

Terms of Agreement for Assessment of Advertising of Therapeutic Goods Applicant and CHP Australia

1 Details

1.1 Background

The Applicant voluntarily engages CHP Australia to review the Proposed Advertising and any TVC submitted to CHP Australia by the Applicant on the terms set out in this agreement.

2 Services

2.1 Provision of Services

(a) CHP Australia:

- (i) will review the Proposed Advertising for the purpose of considering whether the Proposed Advertising complies with all Relevant Laws;
- (ii) may, in its absolute discretion, provide an AdCheck Number in relation to the Proposed Advertising if it forms the view that the Proposed Advertising is compliant with all Relevant Laws;
- (iii) may, if the TGA or any third party raises any Claim or allegation that the Proposed Advertising does not comply with all Relevant Laws, provide a summary of the reasons for CHP Australia's opinion and belief that the Proposed Advertising complies with all Relevant Laws (**Reasons for Compliance**) within [10] Business Days of the Applicant's request for such reasons; and
- (iv) may, on the request of the Applicant and in CHP Australia's absolute discretion, assign a Television Classification and / or issue a Certificate of TVC Classification to a TVC submitted to CHP Australia for review if it forms the view that the TVC is compliant with the applicable Classification Code.

(together, the **Services**).

- (b) The Applicant agrees to pay CHP Australia the Fees for the Services described in clause 2.1(a) above (irrespective of whether an AdCheck Number, Television Classification or Certificate of TVC Classification is provided in relation to the Proposed Advertising or TVC).
- (c) CHP Australia agrees to provide the Services with due care and skill on the terms of this Agreement.
- (d) The parties agree that CHP Australia may offer the Services to third parties, including any competitors of the Applicant.
- (e) CHP Australia will use reasonable endeavours to give notice of its decision whether to issue an AdCheck Number within [10] Business Days of the later of:
 - (i) the date on which the Applicant provides the Proposed Advertising; or
 - (ii) the date on which the Applicant provides the information referred to in clause 4.2.
- (f) CHP Australia will use reasonable endeavours to give notice of its decision whether to assign a Television Classification and / or issue a Certificate of TVC Classification to a TVC within [5] Business Days of the Applicant providing a copy of the TVC to CHP Australia.

3 Fee

3.1 Payment to CHP Australia

- (a) The Applicant agrees to pay CHP Australia the Fee, as applicable, within [30] days of CHP Australia issuing an invoice in respect of the Fee.

3.2 GST

- (a) Amounts referable to this agreement are exclusive of GST unless specified otherwise.
- (b) Where GST is imposed on a taxable supply made in connection with this agreement and the recipient of that supply has received a tax invoice for that supply, the recipient must pay the GST to the supplier (without deduction or set-off) by the tax invoice due date.
- (c) Terms used in this agreement that are defined in the A New Tax System (Goods and Services Tax) Act 1999 (Cwlth) have the meaning given in that Act, unless the context makes it clear that a different meaning is intended.

4 Applicant's obligations

4.1 Supporting Documentation

The Applicant must submit to CHP Australia all Supporting Documentation relating to the Proposed Advertising at the time of making the application.

4.2 Substantiation and warranty/indemnity

- (a) The Applicant shall promptly provide any further information relating to the Proposed Advertising as CHP Australia may reasonably request.

(b) The Applicant:

- (i) warrants and represents to CHP Australia and to any person to whom CHP Australia (or the Applicant) provides its AdCheck Number, Television Classification and / or Certificate of TVC Classification in respect of the Proposed Advertising or TVC that:

(A) the Proposed Advertising or TVC and the publishing or broadcast of the Proposed Advertising or TVC, including all statements and representations, both express and implied, and all materials and information supplied to CHP Australia in connection with the Proposed Advertising or TVC are true, accurate and complete in all respects, and comply with all relevant laws and relevant codes of conduct;

(B) the Applicant is in possession of and/or has available to it all documents and other evidence required to demonstrate that all statements and representations, both express and implied, in the Proposed Advertising or TVC are true and accurate;

- (ii) will inform CHP Australia of any relevant changes in fact or in law which may affect any of the warranties given above;

- (iii) indemnifies CHP Australia and any person to whom CHP Australia (or the Applicant) provides its AdCheck Number or Television Classification and Certificate of TVC Classification in respect of the Proposed Advertising or TVC, against any claim, cost or expense (including without limitation, all legal costs, on a solicitor/client basis) arising from a breach of the foregoing warranty.

- (c) Any organisation or employee of an organisation that accepts these terms and conditions warrants and represents that it is authorised to give the warranty, representation, and indemnity for and on behalf of the Applicant.

4.3 Disclosure

At the time of submitting the Proposed Advertising to CHP Australia, the Applicant must disclose details of any Complaint in accordance with item 7 of the Application Form ("Complaints").

4.4 Classification – variations

- (a) Prior to submitting a TVC to CHP Australia for classification, the Applicant must notify CHP Australia of any variations to the Proposed Advertising that have been incorporated in the TVC and pay the applicable Variation Administration Fee.
- (b) Any variation made to a TVC after a Television Classification and / or Certificate of TVC Classification has been assigned to the TVC will render the Television Classification and / or Certificate of TVC Classification invalid.

5 Nature of relationship

5.1 Independent contractor

CHP Australia is engaged by the Applicant as an independent contractor and not in any other capacity, including as a fiduciary. This agreement does not create any employment, partnership, joint venture, fiduciary, agency or other relationship between the parties.

5.2 No right or authority

Neither the Applicant nor CHP Australia have any right or authority to assume or create any obligations of any kind or to make any representations or warranties, whether express or implied, on behalf of the other, or to bind the other.

6 Compliance and standards

6.1 Compliance

The parties must, in performing obligations and exercising rights under this agreement, comply with all applicable:

- (a) Relevant Laws;
- (b) other laws, regulations, by-laws and industry codes, and all applicable privacy laws.

6.2 Insurance

Each party will maintain all such insurance that is reasonably required and appropriate for a prudent business of its nature.

7 Limitation/Exclusion

(a) The Applicant agrees:

- (i) not to bring any Claim in respect of the Services against any CHP Australia Representative; and
 - (ii) to release CHP Australia Representatives from all Claims arising from or in connection with the Services.
- (b) Any claim arising from or in connection with the Services must be made within [24] months of the date of CHP Australia performing Services under this agreement and the Applicant agrees not to commence any legal proceedings arising from or in connection with the Services more than [24] months from the date of the provision of the Services. The Applicant releases CHP Australia and its Representatives from all Claims arising from or in connection with the Services after that date.

CHP Australia is not liable to the Applicant for any indirect or Consequential Loss in connection with the provision of the Services.

8 Intellectual Property

8.1 Acknowledgments

Each party acknowledges that:

- (a) the other party's Intellectual Property Rights remain the property of the other party at all times and nothing in this agreement affects those rights; and
- (b) a party is only permitted to use any of the other party's Intellectual Property Rights to exercise its rights and perform its obligations under this agreement.

8.2 CHP Australia Intellectual Property

- (a) The Applicant acknowledges that CHP Australia retains:
 - (i) ownership of all Intellectual Property Rights developed prior to or independently of this agreement which are made available to the Applicant for the purpose of providing the Services; and
 - (ii) ownership of all information, research, work papers, methodologies, data models, know-how, ideas, concepts and discoveries and other materials, and any other Intellectual Property Rights, developed, compiled or obtained by CHP Australia in providing the Services.

8.3 Applicant Intellectual Property

- (a) The Applicant grants to CHP Australia a royalty-free, non-exclusive non transferable licence, without the right to sublicense, to use the Applicant's Intellectual Property Rights relating to the Proposed Advertising, the TVC the Supporting Documentation and any other material provided to CHP Australia by the Applicant for the purpose of CHP Australia performing its obligations under this agreement.

8.4 Infringement of CHP Australia Intellectual Property

- (a) If the Applicant suspects any alleged or threatened infringement or misuse of CHP Australia's Intellectual Property Rights by any third party the Applicant must immediately notify CHP Australia of that alleged or threatened infringement.

8.5 Infringement of Third Party Intellectual Property

- (a) If a Claim is made by a third party that the Proposed Advertising, the TVC, the Supporting Documentation or any other materials provided by the Applicant to CHP Australia under this agreement, or that CHP Australia's exercise of rights or performance of obligations in respect of the Advertising or Supporting Documents or any other materials provided by the Applicant under this agreement infringes the Intellectual Property Rights of a third party (Third Party Claim), the Applicant indemnifies CHP Australia in relation to any and all Loss incurred by CHP Australia arising out of or in connection with that Third Party Claim.

9 Confidentiality

9.1 Disclosure of Confidential Information

No Confidential Information may be disclosed by the recipient of that information to any person other than:

- (a) disclosure to Representatives of the recipient or its Related Entities for a purpose contemplated by this agreement;
- (b) use or disclosure with the consent of the party who supplied the information which consent may be given or withheld in its absolute discretion;
- (c) disclosure if the recipient is required to do so by law or a stock exchange;
- (d) disclosure if the recipient is required to do so in connection with legal proceedings relating to this agreement; or
- (e) use or disclosure of the information is in or becomes part of the public domain other than through a breach of this agreement or an obligation of confidence owed to the provider of the Confidential Information.

10 Disputes and complaints

10.1 Dispute resolution

The parties agree to follow the following procedures before starting arbitration or court proceedings with respect to any dispute concerning this agreement (except for urgent injunctive or declaratory relief):

- (a) Any dispute that cannot be resolved promptly between each party's contact person will be escalated to the parties' senior executives for resolution.
- (b) If the dispute cannot be resolved by the parties' senior executives within 10 Business Days (or another agreed period), the parties will seek to resolve it by mediation administered by the Australian Commercial Disputes Centre according to its Mediation Guidelines.

11 Termination

11.1 Mutual rights to terminate

A party may immediately terminate this agreement:

- (a) for breach of a term by the other party, which the other party does not remedy within 10 Business Days of a written notice which requires its remedy and expressly refers to the right to terminate under this clause; or
- (b) if the other party has entered into any form of insolvency, administration or liquidation, whether voluntary or involuntary, formal or otherwise, or is otherwise unable to pay its debts when they fall due.

11.2 Consequences of termination

On expiration or termination of this agreement, the Applicant must pay CHP Australia any outstanding Fees relating to the provision of the Services by CHP Australia within 20 Business Days of termination.

11.3 Survival

The expiration or termination of this agreement does not affect the parties' rights and obligations under clauses 7, 8 and 9, 10 this clause 11, 12.4, 12.5 and any other clauses which expressly or by implication from their nature are intended to survive termination or expiration.

12 Miscellaneous

12.1 Costs and expenses

Each party will bear its own costs of performing its respective obligations under this agreement.

12.2 Variation

- (a) The terms of this agreement may only be waived or amended by agreement of the parties in writing.

12.3 Assignment

A party may not assign or otherwise deal with its rights under this agreement without the consent of the other party, which consent must not be unreasonably withheld.

12.4 Entire agreement

This agreement constitutes the entire agreement of the parties in relation to its subject matter and any previous agreements, understands and negotiations on that subject matter cease to have any effect.

12.5 No representations or warranties

Each party acknowledges that in entering into this agreement it has not relied on any representations or warranties about its subject matter except as provided in this agreement.

12.6 Privacy

CHP Australia will collect, store, use and disclose information it receives in connection with the Services in accordance with its Privacy Policy that is available on the CHP Australia website and updated from time to time (<https://www.chpaustralia.com.au/Home/Privacy-Policy>).

13 Interpretation

13.1 Definitions

These meanings apply unless the contrary intention appears:

Applicant means the entity described in item 1 of the Application Form ("Applicant details").

AdCheck Number means a confirmation provided by CHP Australia in the form of a unique identification number that it is CHP Australia's opinion and belief that the Proposed Advertising complies with all Relevant Laws.

Australian Consumer Law means schedule 2 of the *Competition and Consumer Act 2010 (Cth)*.

Business Day means a day not being a Saturday, Sunday or public holiday in Sydney, Australia.

Certificate for TVC Classification means a confirmation issued by CHP Australia in the form of a certificate of the Australian Classification (G, PG, M, MA 15+, R 18+) assigned to a TVC by CHP Australia in accordance with the *Commercial Television Industry Code of Practice* or the *Australian Subscription Television and Radio Association Codes of Practice*.

CHP Australia means Consumer Healthcare Products Australia.

Claim means any allegation, debt, cause of action, liability, claim, proceeding, suit or demand of any nature, including any claim for costs, howsoever arising and whether present or future, fixed or unascertained, actual or contingent, whether at law, in equity, under statute or otherwise.

Classification Code means the *Commercial Television Industry Code of Practice* or the *Australian Subscription Television and Radio Association Codes of Practice*, whichever is applicable.

Complaint means any actual, suspected or threatened complaint, assertion, Claim, or allegation made to the TGA or any third party (including any Australian Regulatory Authority), that any advertising relating to the therapeutic good the subject of the Proposed Advertising does not comply with any Australian law, regulation, by-law or industry code, or that the Proposed Advertising (or modification or variation of the Proposed Advertising) does not comply with any Australian law, regulation, by-law or industry code.

Confidential Information means all confidential, non-public or proprietary information regardless of how the information is stored or delivered, exchanged between the parties before, on or after the date of this agreement relating to the business, technology or affairs of the party providing the information. For the avoidance of doubt, this includes any information in respect of the business and affairs of the Applicant which CHP Australia has access to during the course of providing the Services including, but not limited to, the Supporting Documentation and all other proposed advertising and promotional material, trade secrets, financial, marketing and technical information, ideas, concepts, know-how, technology, strategy, specifications, drawings, reports, contractual arrangements, algorithms, financial modelling, processes and knowledge belonging to the Applicant or relating to the business, finances, dealings, employees, transactions or affairs of the Applicant which may come to CHP Australia's knowledge, other than information which is freely available to the public (other than due to a breach of confidentiality by CHP Australia).

Consequential Loss means any loss other than loss which may fairly and reasonably be considered to arise naturally or directly from the event that gave rise to that loss.

Fee means any fee payable in respect of the Services and any applicable Variation Administration Fee set out in the Service Fee Schedule on the CHP Australia website at the time of the application.

Intellectual Property Rights means all intellectual property rights including current and future registered and unregistered rights in respect of copyright, trade marks, designs, circuit layouts, trade secrets, know-how, confidential information, plant breeders rights, patents, invention and discoveries and all other intellectual property as defined in article 2 of the Convention establishing the World Intellectual Property Organisation 1967.

Loss means any loss, damage or liability arising from any and all Claims, threatened claims, damages, losses, suits, proceedings, liabilities, costs, or judgments, whether for money or equitable relief, of any kind.

Proposed Advertising means the Applicant's proposed advertisements or promotional materials as provided in attachment 1 of the Supporting Documentation.

Regulatory Authority means any Australian government, non-government, regulatory or self-regulatory body, board, agency, commission or authority exercising regulatory, self-regulatory or enforcement authority.

Related Entity has the meaning it has in the *Corporations Act 2001* (Clth).

Relevant Laws means the Therapeutic Goods Advertising Code as in force at the time of the application and the parts of the *Therapeutic Goods Regulations 1990* and the *Therapeutic Goods Act 1989* which relate to advertising as in force at the time of the application. For the avoidance of doubt this does not include any other laws and regulations, whether Commonwealth, state or territory including the Australian Consumer Law.

Representative of a party includes an employee, agent, officer, director, auditor, advisor, partner, consultant, joint venturer, contractor or sub-contractor of that party

Supporting Documentation means the documents identified in item 5 of the Application Form ("Supporting documentation attached").

Television Classification means the Australian Classification (G, PG, M, MA 15+, R 18+) assigned to a TVC in accordance with the *Commercial Television Industry Code of Practice* or the *Australian Subscription Television and Radio Association Codes of Practice*.

TGA means the Therapeutic Goods Administration

TVC means a television commercial advertising therapeutic goods in video format in respect of which an Adcheck Number has been issued.

13.2 References to certain general terms

Unless the contrary intention appears, a reference in this agreement to:

- (a) **(variations or replacement)** a document (including this agreement) includes any variation or replacement of it;

- (b) **(singular includes plural)** the singular includes the plural and vice versa;

- (c) **(person)** the word "person" includes an individual, a firm, a body corporate, a partnership, joint venture, an unincorporated body or association, or any government agency; and

- (d) **(statutes)** 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

Version 5.0 (25 February 2022)