

Bauer Commissioning Agreement – Terms

1. Nature of this Agreement

(a) This Agreement commences on the Commencement Date and continues until terminated in accordance with clause 6.

From time to time, Bauer may issue a Commission to Contributor. This Agreement sets out the terms that apply to all Commissions that are agreed during the term of this Agreement.

Note: As per section 9(b) of this Agreement, if there is any inconsistency between this Agreement and a Commission, the terms of the Commission will prevail.

Contributors should ensure the details of the Commission are correct and note any inconsistencies between a Commission and this Agreement. This is to ensure any rights they have contracted under this Agreement are not cancelled or modified by a Commission.

(b) Contributor warrants that Contributor:

- (i) is carrying on a business in connection with providing content for publication; and
- (ii) will provide the Works as an independent contractor.

(c) Nothing in this Agreement is intended to constitute a relationship of employer and employee, principal and agent or partnership between Bauer and Contributor.

2. Provision of Works

(a) Contributor shall provide the Works:

(i) with due skill and care, to the best of Contributor's expertise and to Bauer's satisfaction;

The term "best of Contributor's expertise" is imprecise and uncertain.

The term "to Bauer's satisfaction" is vague and subjective; this requirement is both unusual and uncommercial.

A Contributor will not be able to reasonably agree to this unless he/she knows beforehand what Bauer's 'satisfaction criteria' are.

(ii) in accordance with the description, brief and other specifications set out in the relevant Commission;

(iii) in accordance with the due date set out in the relevant Commission.

There is no provision to allow for delay in the event of circumstances outside the Contributor's control (e.g. weather conditions)

(b) Contributor shall:

(i) in providing the Works, consult with and if required, provide regular updates to the Representative or, where that person is not available, to that person's delegate;

(ii) subject to clause 2(f), provide all the resources required to provide the Works in accordance with this Agreement; and

(iii) promptly respond to any reasonable request by Bauer for information regarding Contributor's engagement by Bauer.

(c) Contributor may only subcontract the whole or any part of the work to be performed under this Agreement with Bauer's prior written consent and on such conditions as Bauer may reasonably impose.

If the Contributor is likely to subcontract his/her work under this Agreement, the Contributor should make this clear, preferably from the outset.

(d) Notwithstanding any subcontract entered into by Contributor, the use by Contributor of any subcontractor does not relieve Contributor from any of Contributor's liabilities or obligations under this Agreement and Contributor is liable to Bauer for the acts and omissions of any subcontractor as if they were the acts or omissions of Contributor.

If the Contributor were to subcontract his/her work or where Bauer requests the Contributor to engage contractors on its behalf, it would be prudent to use additional terms which provide for indemnities for costs, disbursements and other obligations arising from the engagement of contractors.

(e) Contributor shall not:

(i) enter into any contra arrangement with, or solicit or accept any benefit from, any client of Bauer or any other person in connection with providing the Works;

(ii) engage in conduct which, in Bauer's opinion, is likely to prejudice Bauer's business or injure the reputation of Bauer or a Bauer Brand;

(iii) assume or create or attempt to assume or create, directly or indirectly, any obligation on behalf of or in the name of Bauer;

(iv) use its best endeavours to ensure that it does not cause Bauer to breach any applicable law, code or standard;

(v) in relation to providing the Works, defame, injure or infringe the copyright or intellectual property rights of any person or breach any obligation to any person.

(f) Where requested to do so by Bauer, whether in a Commission or otherwise, Contributor shall use equipment specified by Bauer in the provision of the Works.

3. Invoices and payment

(a) Bauer will pay the Contributor the Fee set out in the Commission until the termination of this Agreement.

Normally a Contributor's terms of engagement will allow for reasonable variance in fees (e.g. the AIPA Standard Terms and Conditions Clause 7 provides that any change to job specifications by the client may result in a change to fee and costs estimates, but that the Client will be informed of an increase of more than 10%). Due to the "Fee" definition, namely that it is set at the outset of the Commission, usual fee protections for Contributors are not found in this contract.

(b) The Contributor will invoice Bauer once per Commission following completion of the Works for the amount of the Fee, showing the GST breakdown. Each invoice must provide full details of the Works undertaken by the Contributor in completing that Commission.

(c) Bauer will pay the Fee 21 days after receipt of a valid invoice issued by the Contributor.

There is no provision for late payment interest, which is a normal clause in a contract for services.

(d) For the avoidance of doubt, if this Agreement is terminated in accordance with the provisions contained in clause 6, Bauer is not obliged to pay any further amount to the Contributor other than what is due to the Contractor up to the effective date of termination.

(e) The Contributor is responsible for the payment of their own income tax, GST and accident compensation premiums. Nothing in this Agreement shall require Bauer to deduct PAYE from any payments or reimbursements it makes to the Contributor. Bauer may deduct any form of withholding tax or additional tax levied by Inland Revenue relating to the Contributor from the Contributor's fee.

(f) The Contributor shall not be entitled to any of the following payments: sick leave, holiday pay, or redundancy compensation.

(g) The Contributor will be entitled to the reimbursement of reasonable out of pocket expenses, provided such expenses are approved by Bauer in advance and in writing. Each invoice must show the GST breakdown and provide full details of the expenses being claimed.

Contributors should ensure that all relevant expenses are recorded and seek approval for these at the outset of any Agreement or Commission.

4. Confidential Information

- (a) Contributor shall use the Confidential Information solely for the purpose of providing the Works.
- (b) Contributor shall keep confidential the Confidential Information other than Confidential Information that:
 - (i) is or becomes part of the public domain otherwise than by a breach of confidentiality by Contributor; or
 - (ii) Contributor is required by law to disclose.
- (c) Contributor shall provide assistance reasonably requested by Bauer in relation to any proceedings Bauer may take against any person for unauthorised use, copying or disclosure of Confidential Information.

5. Intellectual Property

- (a) Contributor assigns to Bauer, as an outright sale, from the date of its creation all existing and future copyright throughout the world in the Works. To the extent that any third party (including any of Contributor's employees, agents or subcontractors) is the owner of any part of such copyright, Contributor shall procure that such third party assigns such copyright to Bauer.

Bauer reserves the rights over all copyright entitlements held by the Contributor. The Contributor retains no copyright to his/her work under this Agreement. The Contributor may also not be able to use/ license/ re-sell any of his/her work or components of that work in the future. It is very unusual for a Contributor to face a perpetual restriction on dealing with his/her own work.

This clause also creates other problems, including:

- Bauer may continue to use the Contributor's work in any way and for any further publication in any medium or re-sell the works to 3rd parties, without any further payment or compensation to the Contributor.
- It will also be difficult for the Contributor to obtain any valid third party consents where the Contributor cannot inform those third parties how the work will be used, given the extensive assignment of rights to Bauer.

This is a serious risk to the Contributor.

The Contributor will also have no control over how his/her work will be edited or used (either initially or in the future).

- (b) Contributor shall do all things requested by Bauer to enable Bauer to assure further the rights assigned under this Agreement. This is a vague and potentially onerous requirement. The Contributor might be obligated to do things, and incur expenses, not agreed upon at time of signing the Agreement.
- (c) Contributor warrants that the Works will be original works that, where relevant, have not previously been published or communicated to the public.

In so far as this relates to copyright, an original Work created pursuant to a Commission would normally fulfil the threshold of originality, provided that Bauer has not commissioned the recreation of an existing work.

This warranty should exclude any specific brief or instructions issued by Bauer.

- (d) Without limiting clause 5(e), Contributor irrevocably consents to any and all acts or omissions of Bauer or persons authorised by Bauer that may infringe any moral right (or analogous right) in the Works.

This involves perpetually waiving the Contributor's moral rights. Although moral rights cannot be assigned/ transferred, they can be waived: s107 Copyright Act 1994. However, moral rights may be inalienable in other jurisdictions.

The principle moral rights under Part 4 of the Copyright Act 1994 include:

- (i) The right of a [Contributor] not to have his/her copyright work subjected to derogatory treatment: s99; and
- (ii) The right as the creator of a copyright work to be identified: s94.

Unless Bauer's use of the Work is prescribed, it will not be possible to provide an "informed waiver" of these moral rights.

This clause may also require the Contributor to obtain waivers from persons who have moral rights in a Work.

- (e) Bauer is entitled to make all decisions regarding the use and, where applicable, promotion of the Works. As with clause (a) above, the Contributor will have no control over how his/her Work will be edited or used (either initially or in the future).

Any third party consents would also be difficult to obtain where the Contributor cannot inform those third parties how the Work will be used.

6 Termination

- (a) Either party may terminate this Agreement at any time by giving 30 days' written notice to the other.
- (b) Either party may terminate this Agreement with immediate effect by giving written notice to the other if the other:
 - (i) breaches any term of this Agreement and that breach is not capable of remedy;
 - (ii) breaches any term of this Agreement and fails to remedy that breach within 7 days of receiving notice of that breach from Bauer (instead of "... breach from Bauer", this should be "... breach from *the non-defaulting party*"); or
 - (iii) becomes bankrupt or insolvent.
- (c) On termination of this Agreement:
 - (i) Contributor must promptly return to Bauer all property of Bauer and its associated entities (including any property leased by or in the custody or possession of Bauer or any of its associated entities) and any document (including any electronic record) that includes any Confidential Information; and

This requirement [c(i)] should be two-way.

- (ii) in addition to those clauses that, as a matter of construction, continue, the operation of clauses 2(e)(iii), (iv) and (v), 3(d) and (e), 5, 7(b) and 8 continues.
- (d) Termination of this Agreement will not affect any accrued right or remedy either party may have. Termination would favour Bauer. As per section 5(a) above, Bauer perpetually retains all copyright in the Contributor's work (pursuant to a Commission) upon the creation of that work, while not being constrained by the provisions of this Agreement. As owner of copyright in a Work, Bauer would then be free to deal with it. Restrictions on Bauer's entitlement to use/ exploit Works should also be perpetual.

7. Remedies

- (a) Contributor acknowledges that damages for breach of Contributor's obligations under this Agreement would be an inadequate remedy and agrees that temporary and permanent relief by way of injunction against Contributor may be granted in any proceedings which Bauer or any person on its behalf may bring to enforce any of the provisions of this Agreement. This clause [7(a)] should be two-way.
- (b) To the extent permitted by law, Contributor indemnifies Bauer against all expense, loss, damage, penalty or cost (on a solicitor and own client basis and whether incurred by or awarded against Bauer) that Bauer may sustain or incur as a result, whether directly or indirectly, of:
 - (i) any breach of this Agreement by Contributor;
 - (ii) any negligent or reckless act or omission of Contributor;
 - (iii) any claim or demand against Bauer in relation to any tax or insurance in connection with this Agreement other than a tax or insurance ordinarily payable by Bauer in respect of an independent contractor;

- (iv) any claim by Contributor that Contributor is employed by Bauer.
(c) Each indemnity in this Agreement is a continuing and independent obligation.

These indemnities in section 7 of the Agreement are entirely one-sided, and very broad and punitive, and do not limit the Contributor's potential liability (e.g. the value of the invoice related to that Work). Such a limit is standard practice in industry agreements, including in the AIPA Standard Photographic Terms and Conditions of engagement (Clause 20).

These provisions do not provide for external risks that may need to be taken into account (e.g. weather conditions).

The Contributor could be put in a position where he/she is liable to Bauer for an unlimited sum of any costs/ losses, even where those costs/ losses may be beyond the Contributor's control, because Bauer has control over use of the Works.

8. General

- (a) This Agreement may only be modified or amended by written agreement executed by both parties.
(b) Contributor shall not assign or otherwise transfer any right or obligation arising out of this Agreement without the prior written consent of Bauer.
(c) Bauer may assign, novate or otherwise deal with this Agreement, or its rights or obligations under this Agreement.
The Contributor should have the same assignment rights as Bauer.
(d) No failure or delay by either party to exercise any right under this Agreement or to insist on strict compliance by the other party with any obligation under this Agreement, nor any custom or practice of the parties at variance with the terms of this Agreement, constitutes a waiver of that party's right to demand exact compliance with this Agreement.
(e) This Agreement is governed by the laws of New Zealand and each party irrevocably and unconditionally submits to the non-exclusive jurisdiction of the courts of New Zealand.
(f) This Agreement constitutes the entire agreement of the parties about its subject matter and supersedes any previous understandings or agreements about that subject matter.
(g) This Agreement may be executed in any number of counterparts. All counterparts taken together constitute one instrument. Signatures transmitted by facsimile or by read-only digital files have the same effect as original signatures.

9. Defined Terms and Interpretation

- (a) In this Agreement, words defined in the Cover Sheet have the meaning given to them in the Cover Sheet and the following words have the following meanings, unless the context requires otherwise:

Commission means a commission for the provision to Bauer of text, images or other content by Contributor;

Bauer Brand means a brand of or used by Bauer, any associated entity (as defined in the Companies Act 1993) of Bauer or any joint venture in which Bauer has an interest;

This is very broad, and Contributors may well be unaware of Bauer's joint venture interests etc.

Confidential Information means all confidential information, whether or not in material form, of which Contributor becomes aware or generates (before and after the Commencement Date) in connection with providing the Works, including the terms of this Agreement;

Cover Sheet means the front cover sheet to this Agreement;

Fee means the fee specified in a Commission;

Normally a Contributor's terms of engagement will allow for reasonable variance in fees especially where the costs have altered due to events beyond the Contributor's control (e.g. weather). Note: the AIPA Standard Terms and Conditions Clause 7 provides that any change to job specifications by the client may result in a change to fee and costs estimates, but that the Client will be informed of an increase of more than 10%. This "fee" definition means that the usual fee protections for Contributors are not found in this Agreement.

As per section 3(g) of this Agreement, the Contributor can claim reimbursement of reasonable out of pocket expenses, but these expenses need to be approved by Bauer in advance. It does not provide for any extra compensation post-completion of a Commission.

Representative means the editor of the print or digital publication to which the relevant Commission relates; and

Works means text, images or other content to be provided to Bauer by Contributor pursuant to a Commission and includes, in the case of images, all "overs".

- (b) To the extent of any inconsistency between a Commission and this Agreement, the Commission prevails.

- (c) In this Agreement, unless the context requires otherwise:

(i) the singular includes the plural and vice versa;

(ii) a reference to any document, policy or agreement includes a reference to that document, policy or agreement as amended, novated, supplemented, varied or replaced;

(iii) a reference to legislation includes a modification or re-enactment of it, and a regulation or statutory instrument issued under it;

(iv) a reference to a party includes its executors, administrators, successors, substitutes (including persons taking by novation) and permitted assigns; and

(v) no rule of construction applies to the disadvantage of a party because that party was responsible for the preparation of this Agreement or any part of it. **Usually if a contract term is ambiguous, it is interpreted against the party responsible for preparing the contract/ Agreement.**

Additionally, this Agreement contract omits important clauses that would normally be found in a [photographic] services licence agreement, for example clauses covering:

- Payment of reuse fee
- Avenues for dispute resolution
- Late payment charges
- Cancellation or postponement fees
- Weather conditions and weather insurance
- Damage to the Contributor's reputation by Bauer
- Permitted uses of a Contributor's work by Bauer
- Preservation of electronic rights information in Works (e.g. metadata)
- Creation of derivative works from the Contributor's Work