

Guide to Publishing Agreement

The publishing agreement is a legal document. You should get advice on the terms if you do not understand the agreement. Further, the agreement is designed to be read in conjunction with the process for publishing your work with D Publishing as some of the concepts in the agreement relate to data or choices that you make when producing and managing your “Completed Work”.

Notes are placed throughout the document to assist you in reading the agreement. Notes are formatted in shaded boxes so that they are easy to see. Whilst D Publishing has tried to ensure that notes are made to explain critical concepts, it is not possible to address all questions. For further information about publishing with D Publishing you can also review the ‘Frequently Asked Questions’ which can be accessed [here](#).

Finally, this agreement only applies to people who want to **publish** their work through D Publishing. It does **not** apply to people who only wish to use the production and print services of D Publishing.

Publishing Agreement

Parties

D Publishing ABN 65 090 395 690 of Level 6, 428 George Street, Sydney NSW 2000 (**D Publishing**)

Such person or persons (called an **Author**) who submit a work to D Publishing for publishing through the online publishing portal available at www.dpublishing.com (**Website**). For the purpose of this Agreement, the term ‘Author’ includes the Author’s successors and assigns.

Recitals

- A. The Author has written a book or other document which has been uploaded through the Website (**Work**) and wishes D Publishing to publish the Work.
 - B. The Author grants D Publishing the right to publish the Work on the terms set out in this Agreement.
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1 Agreement formation

- 1.1 This Agreement commences on the date that the Author accepts these terms and conditions through the Website.
 - 1.2 The Author accepts this Agreement and agrees to be bound by:
 - (1) clicking agree or accept where given the option to do so; or
 - (2) using the services of D Publishing.
 - 1.3 Incorporated into this Agreement are the following additional terms (with the appropriate amendments made, where the context requires):
 - (1) D Publishing rate card located at <https://www.dpublishing.com/ratecard.aspx> (**Rate Card**); and
 - (2) D Publishing website terms and conditions located at <https://www.dpublishing.com/PrivacyAndSecurity.aspx>; and
 - (3) D Publishing Terms of Service located at <https://www.dpublishing.com/TermsOfService.aspx>; and
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2 Distribution Channels

Note 1 This section describes the licence of copyright that the Author grants. It needs to be read together with the information that an Author enters when requesting publication through D Publishing as well as the Rate Card.

- 2.1 D Publishing conceptualises distribution of works through one of two categories:
 - (1) Core Distribution Channel
 - (2) Secondary Distribution Channel which has two aspects:
 - (a) Nominated Secondary Distribution Channel

(b) Secondary Distribution Channel

2.2 At the time that the Author agrees to publish the Work with D Publishing they will select:

- (1) distribution through the Core Distribution Channel only; or
- (2) distribution through the Core and Secondary Distribution Channels.

Note 2 The Author should ensure that they understand the difference between Core and Secondary Distribution Channels because the channels affect their rights to distribute their work.

2.3 D Publishing may, from time to time add a distribution method or channel to the Core Distribution Channel. However, where it does so after an Author accepts this Agreement the Author will be requested to agree to the addition of the Core Distribution Channel.

3 Copyright Licence

Note 3 To properly understand this section the Author needs to know which distribution channels they selected when submitting their Work for publication with D Publishing.

3.1 If the Author selects distribution through the Core Distribution Channel only then the Author grants to D Publishing the sole and exclusive licence to:

- (1) to print, publish and sell the Work in hardcopy; and
- (2) to produce, publish and sell electronic book and multimedia (being any format or file that combines two or more media such as text, image, video or sound) forms of the Work; and
- (3) to produce, publish and sell audible (or spoken) book,

through the Core Distribution Channels and for the territory of the world in the Core Distribution Channel **only**.

Note 4 There are currently only three Core Distribution Channels: (1) Dymocks Online; (2) Google eBooks; and (3) Dymocks Stores. The Author should note that whilst the territory of the Core Distribution Channel is worldwide, it is worldwide through the specific named retailer **only**.

3.2 If the Author selects distribution through the Core and Secondary Distribution Channel then the Author grants to D Publishing:

- (1) sole and exclusive licence to:
 - (a) to print, publish and sell the Work in hardcopy; and
 - (b) to produce, publish and sell electronic book and multimedia (being any format or file that combines two or more media such as text, image, video or sound) forms of the Work,; and
 - (c) to produce, publish and sell audible (or spoken) book,through the Core Distribution Channels and for the territory of the world in the Core Distribution Channel **only**; and

- (2) sole and exclusive licence to:
 - (a) to print, publish and sell the Work in hardcopy; and
 - (b) to produce, publish and sell electronic book and multimedia (being any format or file that combines two or more media such as text, image, video or sound) forms of the Work,; and
 - (c) to produce, publish and sell audible (or spoken) book,through the Nominated Secondary Distribution Channels and for the territory of the world in the Nominated Secondary Distribution Channel **only**; and

Note 5 Once a Secondary Distribution Channel is nominated it operates in the same manner as a Core Distribution Channel (for details on how a Core Distribution Channel operates see clause 3.1 and Note 4).

- (3) non-exclusive licence, in conjunction with the Author, to:
 - (a) to print, publish and sell the Work in hardcopy; and
 - (b) to produce, publish and sell electronic book and multimedia (being any format or file that combines two or more media such as text, image, video or sound) forms of the Work; and

- (c) to produce, publish and sell audible (or spoken) book; and
 - (d) to exercise, including by way of sub-licence, all rights in the Work other than its first volume and electronic publication rights (**Subsidiary Rights**). Without limiting the preceding, Subsidiary Rights include:
 - (i) anthology and quotation rights
 - (ii) the right to distribute the Work in parts, for example, on a stand-alone chapter basis whether as part of a single transaction or as part of a subscription in which the whole of the Work may, over time, be accessed
 - (iii) condensation e.g. magazines, newspapers and ezines
- for the territory of the world.

Note 6 Authors should note that the Subsidiary Rights are able to be exercised by them as well. D Publishing is under an obligation to commercialise those rights (see clause 5.1) and must obtain the approval of the Author before selling the Subsidiary Rights (see clause 6.2)

3.3 The Licence granted to D Publishing in clauses 3.1 and 3.2 are each a '**Licence**' when referred to in this Agreement.

Note 7 Whilst the term 'Licence' refers to both forms of licence, the Author only grants one Licence and it takes the form set out in **either** clauses 3.1 or 3.2. References throughout the agreement then refer only to the type of licence granted by the Author.

3.4 Clause 3.2(3) expressly permits the Author to personally distribute the Work through Secondary Distribution Channels until such time as that channel or distribution method is nominated by D Publishing as a '**Nominated Secondary Distribution Channel**'. The Author may at any time grant to a third party distributor the right to distribute the Work on its behalf but may not enter into an agreement with another publisher in relation to the Work which would result in part or all of copyright in the Work being licensed to the publisher.

Note 8 Clause 3.4 makes clear that an Author can distribute their Work through channels that are not exclusive to D Publishing. This includes distribution by the Author themselves as well as distribution by a third party distributor.

3.5 D Publishing may, from time to time, give notice that a Secondary Distribution Channel has become a Nominated Secondary Distribution Channel. Where this occurs the Author will be notified and given 30 days to object to the nomination of the relevant channel. Where the Author rejects the nomination of a Secondary Distribution Channel D Publishing may, at its option, elect to stop distributing the Work through all Secondary Distribution Channels (including Nominated Secondary Distribution Channels). Where this occurs the Licence is automatically varied to remove D Publishing's right to distribute the Work through Secondary Distribution Channels.

Note 9 At the time that an Author enters into this Agreement D Publishing must use reasonable commercial efforts to distribute through the Core Distribution Channels as these are channels in which D Publishing has established distribution arrangements. Where D Publishing develops further distribution arrangements which will benefit an Author it is likely that D Publishing will 'nominate' that secondary distribution channel so that it obtains the exclusivity in respect of that sales channel. The Author **always** has the **choice** to accept or reject nomination of a channel. There are many reasons for nomination: (1) before D Publishing nominates the channel the Author is free to commercialise the channel; (2) when D Publishing can commercialise a channel it can leverage the body of work it has from a number of authors to access the channel and, hopefully, obtain favourable terms for authors; and (3) nomination ensures that in some channels where only one party can represent a Work, there is no confusion as to who can distribute the Work.

3.6 D Publishing has the exclusive right to publish a tie-in edition to any motion picture, television or other dramatic version of the Work. The parties agree that, in negotiating the terms of the tie-in edition with any producer of the motion picture, television or other dramatic version of the Work they will use their best endeavours to ensure that D Publishing:

- (1) has the right to use the title of any such version in the form of the logotype used in the final credits of that version; and
- (2) is given access, at no cost, to photographic and other promotional material as is reasonably necessary to produce and promote the tie-in; and
- (3) is given the opportunity to cooperate with the promoter and distributors of such version for the mutual advantage of D Publishing and the promoter and distributor.

3.7 The parties agree that the term 'sell' in clauses 3.1 and 3.2 refers to any manner in which the Work can be

commercialised and is not intended to be interpreted narrowly or by reference to sale methods current at the time that the Author enters into this Agreement. Sale methods may include, but are not limited to:

- (1) sale of the Work to an end consumer; or
- (2) allowing an end consumer to access the Work on a time-limited basis (such as via a subscription service).

Where the Rate Card does not identify royalty and cost structures for a new sale method, D Publishing will obtain the prior consent of the Author prior to implementing the sale method. The Author is deemed to consent to a request from D Publishing to implement a sale method if it does not respond to the request within 30 days.

Note 10 The purpose of clause 3.7 is to ensure that the Agreement does not limit the parties to distribution through traditional sale methods. As technology and the manner in which content is accessed evolves, new distribution opportunities may arise which D Publishing will want to commercialise for the benefit of the Author. The clause seeks to provide this flexibility.

- 3.8 The Author warrants that they have not prepared, prior to the date of this Agreement, any work which reproduces or adapts any material part of the Work.
- 3.9 All rights other than those specifically granted to D Publishing are reserved to the Author.

4 Copyright Notification

- 4.1 Copyright in the Works remains with the Author.
- 4.2 D Publishing undertakes that the name of the Author will appear on:
 - (1) the title page; and
 - (2) the cover or binding; and
 - (3) any jacket,of the Work.
- 4.3 The parties agree that the following copyright notice will appear in accordance with the provisions of the Universal Copyright Convention:

*Copyright © [AUTHOR NAME] 20***

Where ** indicates the year of first publication.
- 4.4 All moral rights in the Work are reserved to the Author.
- 4.5 D Publishing may, but is not required to, make available the option to apply digital rights management (**DRM**) technology to the Work. DRM technology may be made available at a price set by D Publishing at its discretion. Where DRM technology is made available, the Author acknowledges that D Publishing makes no representation as to the effectiveness of DRM and is not responsible for the failure of the DRM.

5 Distribution and commercialisation by D Publishing

- 5.1 D Publishing must use reasonable commercial efforts to distribute and commercialise the Work through the channels that are permitted under the Licence.
- 5.2 Where a distribution channel is online, D Publishing will have satisfied the obligation in clause 5.1 by ensuring that the Work is:
 - (1) loaded into the online catalogue for the relevant channel; and
 - (2) capable of fulfilment from the channel.

6 Compensation to the Author

- 6.1 D Publishing will pay to the Author the Royalties as set out in the Rate Card.
- 6.2 D Publishing agrees not to conclude any sales of Subsidiary Rights without the prior approval of the Author, such approval not to be unreasonably withheld. The Author must act promptly in considering any request from D Publishing to commercialise the Subsidiary Rights. The Author is deemed to consent to a request from D Publishing to commercialise a Subsidiary Right if it does not respond to the request within 30 days.

Note 11 Clause 6.2 ensures that an Author is consulted on, and must approve, the terms of any commercial opportunity relating to the Subsidiary Rights in their Work. In many instances the commercial opportunity may require a decision to be made within a specified time period and it is for this reason that D Publishing sets a 30 day window to obtain the Author's view on the commercial opportunity.

- 6.3 D Publishing will prepare accounts of royalties twice yearly – such periods being as at 30 June and 31 December in each calendar year. D Publishing must pay the Author royalties due within two months of the end of the accounting period covered by the account. Such accounts will show the number of sales of the Works in all formats.
- 6.4 Payment of royalties will be made in such manner as determined by D Publishing from time to time and may include by electronic funds transfer to a bank account nominated by the Author. D Publishing is only required to make payment to an Author where the Author has provided all information reasonably required by D Publishing or required by law for the payment to be made.
- 6.5 The Author or the Author's authorised representative will have the right, upon written request, to examine the books of account of D Publishing which relate to the sales of the Work or sub-licences. This examination will be at the cost of the Author unless errors of accounting are found to the Author's disadvantage, where the cost will be borne by D Publishing.

7 Publication

- 7.1 D Publishing will publish the Work in the format submitted by the Author (**Agreed Format**), within a reasonable time from submission of the Work by the Author unless prevented by circumstances beyond its control.
- 7.2 The cost of printing or compiling the Work in the Agreed Format will be borne by D Publishing. D Publishing will not print any copy of the Work:
- (1) except where the cost of printing has already been paid by a third party; or
 - (2) where the Author agrees to the printing of the Work.

Note 12 D Publishing does not work like a standard publisher which orders a print run of a work. The Author controls the quantity of physical books produced, not D Publishing. The **only exception** is where a third party such as a customer orders a book online – in that case the advanced print on demand facilities used by D Publishing allow a single copy of the book to be printed and shipped to the customer and the print cost to be deducted from the price paid by the consumer. Where the Author directs the Work to be printed by D Publishing the Terms of Service apply.

- 7.3 D Publishing will be deemed to have published the Work if it makes it available through one or more online book retailers.
- 7.4 The reference to D Publishing in this Agreement includes any imprint of D Publishing whether under its present or future style.

8 Pricing

- 8.1 The Author will set a list price for the Work (**List Price**). The List Price will be exclusive of value added or similar taxes such as GST. The Author will not be able to set a List Price where the royalty, after all relevant costs and contribution, is less than \$0.
- 8.2 D Publishing may sell the Work in different countries and in doing so may make the Work available in a currency different than the currency listed for the List Price (**List Currency**). D Publishing may convert the List Currency to another List Currency at any time and from time to time. Where this occurs the royalties payable to the Author will be calculated based on the List Price in the List Currency.
- 8.3 In determining the royalties payable on a sale of the Work in a currency other than the original List Currency, D Publishing will convert the sale price back into the original List Currency using an exchange rate determined by it and deducting all appropriate foreign exchange and other fees and charges for the conversion.
- 8.4 D Publishing is responsible for processing payments, payment collection, requests for refunds and related customer service through the distribution channels in which it distributes the Work. All data collected through the processes referred to in the preceding sentence is the property of D Publishing.

9 Promotion

- 9.1 The Author is primarily responsible determining the manner in which the Work is marketed and promoted.
- 9.2 D Publishing may, from time to time, develop marketing and promotional programs for the Work. D Publishing

has sole discretion in determining the manner in which it will market and promote the Work. Without limiting the preceding, D Publishing may promote the Work by making chapters or portions of the Work available to the public free of charge.

- 9.3 The Author agrees to be available, on reasonable notice, to assist with all promotion of the Work.
- 9.4 Where D Publishing requires the Author to travel in order to assist with the promotion of the Work, D Publishing agrees to meet the reasonable costs associated with travel, accommodation and meals.
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10 Legally objectionable material

- 10.1 If, in the reasonable opinion of D Publishing, it is necessary for the Work to be reviewed for defamation or other legally objectionable material, the costs of that review will be paid by the Author.
- 10.2 D Publishing has the right to require the Author to alter the text of the Work so as to remove any legally objectionable material or reduce the risk of any claim being made in respect of such material. Any alteration made by the Author is without prejudice to the Author's liability under the indemnities and warranties set out in this Agreement.
- 10.3 If the Author refuses to amend or delete passages in the Work to D Publishing's reasonable satisfaction then D Publishing may terminate this agreement.
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11 Author's Warranties and Indemnity

- 11.1 The Author warrants to D Publishing that:
- (1) the Work is an original work; and
 - (2) the Author is the sole proprietor of the Work; and
 - (3) the Work has not been published in any format with any company or person that may still own proprietary rights to the Work; and
 - (4) the Work contains no defamatory matter or any material which would breach the law of any of the territories in which the Work is to be published; and
 - (5) all statements in the Work purporting to be facts are true; and
 - (6) the Work contains no obscene, blasphemous or improper material; and
 - (7) the Work does not infringe upon any copyright or proprietary right, common law or statutory law; and does not contain any material of a libellous or obscene nature, or constitute a violation of privacy rights;
 - (8) the Author will not, after entering into this Agreement, enter into any agreement or understanding with any person or entity which might conflict with the rights granted to D Publishing pursuant to this Agreement during the term of this Agreement.
- 11.2 The Author agrees to hold D Publishing harmless and indemnifies D Publishing and its subsidiaries or affiliates, against any claim, demand, action, suit proceeding, or any expense whatsoever arising from any breach of the warranties in this Agreement or any claims of infringement of copyright or proprietary right, or claims of libel, obscenity, invasion of privacy.
- 11.3 In the event of a claim being made against D Publishing in respect of the Works, D Publishing may retain any sum due from it to the Author under this or any other agreement until the final settlement of such claim. Any sums retained by D Publishing in accordance with the preceding sentence may be used to set off any liability of the Author to D Publishing.
- 11.4 All warranties and indemnities in this Agreement will survive termination of this Agreement and any licences granted under this Agreement.
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12 Third party Copyright

- 12.1 The Author must inform D Publishing on delivery of the Work of any quotation or inclusion in the Work of any copyright material from any third party source (**Third Party Material**).
- 12.2 The Author is responsible for:
- (1) ensuring that consent is obtained to the inclusion of the Third Party Material in the Work from the proprietor of copyright in that material; and
 - (2) paying any fees or royalties necessary to procure such consent.

- 12.3 The Author must forward to D Publishing all correspondence relating to the consent of copyright holders to the inclusion of the Third Party Material in the Work.
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13 Copyright Infringement

In the event of any identified copyright infringement of the Work, D Publishing may, at its expense, take legal action in order to restrain the infringement and/or seek damages from the infringing party. D Publishing is not required to take such legal action, nor is D Publishing liable to the Author if it refuses to take such action. Should D Publishing refuse, the Author may then, at the Author's expense, take legal action.

14 First and last rights of refusal

- 14.1 In the event that the parties agree that a new edition of the Work is warranted, the Author grants to D Publishing a right of first refusal to publish and market the new edition of the Work by any means agreed in writing between the parties. If D Publishing does not accept any offer of the Author made under this clause 14.1 within one month of the offer being made, the Author may make the same offer on the same terms and conditions as offered to D Publishing to any other person but on no more favourable terms and conditions without first offering the same again to D Publishing.
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15 Termination

- 15.1 Either party may terminate this Agreement in the event of a breach by the other party of a material term of this Agreement that has not been remedied within 28 days of notice of the breach being provided.

Note 13 Clause 15.1 is a general termination clause which enables both the Author and D Publishing to terminate the agreement if there is a breach. If the Author believes that D Publishing is not complying with the terms of the Licence granted to it then the Author can utilise clause 15.1 to end the Agreement.

- 15.2 This Agreement will automatically terminate without prejudice to any claims outstanding or any sub-licences properly granted in the event of D Publishing going into liquidation (except a voluntary liquidation for the purpose of reconstruction) or becoming insolvent within the meaning set out in the Corporations Act 2001.
- 15.3 The Author may terminate this Agreement if D Publishing has not published the Work within 28 days of being requested to do so by notice in writing from the Author.
- 15.4 D Publishing may, at its discretion and at any time, terminate this Agreement for convenience on giving 30 days' notice in writing to the Author.
- 15.5 The term of this Agreement is for an initial period of 10 years (**Initial Term**) and will automatically renew for additional 10 year periods (each a '**Successive Term**') until the expiry of copyright in the Work. The Author may terminate this Agreement by giving notice in writing to D Publishing to that effect in the 30 day period prior to expiry of the Initial Term or a Successive Term. If notice is not given in the period specified in the preceding sentence the Agreement automatically renews for a further Successive Term.
- 15.6 Upon the termination of this Agreement for any cause all rights granted to D Publishing will revert to the Author for use at any time and D Publishing will return to the Author all property originally furnished by the Author.
- 15.7 D Publishing may sell the remaining copies of the Work for three months after the effective termination date and thereupon all remaining copies will, at the Author's request and cost, be returned to the Author or destroyed. D Publishing will continue to account to the Author for all sales within the sell-off period. Alternatively, D Publishing may elect not to require the sell-off period in which case it can end retail supply immediately on termination.
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16 Limitation of liability

- 16.1 The services are provided by D Publishing as far as permitted by law, on an 'as is, where is' basis. D Publishing is not responsible or liable for any claims, actions, proceedings, accounts, rights, demands, liabilities, costs and expenses, wherever and however arising, whether present or future, actual or contingent, known or unknown which the Author may have or have had but for the terms of this Agreement. In any event, the total liability of D Publishing under this Agreement is limited to the amount of royalty due and payable by D Publishing in the twelve month period preceding the claim.
- 16.2 D Publishing is not liable to an Author for any failure or delay in the performance of its obligations where such failure or delay arises as a consequence of force majeure events.

17 Dispute and Mediation

- 17.1 If a party believes that there is a dispute regarding the performance or interpretation of this document (**Dispute**) then:
- (1) that party must give notice in writing to the other party stating that there is a Dispute; and
 - (2) the notice must outline:
 - (a) what the party believes the dispute to be; and
 - (b) what the party wants to achieve; and
 - (c) what the party believes will settle the Dispute.
- 17.2 In the event of a dispute the parties agree that they or their representatives will meet to discuss the Dispute in good faith and attempt to resolve it.
- 17.3 If the dispute is not resolved within 7 days after the notice of Dispute is given to the other party or parties (**Notice Period**), the Dispute is by this clause submitted to mediation. The mediation must be conducted in Sydney. The Institute of Arbitrators Australia Rules for the Mediation of Commercial Disputes (edition 2 – September 1995) as amended by this clause 17 apply to the mediation, except where they conflict with this clause 17.
- 17.4 If the parties have not agreed upon the mediator and the mediator's remuneration within 7 days after the expiry of the Notice Period:
- (1) the mediator is the person appointed by; and
 - (2) the remuneration of the mediator is the amount or rate determined by,
the President or the President's nominee, of the Law Society of New South Wales acting on the request of either party to the Dispute.
- 17.5 If the dispute is not resolved within 28 days after the appointment of the mediator, any party may take legal proceedings to resolve the Dispute.
- 17.6 This clause 17 does not prevent any party from obtaining any injunctive, declaratory or other interlocutory relief from a court which may be urgently required.

18 GST and ABN registration

- 18.1 This Agreement is drafted on the basis that the supply of the Work by the Author to D Publishing relates to a private or recreational pursuit or hobby or is otherwise wholly of a private or domestic nature for the Author. By accepting this Agreement the Author warrants the accuracy of the previous statement. If the previous statement is not accurate the Author must contact D Publishing for a variation of this Agreement that treats the Author's supply of the Work as subject to GST.

Note 14 In simple terms, tax law provides that where an Author might appear to engage in an enterprise and does not provide an ABN then D Publishing must withhold 46.5% of any payment as withholding tax. D Publishing assumes that most users of this standard form Agreement are not engaging in an enterprise when they supply the Work. Clause 1.1 reflects this understanding and contains the phrases that the tax law requires in order for D Publishing to not have to withhold tax. If an Author is engaged in an enterprise in the supply of their Work (and they should seek their own financial and tax advice) then they should contact D Publishing and an alternative agreement will be provided which reflects the Author's GST status.

- 18.2 In this clause terms that are not otherwise defined in this document have the meanings given to them in the *A New Tax System (Goods and Services Tax) Act 1999*.
- 18.3 Unless the context provides otherwise, all consideration provided under this document has been calculated without regard to GST.
- 18.4 If and to the extent that one party (**Supplier**) makes a taxable supply to the other party (**Recipient**) pursuant to this document, the Recipient must pay to the Supplier an additional amount equal to the GST payable on that taxable supply (unless the consideration for that taxable supply is expressed to be GST-inclusive). The additional amount must be paid by the Recipient at the later of:
- (1) the date when any consideration for the taxable supply is first paid or provided; and
 - (2) the date when the Supplier issues a tax invoice to the Recipient.
- 18.5 If the GST payable in relation to a supply made under or in connection with this document (including any GST

payable in relation to an adjustment for the supply) varies from the amount that the Recipient has paid the Supplier under clause 18.3 such that a further amount of GST is payable in relation to the supply or a refund or credit of GST is obtained in relation to the supply, then the Supplier will adjust the amount payable by the Recipient to take account of the variation, and:

- (1) any amount that becomes payable must be paid by the Recipient within 10 business days of the Supplier providing written notice requiring such payment. Any payment is deemed to be a payment of the additional amount payable under clause 18.3.
- (2) any refund or credit that becomes payable to the Recipient must be paid by the Supplier within 10 business days of the Supplier receiving such credit or refund from the Australian Taxation Office. Any credit or refund is deemed to be a credit or refund of the additional amount payable under clause 18.3.

18.6 This clause will not merge on completion and will survive the termination of this document by any party.

19 Confidentiality

19.1 In this clause the term '**Confidential Information**' means:

- (1) this Agreement; and
- (2) any and all designs, formulas, confidential information, plans, specifications, websites, URLs, trade secrets and know-how and similar industrial, commercial and intellectual property which are owned by or licensed to D Publishing (**Intellectual Property**); and
- (3) information regarding costs, profits, markets, sales and other financial information; and
- (4) information regarding business relationships and strategies, development plans, marketing, product concepts, trade secrets and other business information the business of the disclosing party and the disclosing party's clients or third party suppliers; and
- (5) any other information disclosed by, on behalf or in relation to D Publishing that:
 - (a) is identified as being confidential; or
 - (b) would be apparent to a reasonable person that such information was disclosed in confidence.

19.2 The Author must not disclose the Confidential Information except as permitted by the terms of this Agreement.

19.3 The Confidential Information may be disclosed:

- (1) where agreed by D Publishing; and
 - (2) to the Author's professional advisers (including legal advisers) who are subject to a duty of confidentiality; and
 - (3) to any governmental or statutory authority where the Author is required to make disclosure in accordance with any provision of any legislation, regulation, statutory rule or ordinance.
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20 Notices

20.1 A notice, demand, consent, approval or communication under this agreement (**Notice**)

- (1) must be in writing in English directed to the recipient's address for notices specified in the Details (as varied by any Notice);
- (2) must be hand delivered, left at or sent by prepaid post, email or facsimile to the recipient's address for notices specified in the Details (as varied by any Notice); and
- (3) may be given by an agent of the sender.

20.2 A Notice given in accordance with clause 20.1 takes effect when received (or at a later time specified in it), and is taken to be received:

- (1) if hand delivered or left at the recipient's address, on delivery;
- (2) if sent by prepaid post, the third Business Day after the date of posting, or the seventh Business Day after the date of posting if posted to or from outside Australia; and
- (3) if sent by facsimile, when the sender's facsimile system generates a message confirming successful transmission of the entire Notice unless, within one Business Day after the transmission, the recipient informs the sender that it has not received the entire Notice,

but if the delivery or transmission under paragraph (1) or (3) is outside Business Hours, the Notice is taken to be received at the commencement of Business Hours after that delivery, receipt or transmission.

- 20.3 Any process or other document relating to litigation, administrative or arbitral proceedings in relation to this Agreement may be served by any method contemplated by this clause in addition to any means authorised by law.

21 General

21.1 The publishing services from D Publishing will change over time and so the terms of this Agreement will change. D Publishing reserves the right to change the Agreement on giving reasonable notice. Notice of changes will be given by publication of the revised terms on the Website. Changes to this Agreement take effect:

- (1) in the case of changes other than to amounts shown in the Rate Card – immediately on posting of the revised version of this Agreement; and
- (2) in the case of changes to amounts shown in the Rate Card – within 30 days of posting on the Website.

The Author is deemed to accept changes to this Agreement by continuing to use D Publishing's publishing services.

Note 15 Authors should keep in mind that changes are designed to ensure that the range of services available to the public increase and that minor technical changes to provisions can be effected with minimal disruption. The clause gives D Publishing the right, for instance, to add sales channels to the Rate Card and is essential in a market that is subject to technological change and innovation or where the law is constantly changing (for example, introduction of new taxes or laws relating to form and manner of publication). D Publishing cannot use the clause above to change the commercial terms set at the time the Author enters into the contract. The *Competition and Consumer Act 2010* ensures that any 'unfair term' is not able to be enforced. An Author should also note that there are certain key terms in the Agreement that require specific agreement from the Author if a change is to be made (such as the scope of the copyright licence granted).

21.2 If a provision of this Agreement or a right or remedy of a party under this Agreement is invalid or unenforceable in a particular jurisdiction:

- (1) it is read down or severed in that jurisdiction only to the extent of the invalidity or unenforceability; and
- (2) it does not affect the validity or enforceability of that provision in another jurisdiction or the remaining provisions in any jurisdiction.

This clause is not limited by any other provision of this document in relation to severability, prohibition or enforceability.

21.3 This Agreement states all the express terms agreed by the parties in respect of its subject matter. It supersedes all prior discussions, negotiations, understandings and agreements in respect of its subject matter.

21.4 Nothing in this Agreement gives a party authority to bind any other party in any way. Nothing in this Agreement imposes any fiduciary duties on a party in relation to any other party.

21.5 This Agreement is governed by the laws of New South Wales, Australia and the parties submit to the exclusive jurisdiction of the courts of that jurisdiction.

21.6 Subject to any other clause in this Agreement, this Agreement may only be amended by the agreement of all parties recorded in writing.

21.7 Each party must promptly at its cost do all things, including executing all documents, necessary or desirable to give full effect to this Agreement.

21.8 No party has relied on any statement by any other party not expressly included in this document. No party to this Agreement may rely on the words or conduct of any other party as a waiver of any right unless the waiver is in writing and signed by the party granting the waiver.

21.9 It is not necessary for a party to incur expense or make payment before enforcing a right of indemnity conferred by this Agreement.

21.10 Any indemnity or obligation of confidentiality in this Agreement is independent and survives termination of this Agreement. Any other term which by its nature is intended to survive termination of this Agreement survives termination of this Agreement.

21.11 A party does not waive a right, power or remedy if it fails to exercise or delays in exercising the right, power or remedy. A single or partial exercise by a part of a right, power or remedy does not prevent another or further exercise of that or another right, power or remedy. A waiver of a right, power or remedy must be in writing and

signed by the party giving the waiver.

21.12 Except where this Agreement expressly states otherwise, this Agreement does not create a relationship of employment, trust, agency or partnership between the parties.

21.13 The rights provided in this Agreement are cumulative with and not exclusive of the rights, powers or remedies provided by law independently of this Agreement.

21.14 A party may exercise a right, at its discretion and separately or concurrently with another right.

22 Interpretation

In this Agreement, except where the context otherwise requires:

- (1) the singular includes the plural and vice versa and a gender includes other genders;
- (2) other grammatical forms of a defined word or expression have a corresponding meaning;
- (3) a reference to a clause, paragraph, schedule or annexure is to a clause or a paragraph or a schedule or annexure to this Agreement and a reference to this Agreement includes any schedule and annexure;
- (4) a reference to a document or agreement, includes the document or agreement as novated, altered, supplemented or replaced from time to time;
- (5) a reference to A\$, \$A dollar or \$ is to Australian currency;
- (6) a reference to time is to Sydney time;
- (7) a reference to a year (other than a financial year) or month means a calendar year or calendar month respectively;
- (8) a reference to a party is to a party to this Agreement, and a reference to a party to a document includes the party's executors, administrators, successors and permitted assigns and substitutes;
- (9) a reference to a person includes a natural person, partnership, firm, body corporate, trust, joint venture, association, governmental or local authority or agency or other entity;
- (10) a reference to a statute, ordinance, code or other law includes regulations and other instruments under it and consolidations, amendments, re-enactments or replacements of any of them;
- (11) any authorities, associations, bodies and entities whether statutory or otherwise will, in the event of such authority, association, or body or entity ceasing to exist or being reconstituted, replaced or the powers or functions thereof being transferred to or taken over by any other authority, association, body or entity, be deemed to refer respectively to the authority, association, body or entity established, constituted or substituted in lieu thereof which exercises substantially the same powers or functions;
- (12) the meaning of general words is not limited by specific examples introduced by including, for example, or similar expressions;
- (13) any agreement, representation, warranty or indemnity in favour of two or more parties (including where two or more persons are included in the same defined term) is for the benefit of them jointly and severally;
- (14) notes in the document are inserted for reference only and do not form part of the agreement itself;
- (15) a rule of construction does not apply to the disadvantage of a party because the party was responsible for the preparation of this Agreement or any part of it; and
- (16) if a day on or by which an obligation must be performed or an event must occur is not a Business Day, the obligation must be performed or the event must occur on or by the next Business Day.