

## ZEPHYR SOCIAL - TERMS OF SERVICE

These terms of service ("Terms"), together with the Zephyr Social SLA and Zephyr Social Proposal constitute a legally binding agreement between you (the Client) and Denari Pty Ltd(ACN 001 496 788) T/A Zephyr Social of 6 Highview Avenue Manly Vale NSW 2093 ("Zephyr Social"), for the provision of digital marketing, website production and hosting and online advertising services and/or other services set out in your Zephyr Social Proposal (the "Services") effective from the date the last party signs the Zephyr Social Proposal OR starts using the Services.

### Definitions:

The following definitions apply to this agreement (unless the context otherwise requires):

'Agreement' means these Terms, the Zephyr Social Proposal & SLA and any documents, schedules or annexures referenced or incorporated into this agreement as amended from time to time;

'Australian Consumer Law' means the consumer protections set out in Attachment A of the Competition and Consumer Act 2010 (Cth) as amended from time to time;

'Background IPR' means a party's IPR that existed prior to, or created independently of, this Agreement.

'Zephyr Social Proposal' means the document that sets out the Services, Fees and Special Conditions and/or other details of the Client's engagement with Zephyr Social, as agreed to by the Client and approved by Zephyr Social.

'Cancellation Fee' means the cancellation fee specified in the Fee Schedule;

'Client Content' means all text, data, graphics files, videos and sound files, and other materials contained in the website or as otherwise owned or created by the Client in whatever form that information may exist and whether entered into, stored in, generated by or processed through software or equipment by or on behalf of the Client.

'Commencement Date' means the date the Services are to commence as specified in the Zephyr Social Proposal.

'Completion Date' means the date the Services will cease as specified in the Zephyr Social Proposal;

'Confidential Information' means and includes any information that by its nature is confidential, is designated by a party as confidential, or the recipient knows or ought to know is confidential but does not include information which:

- (a) is or becomes public knowledge other than by breach of this Agreement;
  - (b) is required to be disclosed by law;
  - (c) was known by the recipient as at the date of this Agreement; or
  - (d) has been independently developed or acquired by the recipient without reference to the disclosing party's Confidential Information
- where the burden of establishing any of the exceptions referred to in (a) to (d) will be upon the recipient;

'Fee' means the money payable to Zephyr Social for the Services and any incidental costs as set out in Zephyr Social Proposal or otherwise agreed by Zephyr Social and the Client.

'Intellectual Property Rights' or 'IPR' means all statutory and other proprietary rights in respect of copyright and neighbouring rights (including but not limited to rights in relation to software), all rights in relation to inventions (including registered and not yet registered patent rights), registered and unregistered trademarks, designs, the right to have Confidential Information (including trade secrets and know-how) kept confidential, and all other rights resulting from intellectual activity in the industrial, scientific, literary or artistic fields;

'Material' means information, documents, equipment, software, goods, computer files, designs, transferable knowhow and data, stored by any means, whether or not in material form, and includes any Intellectual Property Rights in such Material..

'Minimum Term' where applicable, means the term of 1, 3, 6, 12, or 24 months or such other term as agreed with the Client and specified in the Zephyr Social Proposal;

'Services' means the services described in the Zephyr Proposal;

'Services Material' means any Material that is created during the performance of the Services but does not include the Client Content;

'Special Conditions' means the special conditions set out in the Zephyr Social Proposal (if any);

'Transfer Fee' means the transfer fee set out in the Zephyr Proposal (if any).

'Uptime SLA' means the uptime service level agreement for websites which Zephyr Social hosts.

## **1. Term and extension**

1.1 This Agreement will commence on the Commencement Date and continue until the Completion date (the 'Term') unless terminated earlier in accordance with clause 24.

1.2 The parties agree that the Agreement will run for the Minimum Term in order to maximise the results and benefits of the Services. Should the Client wish to terminate the Services during the Minimum Term, it can do so in accordance with clause 24.1 noting however that Zephyr Social reserves the right to charge a Cancellation Fee (or part thereof) in its absolute discretion.

1.3 The parties may choose to extend the Term for a further period or as agreed by the Parties in writing (including moving to a monthly agreement).

## **2. Provision of the Services**

2.1 During the Term Zephyr Social will:

(a) provide the Services to the Client with all due care and skill and in a professional manner consistent with generally-accepted industry standards;

(b) assist the Client in the establishment of a digital strategy in order to maximise the effectiveness of the Services;

(c) keep the Clients nominated contact(s) informed of the progress of the Services;

(d) inform the Client of any issues, which Zephyr Social reasonably believes may impact on the provision of the Services; and

(e) provide the Client with detailed accounts of Services rendered.

### **3. Client Obligations**

3.1 The Client warrants that:

(a) it owns the rights or has the right to use the Client Content;

(b) it owns the rights or has the rights to use any software, hardware, systems, IP addresses, domain names and other items in the Clients' ICT systems and infrastructure ("Infrastructure");

(c) its Infrastructure is in good working order and that it has sole responsibility for the availability and integrity of the Infrastructure;

(d) has put in place sufficient internal controls to ensure the accuracy and integrity of the Client Content;

(e) it will check the integrity of the Client Content on a regular basis; and

(f) it will use its best endeavours to comply with its obligations under this Agreement.

3.2 For the avoidance of doubt, Zephyr Social does not take any responsibility for the Client Content and it is the Clients sole responsibility to ensure the integrity of the Client Content.

3.3 During the term of this Agreement, the Client must:

(a) Provide all necessary information to Zephyr Social upon request;

(b) Provide access to locations, systems and Infrastructure including relevant passwords and/or data required by Zephyr Social in order to perform the Services;

(c) regularly backup its data, Client Content and use appropriate and up-to-date malicious code and virus detection software for preventing and detecting any harmful code, and take all reasonable precautions to safeguard its business against loss or disruption.

(d) cooperate with Zephyr Social by providing access to its premises and facilities as reasonably necessary to enable Zephyr Social to provide the Services;

(e) provide other such access, documents, information or data as Zephyr Social reasonably requires in order to perform the Services; and.

(f) comply with in the terms and conditions of this agreement, including any Special Conditions set out in Schedule 1.

3.4 The Client agrees to comply with these Terms at all times and not engage in any conduct that in the reasonable opinion of Zephyr Social obstructs the nature and goodwill of the Services.

3.5 The Client agrees to use the Services only for lawful purposes and is prohibited from posting on or transmitting through the Services any unlawful, harmful, threatening, abusive, harassing, defamatory, vulgar, obscene, profane, hateful, racially, ethnically or otherwise objectionable material of any kind, including, but not limited to, any material which encourages conduct that would constitute a criminal offence, give rise to civil liability or otherwise violate any applicable local, state or national law.

3.6 During the Term of this Agreement, Zephyr Social may elect to electronically monitor the Services for adherence to these terms and may disclose to the extent permitted by law (and subject to our obligations of confidentiality) any content, records or electronic communication of any kind:

- (a) As required by law;
- (b) if such disclosure is necessary to perform the Services, or
- (c) to protect the rights or property of Zephyr Social.

3.7 Zephyr Social reserves the right to remove any Client Content or other content that it deems to be offensive or as otherwise described in clause 3.5. Where a series of such breaches occurs by the Client, after receiving notice to desist from Zephyr Social, Zephyr Social will terminate your Agreement with immediate effect in accordance with clause 20.2 (a).

#### **4. Fee and Payment**

4.1 The Fees for the Services are as per the Zephyr Social Proposal or as agreed by Zephyr Social and the Client.

4.2 The Client hereby agrees that all invoices raised from Zephyr Social will be paid within 14 days, or as otherwise agreed in the Zephyr Social Proposal.

4.3 Any disbursements incurred as a result of providing the Services will be reimbursed in full to Zephyr Social upon submission of receipts to the Client.

4.4 If there is a change in the scope, timing or order of the Services, then Zephyr Social will be entitled to additional payment of any amount which is reasonable in the circumstances.

#### **5. Paid Advertising Management**

5.1 Zephyr Social will set up paid advertising campaigns and deliver paid traffic to the Client's website or other site as agreed by the client. This can be from a variety of networks including Google, Facebook and YouTube. If paid traffic cannot be delivered to the website in question due to the editorial policies of the search engines regarding the acceptance of advertiser web properties, then the Client will be notified of the situation in writing. Zephyr Social is not to be held liable in this situation. When utilising remarketing services through Zephyr Social, it is the responsibility of the Advertiser to ensure that relevant Privacy Laws and Policies (Google, Facebook) are in place regarding direct marketing.

5.2 Costs associated with media and clicks generated from running this service will be charged directly by respective platform. The Client will either:

- a) authorises Zephyr Social to provide your credit card details to the advertising platform for this purpose. These fees will appear as separate charges on the Client's credit card statement, or
- b) Zephyr Social will pay the costs and invoice the client at cost, once invoices are received from the suppliers.

5.3 The Client agrees that Zephyr Social is not responsible or liable for any incorrect payments charged by third party advertising platforms. The Client agrees to communicate directly with the advertising platform should any incorrect charges be made on your nominated account by a third party advertising platform. Zephyr Social

agrees to provide tis reasonable assistance to facilitate communication between the Client and Google should this situation arise.

5.4 All paid platform accounts initially set up by Zephyr Social are the property of Zephyr Social. Upon termination or expiration of this Agreement, the Client may apply to Zephyr Social to transfer ownership of the account which will be granted if the term of the agreement is realised.

5.5 The Client must comply with guidelines for the respective paid advertising platforms.

5.6 If Zephyr Social elects to use a paid platform account owned by the Client, changes to the account should only be made by Zephyr Social staff. The Client can request changes to the account via the nominated Zephyr Social account manager.

## **6. Upload of Content to Customer Websites**

6.1 Zephyr Social will upload optimised content and tags to the Client's website where a web page is written in a language that our technicians are trained in. If a web page has been designed using languages that we are not skilled in, uploading of content will be the responsibility of the Client and/or their webmaster.

6.2 During the provision of the Services, the Client may provide Zephyr Social with access to make changes to their website. However, the Client agrees that Zephyr Social is not liable for any errors which may occur in these updates. Although full care is taken when making such website changes, the Client is expected to regularly back up its data in accordance with clause 3.3. This excludes websites which been developed by and still hosted with Zephyr Social.

## **7. Website Design**

7.1 Website design services are provided as per your Website Design Proposal. An approximate timing schedule is provided at the time of the Website Design Agreement. Failure to provide content or other items within the specified time will delay the setup of the website.

7.2 Website design costs may be subsidised by Zephyr Social and set out in Schedule 1. If the Client discontinues the development of the website at any stage prior to completion, the Client is liable to pay this subsidised amount. Further, if the Client discontinues the development of the website at any stage prior to completion, the Client is responsible for any fees associated with the completion of the website as outlined in their Website Design Agreement.

7.3 After the launch of a website, the Client is responsible for backing up their website on a regular basis, unless the website is hosted by Zephyr Social. In the event that the Clients website goes down and it is hosted on a website server other than the Zephyr Social server, we are not responsible for bringing the website back online.

## **8. Website Hosting Services**

8.1 Where Zephyr Social will host a Clients existing website, the Client must pay a Transfer Fee at the outset of the web hosting service.

8.2 Zephyr Social warrants that the Clients uptime availability will be at least 99.9% except where the failure results from:

- (a) A failure or malfunction in relation to any device or equipment, any software or power supply outside our control, unless caused by our wrongful act or omission;
- (b) The Client's act or omission (or a person under the Client's direction or control);

(c) A failure or malfunction of any software forming part of the Services which has not been subjected to a testing regime due to its time critical nature including updates, patches, definitions etc.;

(d) during scheduled maintenance windows and any emergency maintenance and upgrade work;

(e) a requirement, direction or any other order issued by a court, government authority, administrative or judicial body;

(f) unauthorised or illegal access by any party to any party of the computer systems used to provide the Services including hacking, cracking, virus dissemination and denial of service attacks;

(g) any false breaches reported as a result of outages or errors of any Zephyr Social measurement system;

(h) DNS propagation;

8.3 If in any calendar month, should Zephyr Social fail to meet the Uptime SLA, Zephyr Social will refund to the Client, as its sole right or remedy, a 20% percentage credit of the fees for the relevant Service in that month ("Service Credit"). Service Credits are calculated against that month's webhosting fees and charges only. The Client must request a Service Credit in writing via our email address [info@zephyrsocial.com.au](mailto:info@zephyrsocial.com.au). All requests must be made within 30 days of the Uptime SLA breach occurring, and the Client must provide Zephyr Social with details of the breach claimed for verification purposes. If the breach is confirmed by Zephyr Social (based on Zephyr Social's records obtained from its monitoring services) to have occurred, then Zephyr Social will, within 60 days of your request being received, apply the relevant Service Credit to the Client's nominated account.

8.4 The Client is only entitled to make 1 claim for a Service Credit per month.

8.5 Where the Client is in breach of its obligations under this Agreement, including its obligation to pay Fees, then any Service Credit will be set off and deducted from the amount owed by the Client to Zephyr Social. Nothing in this clause prevents Zephyr Social from exercising its full rights to recover monies from the Client owed to Zephyr Social under this Agreement.

8.6 Zephyr Social takes no responsibility for a websites functionality or performance that has been transferred into its hosting environment pursuant to this clause. If Zephyr Social identifies any issues with the website which may degrade the server and/or affect the stability of the Clients website, Zephyr Social will notify the Client of same and such issues must be rectified at the Clients expense in order to continue the hosting services.

## **9. Search Engine Optimisation (SEO)**

9.1 Zephyr Social will undertake the optimisation of the Clients website as per best practise techniques used in the industry.

9.2 Although Zephyr Social are the specialists in the industry, the Client agrees and understands that SEO does not provide any guaranteed results and that results can vary based on the Clients website history, industry and many more factors. The Client agrees to release Zephyr Social and any employee, owner, or director of Zephyr Social from being liable for any damages, cost, or loss of business due to any incidents and/or issues relating to any search engine's actions.

9.3 Any alterations of SEO keywords by the Client after the initial selection of the keywords will incur additional fees.

9.4 SEO services do not include the consultation required in the launching of a new website, on the domain being worked on. An additional fee will be payable for this service, which will be quoted prior to commencement of this consultation. Organic Search Marketing services are exempt of this fee.

#### **10. Website Content Maintenance**

10.1 Ad-hoc website maintenance including content updates is charged at the hourly rates set out in Schedule 1 with a one (1) hour minimum and has a ten (10) business day turnaround time. Website maintenance packages will have content changes administered five (5) business days after requested.

#### **11. Linked Websites**

11.1 Some of the Services may contain links to other websites ("linked websites") which are not owned or operated by Zephyr Social. Those links are provided for convenience only and may not remain current or be maintained. Zephyr Social is not responsible for the content or the terms and conditions and privacy practices associated with linked websites.

11.2 Zephyr Social's links with linked websites should not be construed as an endorsement, approval or recommendation by Zephyr Social of the owners or operators of those linked websites, or of any information, graphics, materials, products or services referred to or contained on those linked websites, unless written and authorised endorsements have been made by Zephyr Social in relation to those specific links, products and/or services.

#### **12. Service Inclusions**

12.1 During the Term Zephyr Social will:

(a) supply telephone or other electronic support to the Client between the hours of 8:30am – 5:30pm Monday to Friday ("Business Hours") in order to support Clients enjoyment of the Services;

(b) provide the services set out in the Zephyr Social Proposal; and

(c) provide any additional services which have been agreed to in writing between Zephyr Social and the Client, the provision of any additional services are subject to the terms of the Agreement and may incur additional fees.

#### **13. Service Exclusions**

13.1 Unless otherwise agreed in writing, Zephyr Social has no liability for, and is not required to provide Services under this Agreement if it relates to:

(a) rectification of lost or corrupted data arising for any reason other than Zephyr Social's own negligence;

(b) support rendered more difficult because of any changes, alterations, additions, modifications or variations to the Services or the use of the system or operating environment;

(c) attendance to faults caused by using the Services outside design or other specifications or outside the provisions laid down in any documentation or manual supplied with the Services, or caused by operator error or omission;

- (d) restoration of data files following failure to backup in accordance with Zephyr Social's recommended procedures;
- (e) diagnosis and/or rectification of problems not associated with the Services;
- (f) damage due to external causes outside Zephyr Social's control including accident, disaster, electrical fault, power surges, lightning, internet connection fault, vandalism or burglary;
- (g) the Client not following Zephyr Social or the a third party (such as Google) written instructions for the Services;
- (h) the Client's or its third party's abnormal use of the Services and/or any repair or damaged caused by such misuse;
- (i) any other Exclusions listed in the Zephyr Social Proposal.

13.2 Zephyr Social may choose to provide the above services at an additional cost to the Client (which will be invoiced separately).

#### **14. Confidentiality**

14.1 Each party must at all times:

- (a) maintain the secrecy and confidentiality of any Confidential Information of the other party;
- (b) not divulge or disclose to any other person, firm, corporation or entity any Confidential Information of the other party;
- (c) refrain from copying, transmitting, retaining or removing any Confidential Information of the other party, or attempting to do the same; and
- (d) use its best endeavours to prevent the disclosure of any Confidential Information of the other party by or to third parties.

14.2 For the avoidance of doubt all methodologies, documentation and procedures used by Zephyr Social for the provision of the Services are classified as Zephyr Social's Confidential Information and may only be disclosed to staff of the Client on a need-to-know basis. Disclosure to third parties of this Confidential Information is strictly prohibited unless Zephyr Social provides its express written consent (which may be withheld in its absolute discretion).

#### **15. Privacy**

15.1 The Client agrees to comply with the Privacy Act 1988 in its dealings with Zephyr Social. In particular, the Client warrants that it has made all necessary disclosures and obtained all consents required under the Act in respect of personal information given to or accessed by Zephyr Social in connection with this Agreement. The Client indemnifies and keeps indemnified Zephyr Social from and against all costs, losses, damages, claims and expenses arising from the Client's breach of this warranty.

#### **16. Ownership of Data and Services Material**

16.1 No Background IPR is transferred by virtue of this Agreement. Each party hereby grants to the other a royalty-free, non-exclusive, non-transferable license to use its Background IPR for the purposes of this Agreement. For the avoidance of

doubt, the Client owns all IPR in the Client Content and grants Zephyr Social a royalty-free right to use the Client Content for the provision of the Services and any other additional services that may arise during the Term of this Agreement.

16.2 All IPR in the Services Material is owned by Zephyr Social upon creation. Subject to the payment of the Fee, Zephyr Social hereby grants the Client a royalty-free, non-exclusive, non-transferable license to use, modify and adapt the Services Material for the purposes of this Agreement and for its internal business purposes.

16.3 The Client agrees to not copy, reproduce, export or deal in the Services and/or Services Materials or any part of them in any way except as expressly permitted by this Agreement.

16.4 The Client agrees not to decompile, reverse engineer, disassemble or otherwise reduce any part of the Services and/or Services Material to human-readable form nor permit any third party to do so.

16.5 The Client indemnifies, saves and holds Zephyr Social harmless from any loss, liability, claim, damage or expense Zephyr Social suffers or incurs as a result of the Client's failure to comply with its obligations under this clause.

## **17. Security**

17.1 Notwithstanding the security precautions taken against disclosure of information, there are certain conditions that exist on the Internet generally which are outside Zephyr Social's control and could result in a breach of security. The Client hereby expressly waives any claim against Zephyr Social arising out of the loss of data through corruption, piracy, and breach of security or for any other reason.

## **18. Warranties and Indemnities**

18.1 Nothing in this Agreement is to be read as excluding, restricting or modifying the application of any legislation which by law cannot be excluded, restricted or modified.

18.2 Subject to clause 22.1, any representation, warranty, condition or undertaking in relation to the performance of the Services which (but for this clause) would be implied in this Agreement by law, is excluded.

18.3 Any liability Zephyr Social may have for any failure to comply with a consumer guarantee imposed by the Australia Consumer Law, or any condition or warranty implied into this Agreement by legislation that cannot be excluded is not excluded but to the extent permitted by law is limited to (at Zephyr Social's option) in the case of the Services:

- (a) re-supplying the Services;
- (b) paying the cost of re-supplying the Services.

18.4 To the extent that Zephyr Social's liability cannot be or is not otherwise limited according to this clause 22, under no circumstances will Zephyr Social's total aggregate liability under this Agreement, whether based upon warranty, contract, statute, tort (including negligence) or otherwise, exceed the actual amounts paid to Zephyr Social by the Client under this Agreement.

18.5 The Client assumes sole responsibility for the use of the Services in its business operations and hereby indemnifies (and keeps indemnified) Zephyr Social, its officers, employees, agents, and contractors from and against all liability, losses, actions, claims (including third party claims), demands, proceedings, awards, settlements,

compensation, damages, costs and expenses, directly or indirectly arising from, or relating to:

(a) the Client's use of, or reliance on, any part of the Services and/or Services Material; or

(b) any other person's use of, or reliance on, any part of the Services and/or Services Material which were provided to that person directly or indirectly by the Client.

(c) a breach or failure to perform by the Client of its obligations under this Agreement; or

(d) any wilful, unlawful or negligent act or omission of the Client.

18.6 The Client's liability under clause 22.5 will be reduced proportionately to the extent that Zephyr Social's negligent act or omission contributed to that loss or liability.

18.7 For the avoidance of doubt and to the fullest extent permitted by law, Zephyr Social is not liable for:

(a) any special, indirect or consequential loss including (but not limited to) loss of opportunity and/or loss of profits, savings, clients, contracts, revenue, interest or goodwill, suffered or incurred by the Client as a result of its use of the Services and/or Services Material under this Agreement; or

(b) Any loss or damage suffered by the Client or any third party due to the Client's negligent or improper use of the Services and/or Services Material.

18.8 Zephyr Social is not responsible for URLs dropped or excluded for any reason.

18.9 Zephyr Social does not represent, warrant, or guarantee that the Client's URLs will achieve a favourable position, or any position. Zephyr Social cannot control or guarantee which, if any, search engines will accept the submission of the Client's website. Zephyr Social will not be responsible for delays or failure of performance resulting from internet service provider delivery problems or failure, or any communication or delivery problems associated with the Client's order details, such as incorrect email address or URL address.

## **19. Disputes**

19.1 The parties must work in good faith to resolve any dispute between them arising from this Agreement.

19.2 Any dispute will initially be referred to the nominated representatives of each party for resolution. If such dispute is not resolved within 7 days, the dispute will be referred to a meeting of the Director/ CEO or authorised delegate or equivalent of each party.

19.3 If the dispute remains unresolved after a period of 60 days after the second meeting referred to in clause 23.2, the parties will agree upon an appropriate mediator. Failing agreement, the President of the Law Society of New South Wales will appoint a mediator. Agreement as to the allocation of costs will be determined through mediation.

19.4 A party may not commence court proceedings until 30 days after referral to a mediator pursuant to clause 23.3 except that nothing in this clause will prevent any party from seeking urgent interlocutory relief through courts of appropriate jurisdiction.

## **20. Termination**

20.1 Each party may terminate this agreement by giving 30 days' written notice to the other party. If the Agreement is terminated by the Client within the Minimum Term, the Client will be liable to pay the Cancellation Fee in accordance with clause 1.2

20.2 Without limiting any other rights or remedies Zephyr Social may have against the Client arising out of or in connection with this Agreement, Zephyr Social may terminate the Agreement with immediate effect if the Client:

(a) Commits a serious breach of this Agreement including (but not limited to) posting offensive material or material promoting or suggestive of illegal or criminal activity;

(b) has failed to pay an invoice within 30 days and has not notified Zephyr Social that it disputes the charges specified under that invoice; and

(c) the Client breaches a provision of this Agreement and fails to remedy the breach within 30 days of receiving notice to do so; or

(d) the Client becomes insolvent or enters into liquidation or receivership or makes a composition or arrangement with its creditors generally or takes advantage of any statutory relief for insolvent debtors.

20.3 A termination of this Agreement will not affect the Client's liability to pay Fees for Services already performed.

20.4 The provisions of clauses 5.3, 16, 17, 19, 20, 21 22, ,27. and this clause 24.4 survives termination or expiration of this Agreement.

## **21. Independent Contractor**

21.1 Zephyr Social is an independent contractor and not an employee or agent of the Client.

22.2 The manner of performance of the Services will be at all times within the judgement and discretion of Zephyr Social.

23.3 Neither Zephyr Social nor any employee, contractor, representative, agent of Zephyr Social will by virtue of this Agreement be deemed to be an employee of the Client.

24.4 The parties to this Agreement will not be or be deemed to be in any partnership, collaboration or joint venture and neither party will hold itself out as being in any way a partner or joint venturer of the other party and neither party will pledge the credit or warrant the authority of the other party.