reasonable pre-estimate of the loss CF will suffer due to non-payment.
- 3.6.) In the event that the Advertiser commits a default under the Advertising Agreement, the Advertiser shall pay to CF on demand all costs and interest including without limitation all interest accrued and calculated pursuant to clause 3, legal costs (assessed on a solicitor/own client basis), all mercantile agent's fees incurred by CF in recovering all amounts outstanding under this Agreement and any dishonour or bank fees incurred by CF relating to payments made by the Advertiser from time to time.
- 3.7.) On completion of a Campaign, pay any applicable performance fees as per the specific Agreement with CF. Performance fees are calculated on a cost-per-click basis as per the Agreement with CF, using the agreed cost-per-click rate. CF's click-tracking provider Clickmeter is used to track clicks and reports are to be provided by CF to the Advertiser confirming the total clicks referred to the Advertiser during the Campaign Period. All clicks referred to the Advertiser during the Campaign Period incur the agreed cost-per-click fees.

### **4 Term and services**

- 4.1.) In relation to each Advertising Order, this Agreement will commence on the Commencement Date and will continue in force until the end of the Event the Advertising Order relates to.
- 4.2.) CF will provide the Services to Advertiser in accordance with the terms of this Agreement.

## 5 Interpretation and definitions

### 5.1.) Interpretation in this Agreement:

- a) references to any law or regulation includes any change, consolidation, replacement, re-enactment or extension of the law or regulation
- b) reference to a document is a reference to the document as from time to time supplemented or varied
- c) references to clauses, and parties are to clauses and parties to this Agreement
- d) headings are for reference only and do not affect the meaning of this Agreement
- e) references to \$ or dollars means Australian dollars
- f) the plural implies the singular and vice versa.

### 5.2.) Definitions in this Agreement the following expressions have the meanings stated:

- a) **Act** means the Privacy Act 1988 (Cth).
- b) **Advertising Order** means a request made by Advertiser for advertising on CF's standard advertising order form.
- c) **Agreement** means the agreement between CF and Advertiser for the provision of Services as set out in this Agreement and an Advertising Order. An Advertising Order may be presented in writing or via email with confirmation by an authorised representative of the Advertiser constituting the Agreement.
- d) **Agreed Advertising Fee** means the overall fee agreed between CF and Advertiser for the provision of Services as set out in this Agreement and an Advertising Order.
- e) **Campaign** means a Click Frenzy sales event, digital advertising, email marketing, social media or other unspecified Click Frenzy-hosted marketing activity featuring the Advertiser's branding and/or offers.
- f) **Campaign period** means the full period during which the Advertiser's branding and promotional content is featured as part of a campaign, which includes the first date relevant to the agreed campaign upon which the Advertiser's brand and/or offers are promoted by Click Frenzy, and ends 24 hours following the conclusion of the Campaign.
- g) **Charges** means the charges to be paid by Advertiser for the Services calculated in accordance with the Rate Card.
- h) **Claim** means any claim made under or in connection with this Agreement or its subject matter, whether arising under contract, negligence or any other tort, under statute or otherwise.
- i) **Click** means a user's click on a link featured as part of a Click Frenzy campaign, which refers that user from Click Frenzy to the Advertiser's designated online property.
- j) **Click Frenzy** means the suite of webpages, e-newsletters, marketing materials and events owned, operated and run by CF.
- k) **Commencement Date** means the date of the Advertising Order.
- l) **Confidential Information** includes all written, electronic or oral information relating to the business or assets of each party and its customers, clients and

suppliers; the terms or subject matter of this Agreement, and the negotiations relating to this Agreement.

- m) **Content** means all materials provided to CF by Advertiser in connection with the Services.
- n) **Event** means a Click Frenzy event operated by CF and nominated on an Advertising Order.
- o) **GST** means a good and services tax, value added tax, consumption tax or services tax.
- p) **Intellectual Property Rights** means all copyright and rights in the nature of copyright, design rights, patents, trademarks, data base rights, applications for any of the above, moral rights, know-how, domain names or any other intellectual or industrial property rights (and any licences in connection with any of the same) whether or not registered or capable of registration and whether subsisting in Australia or any other part of the world.
- q) **Rate Card** means the then current rates for advertising services published by CF from time to time.
- r) **Services** means the provision of advertising and associated services specified in an Advertising Order to be provided by CF to the Advertiser.
- s) **Submission Deadline** means the date specified as such on an Advertising Order.

## 6 GST

- 6.1.) The Charges and all other amounts payable under this Agreement are expressed exclusive of GST. If GST is payable as a consequence of any supply made (or deemed to be made) by one party to the other in connection with this Agreement, the party receiving the supply must pay to the party making the supply an amount equal to the GST payable in respect of the supply, in addition to the Charges or other consideration (if any) required to be paid under any other provision of this Agreement.

## 7 Co-operation and deadline

- 7.1.) Advertiser will co-operate with CF in all respects in connection with the provision of the Services.
- 7.2.) Advertiser will submit all things (including Content) to CF before the Submission Deadline

## 8 Warranties

- 8.1.) Advertiser represents and warrants that:
  - a) It is duly incorporated in accordance with the laws of its jurisdiction, validly exists under those laws and has capacity to sue or be sued in its own name and to own its property and conduct its business as it is being conducted
  - b) It has capacity unconditionally to sign and deliver and comply with its obligations under this Agreement
  - c) It is not insolvent and by entering into this Agreement and receiving the Services it is not breaching any laws
  - d) CF may use the Content in connection with Services without restriction,
  - e) The Content and use of the Services do not, and will not at any time, infringe any Intellectual Property Right or any other right of any person, and
  - f) Any information that it has given to another party in connection with this Agreement is true and accurate in all material respects and not misleading in any

material respect (including by omission) as at the date of this Agreement or, if given later, when given.

- 8.2.) Advertiser acknowledges that CF has entered into this Agreement in reliance upon the representations and warranties in this clause which are ongoing.

## **9 IT security and data**

- 9.1.) Advertiser acknowledges that its information technology systems will interface with that of CF and Advertiser will do all things required to ensure the security, safety and non-corruption of the CF information technology systems (and its data held). Advertiser warrants that all Content and data provided to CF is free from errors, bugs, viruses, malicious code, Trojan horses, worms and the like.
- 9.2.) Advertiser warrants that all Content provided is compliant with the Act and that all required consents have been acquired, as required, to allow CF to use all data provided by Advertiser in connection with this Agreement, and further, that CF's use of the Content or provision of Services to Advertiser will bring not CF into breach of the Act.
- 9.3.) CF is not responsible for and has no liability to Advertiser in connection with any failure of the Advertisers information technology systems in connection with the Services, Click Frenzy or an Event.

## **10 Intellectual property and reputation**

- 10.1.) All Intellectual Property Rights in Click Frenzy and any content created by CF in connection with Events are owned by CF and no third party (including Advertiser) may re-produce or use such content without CF's express and written consent.
- 10.2.) CF reserves all rights to deliver Click Frenzy and the Services in any way it sees fit and Advertiser acknowledges that CF has total control over the content, look, feel and layout of Click Frenzy and Event sites, webpages, publications, e-newsletters and the like.
- 10.3.) Advertiser is granted temporary license to use the Click Frenzy wordmark and trademark logo for the specific Click Frenzy Campaign the Advertiser has purchased Advertising Space for. Assets will be provided by Click Frenzy for each event upon request by the Advertiser. This license commences from one hour prior to the start time of the event the Advertiser has purchased a booking for, and expires one hour after the specific event has concluded, unless with the written consent of CF. Advertiser's may use the Click Frenzy wordmark and trademark logo during this timeframe only – no Advertiser may use the Click Frenzy wordmark and trademark logo outside of these time frames without the express written consent of CF.
- 10.4.) Advertiser will promptly give notice to CF of any suspected infringement of CF's rights in connection with Click Frenzy and any Event.
- 10.5.) Advertiser will not do anything, or omit to do anything that in any way brings CF (and its officers, employees and agents), Click Frenzy or any Event into disrepute or into breach of any law.

## **11 Public announcements and promotion**

- 11.1.) Advertiser will not make any announcements or disclosures in relation to this Agreement or the Services, including press releases or other communications to the public, without the prior written consent of CF, which can be provided or withheld in

its absolute and unfettered discretion.

## **12 Liability**

- 12.1.) Subject to and without limiting clauses 11 (2), (3) and (4) below, the total aggregate liability of CF for a Claim or Claims under or in connection with this Agreement arising from all matters occurring in connection with an Event is limited to 50% of the Charges paid by Advertiser to CF in connection with that Event.
- 12.2.) The law implies various terms, conditions, guarantees and warranties which may apply to CF supplying goods or services to Advertiser. CF excludes all of those terms, conditions, guarantees and warranties, and any other term condition, guarantee and warranty that might have otherwise have been implied by custom or otherwise, to the full extent permitted by law.
- 12.3.) Provisions of the Competition and Consumer Act (Cth) 2010 in some cases either cannot be excluded, restricted or modified, or can only be restricted or modified to a limited extent. If any such provisions do apply, then to the extent permitted by law CF™s liability under those provisions is limited;
  - a) in relation to goods is limited to replacement of the goods or the supply of equivalent goods, or repair of the goods, or payment of the cost of replacing the goods or of acquiring equivalent goods, or payment of the cost of having the goods repaired; and
  - b) in relation to services is limited to the supplying of the services again, or the payment of the cost of having the services supplied again.
- 12.4.) To the extent permitted by law, CF will be liable to Advertiser in respect of any Claim (whether such claim is made under an indemnity or otherwise) or on any other basis for any loss of profit, goodwill or business, loss of or damage to data, loss of opportunity, increased financing costs, any failure to realise anticipated savings or for any consequential, indirect, special, punitive, remote or incidental damages.

## **13 Confidentiality**

- 13.1.) Each party will keep the other parties Confidential Information confidential, not disclose any Confidential Information to a third party, other than as will of necessity acquire it as a consequence of the performance of that parties' obligations under this Agreement, and use Confidential Information only in connection with the proper performance of this Agreement.
- 13.2.) Clause 13(1) will not apply to any Confidential Information to the extent that it comes within the public domain other than through breach of clause 13(1), is required or requested to be divulged by any authority with competent jurisdiction to which either party is subject, wherever situated, is known to the receiving party before the disclosure to it, or is disclosed with the other parties' prior written approval to the disclosure.

## **14 No reliance**

- 14.1.) CF relies on the statements set out in this clause 14 as essential conditions of this Agreement. Advertiser has not relied on any representation made or implied by CF or arising out of or implied by its conduct save for as expressly set out in this Agreement. To the extent that CF has made or implied, or by conduct given rise to or implied, any representation that is not expressly stated in these conditions, Advertiser is not proceeding in reliance on the representation. CF makes no promise, representation or otherwise in relation to any benefit Advertiser may obtain by

entering into this Agreement as set out herein and CF guarantees in no way any increased sales, transactions, revenue, goodwill or profit or any other benefit that may flow from Advertiser having entered into this Agreement.

## **15 Indemnity**

15.1.) Advertiser will indemnify CF from and against all Claims, demands, actions, costs, expenses, liabilities and damages or losses (including all interest, penalties and legal and other professional costs and expenses) incurred by CF and its officer, employees or agents as a result of any claim or action by any third party in connection with the Services and as a result of the negligence of or breach by or malpractice and fraud on behalf of Advertiser.

## **16 Relationship of the parties**

16.1.) CF is an independent contractor dealing at arm's length and nothing in this Agreement will be deemed to constitute a partnership, joint-venture, co-ownership or any employment relationship between the parties nor will anything in this Agreement be deemed to constitute one party as the agent of the other.

## **17 Termination**

17.1.) CF may terminate an Advertising Order at any time prior to an Event without cause.

17.2.) CF may terminate this Agreement immediately where any amount due to be paid to it by Advertiser is overdue.

17.3.) **If a party (Defaulting Party):**

a) commits a breach of any of the terms of this Agreement which:

(1) is not capable of remedy, or

(2) is capable of remedy, but the Defaulting Party fails to remedy such breach within 5 days of receiving notice from the other party specifying the breach and requiring the breach to be remedied, this Agreement will terminate with immediate effect upon the other party giving to the Defaulting Party notice in writing of such breach or failure.

17.4.) Either party may terminate this Agreement with immediate effect by writing to the other party if the other party ceases or threatens to cease to trade (either in whole, or as to any part or division involved in the performance of this Agreement), or becomes insolvent, or is (or in the reasonable opinion of the other part is likely to be) unable to pay its debts as they fall due, or has a receiver, administrative receiver, administrator or manager appointed of the whole or any part of its assets or business, or makes any composition or arrangement with its creditors, or an order or resolution is made for its dissolution or liquidation (other than for the purpose of solvent amalgamation or reconstruction).

## **18 General**

18.1.) Termination or expiry of this Agreement (howsoever occurring) will not affect either of the parties™ accrued rights or liabilities or affect the coming into force or the continuance in force of any provision which is expressly or by implication intended to come into or continue in force on or after termination or expiry, including clauses 5, 8, 10, 11, 12, 13, 14, 15, 16, 18(1), 18(3), 18(6), 18(8) and 18(11).

18.2.) If a party by reason out of their control is unable to perform or carry out any obligation under this Agreement, then that obligation is suspended for so long and to

the extent that it is affected by that reason. This clause does not apply to any obligation to make a payment.

- 18.3.) The parties do not intend any third party to have the right to enforce any provision of this Agreement. CF may assign or transfer all or any of its rights under or in respect of this Agreement, including granting security interests in all or any of its rights. Advertiser may not assign or transfer all or any of its rights under or in respect of this Agreement.
- 18.4.) This Agreement contains the entire agreement between the parties about its subject matter and supersedes all prior discussions, representations, agreements and understandings between the parties in connection with the subject matter.
- 18.5.) Any changes to this Agreement must be agreed by all parties in writing.
- 18.6.) No failure, delay, relaxation or indulgence on the part of a party in exercising any right, power, privilege or remedy in connection with this Agreement, operates as a waiver of that right, power, privilege or remedy.
- 18.7.) Except as expressly provided under this Agreement, the rights and remedies contained in this Agreement are cumulative and are not exclusive of any other rights or remedies provided by law or otherwise.
- 18.8.) If any term of this Agreement is found to be illegal, invalid or unenforceable under any applicable law, such term will, to the extent it is severable from the remaining terms, be deemed omitted from this Agreement and will not affect the legality, validity or enforceability of the remaining terms.
- 18.9.) This Agreement may be signed in any number of counterparts and each of those counterparts taken together constitute one and the same Agreement.
- 18.10.) Any notice given under this Agreement must be in writing, addressed to the intended recipient at the address shown in this Agreement, (or updated address as relevant).
- 18.11.) This Agreement will be governed by the law of the State of Victoria, Australia and each party agrees to submit any dispute which may arise out of, under, or in connection with this Agreement to the exclusive jurisdiction of the courts of Victoria.
- 18.12.) Each party must bear its own costs including legal costs in connection with the preparation and signing of this Agreement. Advertiser must pay any stamp duty in respect of this Agreement.
- 18.13.) Each person signing this Agreement on behalf of a party, warrants to the other parties that on the date of signing, that person has full authority to sign this Agreement on behalf of that party.