



Dear Fairfax Contributor,

Please find attached a review of the Fairfax 'Contributor Agreement (photographs/films)' as conducted by Clendons, legal counsel for the AIPA.

We would encourage you to read this document in its entirety before deciding whether or not to sign the Fairfax contract. It is vital that you understand your obligations under this agreement, and the implications that may arise as a result of signing.

While the Fairfax contract provides that you own the copyright in your Work (Clause 3), the license on which the Work is provided to Fairfax is incredibly broad. The Fairfax contract retains almost no rights for the photographer, removes future revenue-earning capacity for images, and provides little legal protection for the photographer.

These terms are **incompatible** with the AIPA Standard Photographic Terms of Engagement, and most other engagement agreements in the industry. Fairfax has previously stated that '*...the AIPA standard terms are the same as the new Fairfax Magazines agreement in structure; the terms are a licence, for specific uses within Fairfax. The licence is exclusive for a period of time, and then reverts to non-exclusive*'.

We consider this to be highly misleading as the two sets of terms are massively dissimilar: The Fairfax license is **not for specific uses within Fairfax**, but rather **a very broad perpetual license** for Fairfax to use your work **in any Fairfax publication**, however they see fit, without paying further license fees.

Please take particular note of the following:

- The Fairfax license allows indiscriminate worldwide publication in **any** publication by Fairfax **or a related company**, including online publications and publications of Fairfax Australia. It is not limited to publication in New Zealand/Australia, or in the publication for which a photograph was taken (Clause 4). This includes unlimited future **advertising use** (see Clause 8) by Fairfax, **without payment of any extra fee**.
- The Fairfax contract provides that, unless Fairfax sets a different exclusivity period in a written brief, the work is licensed for a **one year exclusivity period**, beginning on the date the work is accepted for publication (Clause 5).

We understand that magazines require a reasonable period of exclusivity. We also agree that while the exclusivity period is in force photographers should not license the work to any third party. However, the one-year exclusivity period is unnecessary, unreasonably long, and excessive relative to the modest fees paid by Fairfax.

It is common knowledge that the syndication value of any image declines significantly after the first 6 months of its life, so this clause effectively ensures that a photographer's ability to generate secondary income from their work will be severely compromised.

A 3 month exclusivity period is standard in the magazine industry and is far more reasonable given the low fees that are generally paid to photographers when they are engaged to create images.

- The Fairfax contract (Clause 11) provides that Fairfax **does not have to pay** for your work unless it is accepted for publication. For example, this means that Fairfax could engage you to complete a shoot then choose not to publish the associated news item, and that therefore they would not have to pay you, even if your work was of an exceptional quality.
- The Fairfax contract is highly restrictive in terms of your ability to use your Work for self-promotion / portfolio / competition uses. During the exclusivity period (one year), the Fairfax contract allows only for you to **link** to the Work on your **personal** website (Clause 5). This does not clearly provide for your ability to **host/publish** your photographs on your **business** website or blog, in your print portfolio, or on any social media platform.
- Following the exclusivity period, the Fairfax license provides for a **perpetual non-exclusive license** (Clause 6), without payment of a further fee. The continued use of images on a non-exclusive license by Fairfax seriously diminishes the value of the images for any uses the creator may have for them. For example, most large stock libraries will not accept images that are currently under license. Nor will they accept 'similar' or 'sister images' from the same shoot.

Photographers may also wish to produce their own books using images they initially shot for Fairfax. The continued use of images on a non-exclusive license by Fairfax in a different context will compromise the photographer's own exclusivity after Fairfax's exclusivity has expired. If Fairfax wish to extend their license to include an unlimited time period, then additional fees should be paid to acknowledge the added value that they are receiving.

- Clause 8 of the Fairfax contract provides that Fairfax may use images for certain advertising purposes. Advertising rates for photography are significantly higher than editorial rates (by a factor of approximately 500%). There should be provision for further payment to be made to use the Work for advertising.
- As the creator of a copyright work you have a moral right to be identified as the author of your work, however, the Fairfax contract does not provide for this attribution right. By signing this

contract you have no control over how or where your images will be used (either initially or in the future), and you consent to editing and publishing of your work by Fairfax (or persons/companies authorised by Fairfax) which may infringe any moral rights in the works. Note that moral rights include the right of a photographer not have his or her work subjected to **derogatory treatment**. Proper and fair industry agreements protect your attribution and intellectual property rights, and your ability to recover losses where they are breached.

- You are also expected to provide extensive warranties (Clause 21) that your works will not infringe the law or rights of any other person - including the commercial and privacy rights of your subjects. This is despite the fact that you have no control over how or where the photos will be used, and often no control over the subject matter of the photos you are requested to shoot. With regards to film/video works, you are even asked to warrant that you have obtained a license for Fairfax to use the music in your recordings, which is impossible given that under the broad license given to Fairfax under this contract, you cannot know how Fairfax will use the work in the future; therefore the music-use license would need to be perpetual and limitless.
- You are expected to provide an indemnity to Fairfax both against breach of the warranties (Clause 23) and all costs and expenses that Fairfax might incur due to your work. This is despite the fact that Fairfax accepts virtually no responsibility for your losses, and expects an indemnity for warranties even though you cannot legitimately provide such warranties – essentially putting you in a position where you are liable to Fairfax for an **unlimited sum** for any costs/losses, even where the losses in question may be beyond your control.
- Additionally, the Fairfax contract omits important clauses that should normally be found in an engagement agreement, for example:
 - changes to fee estimates;
 - client confidentiality;
 - late payment charges;
 - cancellation or postponement fees;
 - weather conditions and weather insurance;
 - attribution rights;
 - damage to/misuse of your intellectual property;
 - damage to your reputation by Fairfax;
 - preservation of electronic rights information (e.g. metadata);
 - creation of derivative works from your Work;
 - termination of the contract and/or license to use a Work.

It would be fair to say that this 'Contributor Agreement' is vastly inadequate, and unfair to the photographers. Under this contract Fairfax Media obtains extraordinary benefit while photographers are denied basic rights and burdened with unreasonable responsibility for inadequate compensation.

Please remember that as an independent freelance photographer you have the right to determine the terms and conditions under which your business operates. Furthermore, you are not an employee of Fairfax Media and therefore it is completely unreasonable for Fairfax to treat you as such, which is essentially what their contract seeks to do by failing to allow for you to charge for cancellations/postponements, assert proper attribution rights, or provide for future licensing and revenue streams.

Protecting your rights will enable the long term viability and growth of your business, preserve an archive available for your future use or stock availability, and ensure that editorial photography has a future in New Zealand.

It is for these reasons that the AIPA strongly recommends that professional photographers avoid signing the Fairfax 'Contributor Agreement' and instead implement fair and reasonable terms and conditions that will protect both the client and the photographer. Please continue to use the AIPA Standard Photographic Terms and Conditions of Engagement (available as a free download from the AIPA website). We advise you to licence your work in a fair and reasonable manner that reflects the fees being offered in return.

For the sake of your own business, and the industry at large, we strongly urge you to say **no** to this **very bad deal**.

Best regards,

A handwritten signature in black ink, appearing to read 'Aaron K.', written in a cursive style.

Aaron K
AIPA Executive Director



Fairfax Media creates and publishes content in many formats. As part of our publishing operations we commission and accept editorial work from skilled contributors.

This agreement sets out the terms that relate to the creation, acceptance and use of that work. The basis of this agreement is that as author, you keep the copyright in the work you create, but in return for the fee we agree, you licence us to publish that work.

It is important to us that the material we publish does not appear for a period of time in competing publications or by other means. Different types of publication are seasonal or have different lead times for commissioning work, so material may not actually be published for some time after it is accepted by us for publication. The Agreement provides that Fairfax has exclusive publication rights for a period after your work is accepted by us. After that exclusivity period the rights are non-exclusive so (with a few qualifications) you are free to publish the work elsewhere.

CONTRIBUTOR AGREEMENT (photographs / films)

1. In this Agreement:

- “Fee” means the amount we agree to pay to licence a Work.
- “We” and “us” and “Fairfax” means Fairfax New Zealand Limited and our related companies
This is vaguely defined and very broad – under this contract “related companies” receive all the rights of the license to a photographer’s Work – and this could include separate companies that should not rightly be able to use a photographer’s work without obtaining a separate license.
- “Work” means a photograph or a film (as defined in the Copyright Act 1994), of which you are author or copyright owner, which is delivered or to be delivered to Fairfax for publication, and “Work” includes parts of that work.
- “You” means the individual or body corporate which has been asked to enter into this Agreement.

2. You agree to produce the Work and deliver it to us on or before the delivery date and time, by a means we agree.

This clause does not allow for the photographer to disclaim liability for potential loss by Fairfax in the event that work is delivered late. To protect a photographer, it is generally preferable for delivery dates to be indicative-only, as there are external risks that may need to be taken into account – for example, a shoot may be weather-dependent.

3. You are the sole owner of copyright in the Work and you represent that you are entitled to enter into this agreement to licence the copyright in the Work.

LICENCE TO FAIRFAX

4. You grant us a licence to publish the Work in any Fairfax publications (including publications of Fairfax Media Limited, which is our parent company in Australia, and in Fairfax's digital publications such as www.stuff.co.nz), by any means.

The licence granted under this contract is very broad. It allows for worldwide publication in any Fairfax NZ or Fairfax Australia publication, including online publications, and also publications of related companies. It is not limited to use in the publication for which a photograph was taken (Clause 4). It is not restricted to a certain type of publication, and therefore, even if a photographer were to license a photo that is intended for one specific magazine, that same photo could be used online, in numerous magazines by Fairfax, and even for advertorial purposes (refer Clause 8), without any payment of a further fee.

5. For a set period the licence is exclusive to us. That exclusivity period is one year after we accept the Work for publication, unless we have specified a different period in the written brief for the Work. You must not licence anyone else to publish the Work in any media until the exclusivity period has passed. If you have a *personal* website you may include a link to your Work on it, after we have published the Work online.

This clause does not clearly provide for a photographer's right to upload the Work to the photographer's portfolio website, or to use the Work for self-promotion / portfolio / competition uses.

Where Fairfax does not publish the image online, it would be impossible to 'link' to that image, thereby restricting a photographer's ability to use the image for portfolio/promotion. It is also unclear what a 'personal' website may be – it should be clear that a photographer may use the image on his or her business website.

By contrast, the AIPA Standard Photographic Terms of Engagement (Clause 1) provide that a photographer will always have the right to use the Work at any time for competition, promotion, exhibition, and for a photographer's own business activities.

6. After the exclusivity period the licence to us will be non-exclusive. You can licence others to publish the Work as long as that publication occurs after the exclusivity period. We can continue to use the Work on a non-exclusive basis.

This perpetual non-exclusive license to the work is very broad. This prevents the photographer granting any further exclusive licenses in the future, and essentially allows Fairfax to retain a photographer's images then re-use them in any Fairfax (or related company) publication in the future, including online, and/or for advertising purposes (refer Clause 8), without further payment of a fee.

In some of our publications, particularly those which feature homes, gardens, boats and motor vehicles we identify the owners in photographs and by name. Owners are often sensitive about publication of that identifying information outside the original publication. So if you licence the Work to a third party, or display it, you must ensure that the name or identifying details of the owner or other individuals, and the specific locality of any featured property, boat or motor vehicle are not shown. If you need to show those details, you must first get our consent.

If information is 'personal information' as defined in the Privacy Act 1993, then consent should be obtained to publish that information. If the information is not personal information or otherwise commercially sensitive, there should be no need for consent from any party, including Fairfax.

7. Fairfax supplies its published content from time to time to news aggregators, specialist news services and clippings services and the Work may be included with that supply (but we won't have the right to supply the Work to a third party print publisher).

Despite stipulating that images will not be supplied to a third party *print* publisher, it is unclear what may be involved in supplying content to 'news aggregators, specialist news services and clippings services', and whether this third party publication should require a further license.

8. We may include the Work in advertising, promotions and merchandising for Fairfax's brands and publications (but not for third parties or their products).

'Fairfax' is defined broadly in this contract (refer Clause 1) to include related companies, and therefore the Work may be used perpetually for advertising or promotional publications for those companies.

9. If a third party asks to use the Work in a way which is outside the licence granted to us, we will use reasonable endeavours to refer their enquiry to you.

ACCEPTANCE AND PAYMENT

10. The Editor who commissioned or receives the Work will confirm to you when it is accepted for publication. The licence in that Work (and the exclusivity period) starts from acceptance for publication.
11. We do not have to publish the Work but we are obliged to pay the Fee if it is accepted for publication.

This clause would mean that where a photographer is engaged for a shoot, but then Fairfax opts not to publish the Work (for whatever reason) the photographer would not get paid. Where Fairfax chooses to hire a photographer, it could be unfair that Fairfax then has the ability to choose not to pay a photographer for work completed merely because they opt not to publish that work (e.g. for reasons outside of a photographer's control), which this clause would allow. Most industry contracts, including the AIPA Standard Terms & Conditions (Clause 16.1), would instead allow Fairfax to reject work where it is of an unsuitable technical quality, adequately protecting Fairfax's interests.

12. We can edit or crop the Work if we think necessary before publication.

Although it is necessary for Fairfax to modify images in order to make them publishable, in combination with the perpetual license, it is worth noting that this clause means that a photographer has very little control over how the Work will be edited or used (either initially or in the future). Additionally, this contract does not provide for moral rights/attribution rights of the photographer.

13. If we have agreed in writing to reimburse you for expenses incurred in creating the Work you must provide original tax invoices to support your expense claim and the expenses must be reasonable.

This does not provide for markups on costs by the photographer. By contrast, for example, the AIPA Standard Photographic Terms of Engagement (clause 6.1) provides that the Client shall reimburse the photographer for all Job-related costs, and that the photographer may add a service charge.

14. We will pay the Fee and any additional sums due by the 20th of the month following the date of our receipt of your invoice.

This does not provide for late payment interest, which is a normal clause in a contract for services.

15. All payments to you are subject to withholding tax (if deductible) or other schedular payments specified by IRD.

RELATIONSHIP

16. You are not our employee or agent. The real nature of your relationship with us is that of licensor and licensee.
17. You are in business on your own account. You are responsible for your own liability for tax, ACC levies, and all other liabilities and expenses, and you indemnify us from all such costs.

This clause is actually much broader than providing that a photographer is in business on a photographer's own account. This essentially provides unlimited indemnity to Fairfax for all costs and expenses that they might incur due to a photographer's work, and that Fairfax is responsible for none of a photographer's liabilities/expenses.

RESPONSIBILITIES

18. If we have commissioned the Work from you, you will be representing Fairfax (or a Fairfax publication) and you must act appropriately, responsibly and legally at all times in gathering material and creating the Work.
19. For the most part we will not be in control of the place where you create the Work, and you will be responsible for your own safety and health. If you identify any hazard that might arise in the course of creating Work we have commissioned, you must let us know so we can together establish practicable steps to ensure there is no resulting harm.
20. We will not be liable for any loss or damage to equipment or property arising in the creation of the Work or in any way as part of the publication process.

This clause is much wider than to disclaim Fairfax's liability for photographers' equipment damaged in shoots, instead essentially disclaiming *all* damage or loss to property, which could include damage to the photographic works provided.

21. You warrant that:

The below warranties are very broad, often outside of the photographer's control (particularly given the incredibly broad nature of the license under this contract, and the fact that Fairfax may choose how to use a photographer's Work), and impossible for a photographer to provide in many circumstances. Generally photographers can at most state that these things are true "to the best of their knowledge".

- the Work is the original work of the author, "Author" is not defined, and this clause does not provide for situations where the photographer is collaborator/sub licensor etc.
- You have identified to us any digital enhancement or alteration to the Work, before the Work was accepted for publication
- No illegal acts have been committed in the creation of the Work;
It would be imprudent for a photographer to give such a broad warranty where they are working a shoot organized by Fairfax, as many aspects are outside of a

photographer's control. A photographer would also limit any such warrant to their own acts- e.g. "To the best of your knowledge, no illegal acts have been committed by you in the creation of the Work".

- You have obtained any necessary releases (from the subjects or for products featured) for us to use the Work under this licence; and
It would be difficult for a photographer to make such a warranty, particularly where they are working a shoot organized by Fairfax. Additionally, these consents will be very difficult to obtain where the photographer cannot state how the work will be used, given the extensive license that Fairfax seeks to hold, whereby they may choose to use the work in any way they see fit, at any stage in the future.
- If the Work is a film, a licence has been obtained for any musical works and sound recordings which form part of the soundtrack, sufficient for us to use the Work under this licence.
It would be difficult to provide this warranty in the context of the broad, perpetual and exclusive license granted to Fairfax under this contract – very few owners of musical copyright would grant such an extensive license. It is preferable that the responsibility for ensuring that all clearances have been obtained rests with Fairfax, which is in a better position to judge how the Work will be utilized (if at all) and therefore the licenses required.

22. You indemnify us against all costs and losses that may arise as a result of a breach of the warranties in clause 21 other than as set out in clause 23 below.

Despite the fact that Fairfax accepts virtually no responsibility for a photographer's losses, this contract expects an indemnity for the above warranties. This essentially puts the photographer in a position where he/she is liable to Fairfax for an **unlimited sum** for any costs/losses, even where those costs/losses may be beyond a photographer's control, as they are subject to business and publishing decisions by Fairfax.

It is preferable that indemnity is limited to a maximum amount, such as 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).

23. If there is a claim against you or against Fairfax for alleged defamation or injurious falsehood, we will meet the cost of defending or settling the claim/s, as long as we determine that that there has been no negligence or wilful act by you or any other person you involved in the creation of the Work. We will be entitled to appoint legal advisers for the conduct of the matter, you will co-operate with us to the fullest extent possible, and we will have the sole discretion to decide how to proceed. Any decision we make, including any settlement discussions, will bind you, but you will not be responsible for any cost.

The wording of this clause would likely enable Fairfax to avoid its indemnity/defence obligations, for example, if there was a "wilful act" by the photographer "in the creation of the works". Obviously the taking of the photo is a "wilful act".

It is also unclear why this clause is limited to defamation and injurious falsehood but does not include other potential claims (for example breach of privacy).

GENERAL PROVISIONS

24. If there is any dispute under this agreement, that is not resolved by mediation or other agreement, it will be submitted to the arbitration of one arbitrator. The arbitration will be conducted under the Arbitration Act 1996. Either party may appeal to the High Court on any question of law arising out of the arbitration.
25. This agreement will be effective when you return a signed copy or indicate your acceptance of the terms by email or by another electronic means; or when you submit a Work to us for publication. Any variation must be executed or accepted in writing by us both or accepted electronically.
- Acceptance of this contract need not be by a photographer signing the document - if a photographer has been given a copy of this contract then provided Work to Fairfax, even without signing it, a photographer may be deemed to have accepted the contract, even where the Work was unsolicited.
- If you do not accept these terms, you should make it clear that these terms do not apply, and advise which terms and conditions apply to your work (e.g. AIPA Standard Photographic Terms and Conditions).
26. This agreement covers all the Work we accept from you for publication after its effective date. If you have delivered work to us under another arrangement before this agreement, that arrangement still applies to the earlier work.

Signed by the parties:

.....
Contributor

.....
for Fairfax New Zealand Limited

Date:

Additionally, the Fairfax contract omits important clauses that would normally be found in an engagement agreement, for example:

- Changes to fee estimates;
- Client confidentiality;
- Late payment charges;
- Cancellation or postponement fees;
- Weather conditions and weather insurance;
- Attribution rights;
- Damage to/misuse of your intellectual property;
- Damage to your reputation by Fairfax;
- Preservation of electronic rights information (e.g. metadata)
- Creation of derivative works from your Work;
- Termination of the contract and/or license to use a Work.