

Terms and Conditions

1. Element 7 Digital's obligations

1.1 Performance of Services

- (a) Element 7 Digital will perform the Services in accordance with this Agreement, and in particular, the Specifications.
- (b) Element 7 Digital will provide the Services with due care, skill and diligence and in a proper and professional manner.

1.2 Specifications

- (a) The Specifications annexed to this Agreement have been jointly developed by Element 7 Digital and the Customer.
- (b) The Customer acknowledges that the Services will be provided in accordance with the agreed Specifications only, unless amended in accordance with the terms of this Agreement.

1.3 Timing

Element 7 Digital will use reasonable endeavours to perform the Services in accordance with the Milestone timetable specified in Item 7 of the Schedule. The Milestone timetable is an estimate only, as time frames can vary due to factors outside of Element 7 Digital's control, such as changes in the scope of the work or delays in Customers responding to us.

1.4 Types of Services

- (a) Element 7 Digital will perform the Services specified in Item 5 of the Schedule.
- (b) In addition to providing the Services, the parties acknowledge that if the Customer has engaged Element 7 Digital to provide Development Services, at no cost to the Customer, Element 7 Digital will provide (from the date a new Website 'goes live' a 6-month web care package, which is comprised of one hour of 'web care' per month (non-accruable) during that period.
- (c) Element 7 Digital provides ongoing services in relation to which Additional Terms apply.

2. Acceptance Testing

If Acceptance Tests are specified in item 6 of the Schedule, then this clause 2 will apply.

- (a) The Customer will within [5] Business Days of each Milestone conduct the Acceptance Tests for which they are responsible in respect of the Services.
- (b) Element 7 Digital must provide the Customer with any reasonably requested assistance in relation to conducting the Acceptance Tests.
- (c) If the Customer is not satisfied that the Services or Website Design meets any applicable Acceptance Tests, the Customer must, within 5 Business Days (**Notice Period**) following the Acceptance Tests, provide Element 7 Digital with:
 - (i) written notification of the reasons why it believes the Services or Website Design will not be accepted (**Rejection Notice**); and (ii) all necessary information and documentation in support of the Rejection Notice.
- (d) If the Customer fails to either notify Element 7 Digital that the Acceptance Tests are acceptable or provide it with a Rejection Notice within the Notice Period, then the Customer will be deemed to have accepted the Services and the Website Design at the end of the Notice Period but the Customer's website (as specified in item 4 of the Schedule) will not "go live" until written or verbal authority to do so is provided by the Customer to Element 7 Digital.
- (e) On receipt of a Rejection Notice, if Element 7 Digital agrees that the Acceptance Testing Criteria has not been met, Element 7 Digital must, acting reasonably, immediately, and for no additional cost to the Customer, undertake all required actions to ensure that the Services and Website Design meet the Acceptance Test Criteria. Element 7 Digital must notify the Customer in writing when Element 7 Digital considers that the Services and Website Design meet the applicable Acceptance Tests (**Confirmation Notice**).
- (f) Following receipt of a Confirmation Notice, the Services and Website Design must be promptly re-tested by the Customer in accordance with this clause 2.
- (g) If the Acceptance Criteria, in respect of the Services, have not been satisfied in the reasonable opinion of the Customer, by the end of the Acceptance Period the Customer will have the right, without prejudice to its other rights and remedies under the Contract, to either:
 - (i) extend the Acceptance Period for a further period specified by the Customer in writing, during which time Element 7 Digital must correct the fault which caused the Acceptance Test to be recorded as unsuccessful (for no additional fee);
 - (ii) accept such part of the Services as the Customer may decide and pay a reasonable proportion of the Fee as may be agreed in writing between the parties; or
 - (iii) terminate the Agreement in accordance with clause 14 and pay all Fees due up to that time.

3. Change Requests

- (a) Either party may at any time request a change in the Specifications as follows:
 - (i) the party requesting the change must, at its own cost, submit a Change Request in respect of the proposed change; and
 - (ii) Element 7 Digital must at its cost, prepare the necessary amendments required to the Specifications as applicable and provide the Customer with a written estimate of the cost of performing the Change Request together with the likely impact on timing for performance, existing Milestones, delivery dates and any changes to the Acceptance Criteria.
- (b) If the parties agree to a proposed Change Request, the Specifications will be amended accordingly.
- (c) If the parties are unable to agree on a proposed Change Request within 10 Business Days of Element 7 Digital providing the estimate referred to in clause 3(a)(ii), the Change Request is deemed to be rejected.

4. Intellectual Property

4.1 Warranty of right to grant Services

Element 7 Digital warrants that it has the right to grant the rights contained in this Agreement to the Customer.

4.2 Assignment of rights

- (a) Upon payment of the Fees, the Customer will own all of the Intellectual Property Rights in the Services and Website Design pursuant to this Agreement. For the avoidance of doubt, upon payment of the Fee, Element 7 Digital hereby assigns to the Customer (including by way of present and future assignment of copyright) all right, title and interest in the Intellectual Property Rights in the Services and Website Design.

- (b) Element 7 Digital will ensure that its personnel execute all such documents and do all things required by the Customer to effect the assignment contained in clause 4.2(a) and register all Intellectual Property Rights in the Services and Website Design with the Customer.

- (c) Element 7 Digital will ensure that it is vested with all rights and title in and to any the Services and Website Design including any Intellectual Property Rights in the Services and Website Design developed by its personnel to enable the assignment referred to in clause 4.2(a).

4.3 Proprietary Services

If any Proprietary Services is or will be required to enable the Customer to fully use and enjoy all rights in the Services and Website Design contemplated under this Agreement, Element 7 Digital will:

- (a) identify that Proprietary Services in Item 11 of the Schedule of this Agreement; and
- (b) procure for the Customer (at their cost) all necessary rights and licences to enable the Customer to fully use and enjoy all rights in the Services and Website Design contemplated under this Agreement.

4.4 Customer Material

The Customer is and will remain the owner of all rights, title and interest in the Customer Material. For the avoidance of doubt, nothing in this Agreement will be construed as granting any Intellectual Property rights in the Customer Material to Element 7 Digital.

4.5 Residual information

Nothing in this Agreement will prevent either party from using in any way it sees fit and disclosing to its other customers, clients and suppliers any generic knowledge, skills and expertise retained in the memories of its employees, and any programming tools, problem-solving methodologies and associated checklists, templates or forms developed in performance of the Services which may have general application in the fields of website development and business management. It is however understood that the foregoing will in no circumstances extend to use or disclosure of the other party's Confidential Information.

5. Moral Rights

- (a) In this clause 5 **Material** means any copyright work (whether or not currently in existence) created, assigned, licensed, delivered, contributed to or otherwise provided by Element 7 Digital to the Customer in the course of providing the Services to the Customer and includes the Services and Website Design.
- (b) If any of Element 7 Digital's personnel or any other person (**Moral Rights Holder**) have any Moral Rights in any Material, Element 7 Digital must obtain for the benefit of the Customer, its successors, assigns, licensees and any other person authorised by any of them to use or deal with the Material (whether or not currently in existence), the irrevocable and unconditional consent of the Moral Rights Holder to:
 - (i) perform, exhibit, reproduce, adapt and communicate any part of the Material in any medium and anywhere in the world without attributing the Supplier or any other person as an author of or contributor to that Material;
 - (ii) do any act or omission that would constitute derogatory treatment of the Material;
 - (iii) make any use of the Material that may falsely attribute authorship of the Material to another person;
 - (iv) delete or adapt or change any of the Material in any way, including by addition or subtraction from the Material; and
 - (v) combine or juxtapose the Material with anything else,
 - (vi) for the purposes contemplated by the parties to this Agreement, whether such acts or omissions occur before or after the date on which this consent is given.
- (c) Element 7 Digital warrants that the consent obtained pursuant to clause 5(b) will be a genuine consent and complies with the provisions of the Copyright Act 1968 (Cth) and that the Moral Rights Holder has not relied on any statement or representation made by Element 7 Digital or anyone acting on behalf of Element 7 Digital.
- (d) To the extent Element 7 Digital has any Moral Rights in the Materials, Element 7 Digital will provide a consent in favour of the Customer in substantially the same form as that in clause 5(b).

6. Hosting content

6.1 Hosting Services

- (a) If specified in Item 5 of the Schedule, Element 7 Digital will provide Hosting Services to the Customer and install the Website on its computer facilities.
- (b) Element 7 Digital will use reasonable endeavours to ensure that sufficient capacity is maintained on its computer facilities to enable internet users (**Users**) to access the Website.
- (c) Notwithstanding clause 6.1(b), Element 7 Digital does not warrant that Users will have continuous access to the Website. Element 7 Digital will not be liable in the event that the Website is unavailable to the Customer or Users due to computer downtime attributable to malfunction, upgrades or preventative or remedial maintenance activities.
- (d) We are a reseller of Digital Host so Element 7 Digital is not responsible for fixing issues that arise from the infrastructure owned by Digital Host. You can view Digital Host's terms and conditions here <http://www.digitalhost.net/terms.php>.
- (e) Element 7 Digital does not conduct a review of website content; it is the Customer's obligation to comply with Digital Host's Server use policy.
- (f) As a website host, Element 7 Digital may be required to comply with court orders in relation to websites that we host. Element 7 Digital is not liable for any losses or damage suffered as a result of complying with a court order or request from a law enforcement agency.
- (g) If so specified in item 4 of the Schedule, Element 7 Digital will:
 - (i) use its best endeavours to procure a domain name for the Customer; and
 - (ii) endeavour to obtain the Customer's preferred domain name as specified in item 4 of the Schedule.
- (h) If clause 6.1(d) applies:
 - (i) Element 7 Digital does not warrant that any preferred domain name of the Customer will be available and in any event Element 7 Digital accepts no liability arising out of the inability of Element 7 Digital to obtain the Customer's preferred domain name or the exercise of discretion by Element 7 Digital in obtaining on behalf of the Customer an alternative and reasonably comparable domain name; and
 - (ii) the Customer warrants that all information it will provide in its domain name application will be true and correct and that the domain name sought does not breach any legal rights of a third party, including but not limited to Intellectual Property Rights.
- (i) The Customer acknowledges that the registration of its domain name may be the subject of licence conditions and that the licensor may revoke the licence for infringement of those conditions. The Customer undertakes to familiarise itself with any such conditions. The Customer will

indemnify Element 7 Digital in respect of any liability arising, directly or indirectly, from a failure by the Customer to comply with any such licence conditions.

- (j) Except as specifically otherwise provided in this Agreement, the Hosting Services do not include maintenance of the Website. Without limiting the foregoing, Element 7 Digital accepts no responsibility for any deficiency or inaccuracy in the Website attributable to a lack of maintenance.
- (k) Element 7 Digital may use third party products when building websites such as templates or plug-ins. Most third party products are subject to a licence, which generally lasts 12 months. If Customers do not engage Element 7 Digital on a monthly plan, the Customer is responsible for paying for the renewal. If the renewal is not made, then the product may no longer work and website functionality may be lost.
- (l) Notwithstanding any other provision in this Agreement, it is the Customer's responsibility to maintain their domain name, once registered and Element 7 Digital is not liable for any loss or damage suffered as a result of their failure to do so.

6.2 Use of a Host

- (a) Upon execution of this Agreement or within a reasonable time thereafter, if the Customer has not engaged Element 7 Digital to provide Hosting Services, the Customer will:
 - (i) nominate a Host who will provide services to allow the Development Services to be hosted for public access and viewing on the internet; and
 - (ii) establish an account to give effect to clause 6.2(a) with the Host (**Host Account**).
- (b) The Customer may provide its account details for the Host Account, including (if relevant) any activation keys, usernames, passwords and account numbers (**Account Details**) to Element 7 Digital during the term of this Agreement.
- (c) The parties acknowledge and agree that:
 - (i) the Account Details are the Customer's Confidential Information, and Element 7 Digital cannot use or disclose such Account Details except as expressly permitted by this Agreement;
 - (ii) the Host Account will at all times remain the property of, be vested in, and under the exclusive control of the Customer to the extent such rights are granted to the Customer by the Host; and
 - (iii) the Host Account cannot be used by Element 7 Digital to host or store any other content, material or Web Pages which are not authorised in writing by the Customer.

6.3 Element 7 Digital's obligation to upload to Host

- (a) Element 7 Digital must upload the Services to the Host Account (or if it is providing Hosting Services, to its own computer facilities):
 - (i) upon acceptance of the Services, or relevant part, under clause 2; or
 - (ii) if directed in writing by the Customer, within [12] hours of such acceptance or direction being provided by the Customer.
- (b) During the term of the Agreement, Element 7 Digital must use its best efforts and provide all assistance to remove the Services, or relevant part, from the Host (or its computer facilities) if directed in writing by the Customer.

7. Warranties

7.1 General

Element 7 Digital warrants that in respect of Development Services:

- (a) the Services will perform as described in the Specifications when used with a web-browser listed in the Specifications except for any failure caused by the Host (whether or not Element 7 Digital is providing Hosting Services) beyond the control of Element 7 Digital, in accordance with the guarantees provided in the Australian Consumer Law;
- (b) the Services does not, and the use of it in accordance with this Agreement does not, infringe any person's Intellectual Property Rights; and
- (c) the Services will not contain any "back door", "time bomb", "Trojan Horse", "worm", "drop dead device", "virus" or any other like devices relating to accessing, damaging, disputing or impairing normal operations of the Services or the computer upon which it resides.

7.2 Defects

Element 7 Digital is not responsible for problems that arise as a result of third party intervention with the website or with third party products. Without limiting any rights that the Customer has under the Competition and Consumer Act 2010 in the event that a Defect occurs in the Services within three months from the date that the Development Services are uploaded to the Host or Element 7 Digital's computer system, Element 7 Digital may rectify such Defect at its own cost, and upon such rectification the Services will be deemed redelivered.

8. Payment

8.1 Fee

- (a) The Customer will promptly pay the Fee to Element 7 Digital upon the dates set out in Item 10 of the Schedule and if not so specified then monthly in arrears.
- (b) The Customer must, within 30 days of receipt of a valid tax invoice for an amount due in accordance with this Agreement, pay to Element 7 Digital all monies pursuant to that tax invoice and not in dispute.
- (c) If an amount of money is in dispute, the party disputing the amount must give notice in writing of the dispute to the other party within 30 days of the receipt of the tax invoice. If the Customer has a bona fide dispute in respect of an amount, it may withhold that amount until resolution of the dispute.

8.2 Interest

If the Customer defaults in the payment of any money payable under this Agreement, or any other agreement between Element 7 Digital and the Customer, then Element 7 Digital may do one or both of the following:

- (a) Suspend performance of its obligations under this Agreement until all amounts owing by the Customer to Element 7 Digital (whether under this Agreement or otherwise and whether or not actually payable at that time) are paid in full; and
- (b) Charge interest on the amount outstanding at the Prescribed Rate accruing daily from and including the due date for payment until the date of payment in full.

9. GST

9.1 Definitions

In this clause 9:

- (a) the expressions Consideration, GST, Input Tax Credit, Recipient, Supply, Tax Invoice and Taxable Supply have the meanings given to those expressions in the A New Tax System (Goods and Services Tax) Act 1999 (GST Act); and
- (b) Supplier means any party treated by the GST Act as making a supply under this Agreement.

9.2 Consideration is GST exclusive

Unless otherwise expressly stated, all prices or other sums payable or Consideration to be provided under or in accordance with this Agreement are exclusive of GST.

9.3 Payment of GST

- (a) If GST is imposed on any supply made under or in accordance with this Agreement, the Recipient of the Taxable Supply must pay to the Supplier an additional amount equal to the GST payable on or for the Taxable Supply, subject to the Recipient receiving a valid Tax Invoice in respect of the supply at or before the time of payment.
- (b) Payment of the additional amount must be made at the same time and in the same way as payment for the Taxable Supply is required to be made in accordance with this Agreement.

9.4 Reimbursement of expenses

If this Agreement requires a party (the **First Party**) to pay for, reimburse, set off or contribute to any expense, loss or outgoing (**Reimbursable Expense**) suffered or incurred by the other party (the **Other Party**), the amount required to be paid, reimbursed, set off or contributed by the First Party will be the sum of:

- (a) the amount of the Reimbursable Expense net of Input Tax Credits (if any) to which the Other Party is entitled in respect of the Reimbursable Expense (Net Amount); and
- (b) if the Other Party's recovery from the First Party is a Taxable Supply, any GST payable in respect of that supply, such that after the Other Party meets the GST liability, it retains the Net Amount.

10. Confidentiality

10.1 Obligations of Confidentiality

Each party (**Receiving Party**) receiving, possessing or otherwise acquiring Confidential Information of any other party (**Disclosing Party**) acknowledges that the Disclosing Party's Confidential Information is the property of and confidential to or a trade secret of the Disclosing Party. Subject to clause 10.2, the Receiving Party must:

- (a) keep the Disclosing Party's Confidential Information confidential and not directly or indirectly disclose, divulge or communicate that Confidential Information to, or otherwise place that Confidential Information at the disposal of, any other person without the prior written approval of the Disclosing Party;
- (b) take all reasonable steps to secure and keep secure all Disclosing Party's Confidential Information coming into its possession or control; and
- (c) not memorise, use, modify, reverse engineer or make copies, notes or records of the Disclosing Party's Confidential Information for any purpose other than in connection with the performance by the Receiving Party of its obligations under this Agreement.

10.2 Exceptions

The obligations of confidentiality under clause 10.1 do not apply to any information that: (a) is generally available to the public (other than by reason of a breach of this Agreement); or (b) is required to be disclosed by any applicable law.

11. Liability

11.1 Limitations on liability

- (a) Subject to this clause 11 and to the maximum extent permitted by Law, Element 7 Digital is not liable to the Customer or to any other person for:
 - (i) any loss or damage of any kind caused by or resulting from any act or omission of the Customer or any of its employees, agents or contractors; or
 - (ii) any loss of profits or anticipated profits, economic loss, loss of business opportunity, loss or damage resulting from wasted management time or any special, incidental, indirect or other consequential loss or damage, even if notified of the possibility of that potential loss or damage and irrespective of whether it is due to negligence, breach of contract or any other cause.
- (b) The maximum aggregate liability of Element 7 Digital for all proven losses, damages and claims arising under this Agreement, including liability for breach, in negligence, or in tort or for any other common law or statutory action, is limited, for an aggregate of all claims, to the sum of the amounts paid by the Customer to Element 7 Digital in the 3-month period immediately preceding the claim.

11.2 Exclusion of implied warranties

Any representation, warranty, condition or undertaking that would be implied in this Agreement by legislation, common law, equity, trade, custom or usage is excluded to the maximum extent permitted by Law.

11.3 Non-excludable rights implied by statute

Nothing in this Agreement excludes, restricts or modifies any condition, warranty, right or remedy conferred on the Customer by the Competition and Consumer Act 2010 (Cth) or any other applicable Law that cannot be excluded, restricted or modified by agreement.

11.4 Liability for breach of non-excludable rights

To the maximum extent permitted by Law, the liability of Element 7 Digital for a breach of a non-excludable condition or warranty referred to in clause 11.3 is limited, at Element 7 Digital's option, to:

- (a) in the case of goods, any one or more of the following:
 - (i) the replacement of the goods or the supply of equivalent goods;
 - (ii) the repair of the goods;
 - (iii) the payment of the cost of replacing the goods or of acquiring equivalent goods; or (iv) the payment of the cost of having the goods repaired; or (b) in the case of services:
 - (i) the supplying of the services again; or
 - (ii) the payment of the cost of having the services supplied again.

12. Conflict resolution

- (a) If any dispute arises between Element 7 Digital and the Customer relating to or arising out of this Agreement, including its construction, effect, the rights and obligations of the parties, the performance, breach, rescission or termination of this Agreement, the entitlement of any party to damages or compensation (whether for breach of contract, tort or any other cause of action) or the amount of that entitlement (**Dispute**), the party claiming that a Dispute has arisen must deliver to the other party a notice containing particulars of the Dispute (**Dispute Notice**).

- (b) During the period of 10 Business Days after delivery of the Dispute Notice, or any longer period agreed in writing by the parties (**Initial Period**), each of the parties must use its reasonable endeavours and act in good faith to resolve the Dispute by discussion and negotiation.
 - (c) If the parties are unable to resolve the Dispute within the Initial Period, the Dispute must be referred to the respective managing directors (or their nominees) of the parties. The parties must ensure that their respective managing directors (or their nominees):
 - (i) have authority to negotiate and, if appropriate, enter into a binding agreement on behalf of the relevant party;
 - (ii) meet promptly (and in any event within 3 Business Days) after the matter is referred to them; and
 - (iii) use their reasonable endeavours and act in good faith to resolve the matter within 5 Business Days after the matter is referred to them or any longer period agreed in writing by the parties to the Dispute.
 - (d) If the managing directors (or their nominees) have been unable to resolve the Dispute within the period stated in clause 12(b), then the parties must submit the Dispute to a mediator for consideration in accordance with the Mediation and Conciliation Rules of the Institute of Arbitrators and Mediators Australia, which Rules are taken to be incorporated into this Agreement. The decision of the person appointed to determine the dispute is final and binding on the parties.
 - (e) The parties must continue to perform the obligations required to be fulfilled under this Agreement during the dispute resolution process.
 - (f) A party may not commence court proceedings in respect of a Dispute unless it has complied with this clause 12 and until the procedures in this clause 12 have been followed in full, except where:
 - (i) the party seeks injunctive relief in relation to a Dispute from an appropriate court where failure to obtain such relief would cause irreparable damage to the party concerned; or
 - (ii) following those procedures would mean that a limitation period for a cause of action relevant to the issues in dispute will expire.
- 13. Insurance**
- 13.1 Element 7 Digital's insurance**
- Element 7 Digital must take out and maintain for the duration of this Agreement insurances that a reasonable and prudent person engaged in the relevant industry would take out and maintain.
- 14. Termination**
- 14.1 Termination by the Customer**
- The Customer may terminate this Agreement on 30 days' notice in writing to Element 7 Digital and otherwise in accordance with clause 2(g).
- 14.2 Termination by Element 7 Digital**
- Element 7 Digital may terminate this Agreement on 30 days' notice in writing to the Customer and otherwise in accordance with clause 2(g).
- 14.3 Termination by either party**
- If a party breaches this Agreement and fails to remedy the breach within **[14]** days after receiving a notice detailing the breach and requiring that it be remedied, then the other party may terminate this Agreement by notice in writing.
- 14.4 Termination Rights**
- (a) Termination is without prejudice to any accrued rights or remedies of the parties.
 - (b) Upon termination or expiration of this Agreement for any reason:
 - (i) each party must immediately return to the other party that other party's Confidential Information or, if not capable of return, destroy it and provide written certification of its destruction;
 - (ii) Element 7 Digital must immediately return to the Customer all Customer Material and any adaptations thereof;
 - (iii) Element 7 Digital must immediately deliver to the Customer all Services (whether or not completed) in existence at that time together with such Proprietary Services as is required by the Customer to be able to fully use and enjoy all rights in and to the Services and Website Design contemplated under this Agreement;
 - (iv) and the Customer must within **[5]** Business Days, pay Element 7 Digital all amounts owing by the Customer to Element 7 Digital, whether due at that time or not.
- 14.5 Survival of obligations**
- This clause 14.5 and clauses 4, 5, 10, 11, 13, 16 and 16 inclusive will survive expiration or termination of this Agreement.
- 15. Force Majeure**
- Neither party will be liable to the other for any delay or failure to perform its obligations under this Agreement as a result of a cause beyond its reasonable control (**Force Majeure**). If the Force Majeure continues for a period of more than 30 days, the party not affected by the Force Majeure may terminate this Agreement by written notice to the affected party.
- 16. Consent to collection, use and disclosure of information**
- (a) The Customer consents to Element 7 Digital collecting and using Personal Information of or relating to the Customer for the purpose of:
 - (i) assessing the credit worthiness of the Customer;
 - (ii) to the maximum extent permitted by Law, assisting Element 7 Digital in the exercise of its rights against the Customer, including the right to enforce payment of any amount payable by the Customer to Element 7 Digital whether under this Agreement or otherwise; and
 - (iii) any other lawful purpose required by Element 7 Digital, and Element 7 Digital may disclose that Personal Information to any person considered reasonably appropriate by Element 7 Digital to achieve any such purpose.
 - (b) To the extent Element 7 Digital considers it relevant, the Customer agrees to Element 7 Digital obtaining from a Credit Reporting Agency a Credit Report containing the Personal Information of or relating to the Customer.
- 17. General**
- 17.1 Nature of obligations**
- (a) Any provision in this Agreement which binds more than one person binds all of those persons jointly and each of them severally.
 - (b) Each obligation imposed on a party by this Agreement in favour of another is a separate obligation.
- 17.2 Entire understanding**
- (a) This Agreement contains the entire understanding between the parties concerning the subject matter of the Agreement and supersedes all prior communications between the parties.
 - (b) Each party acknowledges that, except as expressly stated in this Agreement, that party has not relied on any representation, warranty or undertaking of any kind made by or on behalf of the other party in relation to the subject matter of this Agreement.

17.3 No adverse construction

This Agreement is not to be construed to the disadvantage of a party because that party was responsible for its preparation.

17.4 Further assurances

A party, at its own expense and within a reasonable time of being requested by another party to do so, must do all things and execute all documents that are reasonably necessary to give full effect to this Agreement.

17.5 No waiver

- (a) A failure, delay, relaxation or indulgence by a party in exercising any power or right conferred on the party by this Agreement does not operate as a waiver of the power or right.
- (b) A single or partial exercise of the power or right does not preclude a further exercise of it or the exercise of any other power or right under this Agreement.
- (c) A waiver of a breach does not operate as a waiver of any other breach.

17.6 Severability

Any provision of this Agreement which is invalid in any jurisdiction must, in relation to that jurisdiction:

- (a) be read down to the minimum extent necessary to achieve its validity, if applicable; and
- (b) be severed from this Agreement in any other case, without invalidating or affecting the remaining provisions of this Agreement or the validity of that provision in any other jurisdiction.

17.7 Successors and assigns

This Agreement binds and benefits the parties and their respective successors and permitted assigns under clause 17.8.

17.8 No assignment

Element 7 Digital may not assign or otherwise transfer the benefit of this Agreement without the prior written consent of the Customer.

17.9 Consents and approvals

Where anything depends on the consent or approval of a party then, unless this Agreement provides otherwise, that consent or approval may be given conditionally or unconditionally or withheld, in the absolute discretion of that party.

17.10 No variation

This Agreement cannot be amended or varied except in writing signed by the parties.

17.11 Costs

Each party must pay its own legal costs of and incidental to the preparation and completion of this Agreement. **17.12**

Governing law and jurisdiction

- (a) This Agreement is governed by and must be construed in accordance with the laws in force in Victoria.
- (b) The parties submit to the exclusive jurisdiction of the courts of that State and the Commonwealth of Australia in respect of all matters arising out of or relating to this Agreement, its performance or subject matter.

17.13 Notices

Any notice or other communication to or by a party under this Agreement must be provided in accordance with the details set out in the Schedule.

17.14 Counterparts

If this Agreement consists of a number of signed counterparts, each is an original and all of the counterparts together constitute the same document.

17.15 Conflicting provisions

If there is any conflict between the main body of this Agreement and any schedules or annexures comprising it, then the provisions of the main body of this Agreement prevail.

17.16 Non merger

A term or condition of, or act done in connection with, this Agreement does not operate as a merger of any of the rights or remedies of the parties under this Agreement and those rights and remedies continue unchanged.

17.17 Operation of indemnities

Unless this Agreement expressly provides otherwise:

- (a) each indemnity in this Agreement survives the expiry or termination of this Agreement; and
- (b) a party may recover a payment under an indemnity in this Agreement before it makes the payment in respect of which the indemnity is given.

17.18 No right of set-off

Unless this Agreement expressly provides otherwise, a party has no right of set-off against a payment due to another party.

17.19 Relationship of parties

Unless this Agreement expressly provides otherwise, nothing in this Agreement may be construed as creating a relationship of partnership, of principal and agent or of trustee and beneficiary.

17.20 Inconsistency

- (a) If there is any inconsistency between the provisions set out in clauses 1 to 17 and the Special Conditions, the Special Conditions will prevail to the extent of the inconsistency.
- (b) This Agreement prevails, supersede and replace any terms and conditions submitted by the Customer to Element 7 Digital in respect of the Services.

18. Definitions and interpretation

18.1 Definitions

In this Agreement:

Acceptance Period means period of time within which the Customer must perform any Acceptance Tests;

Acceptance Tests means such reasonable tests as may be required in the reasonable opinion of the Customer to ensure that the Services is of satisfactory quality and conforms with the Specifications;

Additional Services means the provision of maintenance, operation manuals and other services as agreed by the Customer and Element 7

Digital in writing from time to time

Agreement means this agreement, any schedules and any annexures;

Business Day means a day that is not a Saturday, Sunday, public holiday or bank holiday in Melbourne;

Change Request means a written request by a party for a change to the Specifications which include sufficient information to enable the other party to assess the nature of the request and ascertain its likely impact on the cost, timing and scope of the Services;

Commencement Date means the date that the Services commence as specified in Item 2 of the Schedule;

Confidential Information means all information belonging or relating to a party to this Agreement, whether oral, graphic, electronic, written or in any other form, that is not generally available to the public at the time of disclosure other than by reason of a breach of this Agreement or that is in fact, or should reasonably be regarded as, confidential to the party to whom it belongs or relates;

Content means all text, graphics, animation, audio and/or digital video components and all other components of a Website but excluding Proprietary Services;

Credit Reporting Agency has the meaning given to that term in the Privacy Act 1988 (Cth);

Customer Materials means all documents, software, video, digital images or other works the subject of Intellectual Property Rights, provided by the Customer to Element 7 Digital for adaptation and inclusion in the Services and includes the Specifications;

Defect means any material non-conformance of the Services with the Specifications and in the case of Development Services means such a material non-conformance when used in accordance with the browser and operating system combinations set out in item 12 of the Schedule;

Development Services means the Services including without limitation the Content and Website developed or enhanced by Element 7 Digital (in source and object code) pursuant to the provision of the Services and also includes any update of, enhancement to, modification or derivative of or new releases of that Website or Content which Element 7 Digital may provide to the Customer from time to time at the Customer's request (but excluding any Customer Material)

Fee means the fees as specified in Item 9 of the Schedule;

Host means the webpage hosting service provider who is to provide hosting services on the internet to the Customer, and is appointed by the Customer and notified to Element 7 Digital from time to time in accordance with this Agreement;

Hosting Services means the service provided by Element 7 Digital if indicated in Item 5 of the Schedule pursuant to which Element 7 Digital will appoint a Host for the Customer;

Intellectual Property Rights means all present and future intellectual and industrial property rights conferred by statute, at common law or in equity and wherever existing, including:

- (a) patents, designs, copyright, rights in circuit layouts, plant breeder's rights, trade marks, know how, brand names, domain names, inventions, product names, trade secrets and any other rights subsisting in the results of intellectual effort in any field, whether or not registered or capable of registration;
- (b) any application or right to apply for registration of any of these rights;
- (c) any registration of any of those rights or any registration of any application referred to in paragraph (b); and (d) all renewals and extensions of these rights; **Law** means:
 - (a) principles of law or equity established by decisions of courts;
 - (b) statutes, regulations or by-laws of the Commonwealth, a State, a Territory or a Government Agency; and
 - (c) requirements and approvals (including conditions) of the Commonwealth, a State, a Territory or a Government Agency that have the force of law;

Marketing Services means the services provided by Element 7 Digital to the Customer to recommend marketing strategies and techniques to the Customer;

Milestones means the milestones agreed to by the Customer and Element 7 Digital as set out in these this Agreement or otherwise agreed to by the parties;

Moral Rights means moral rights as defined in the Copyright Act 1968 (Cth);

Personal Information has the meaning given to that term in the Privacy Act 1988 (Cth);

Prescribed Rate means the rate the rate fixed from time to time under section 2 of the Penalty Interest Rates Act 1983 (Vic);

Proprietary Services means all software owned, licensed or developed prior to or outside of the scope of the Services by Element 7 Digital as specified in Item 11 of the Schedule;

Related Body Corporate has the meaning given to that term in the Corporations Act 2001 (Cth);

Services means any services to be performed by Element 7 Digital for the Customer in accordance with this Agreement and includes the Development Services, the Maintenance Services, Hosting Services, Marketing Services and Additional Services;

Special Conditions means the conditions set out in Item 13 of the Schedule; **Specifications**

means the documentation set out in Annexure 1 which:

- (a) describes the Website Design; and
- (b) the functional requirements of the Website;

Website means a collection of web pages accessible on the world wide web with a common hostname, including any web pages which are associated with the domain names specified in Item 4 of the Schedule and as notified by the Customer to Element 7 Digital in writing from time to time; and

Website Design means the actual layout, look, feel and functionality of the Website to be developed by Element 7 Digital as a part of the Services.

18.2 Interpretation

In this Agreement, unless the context requires otherwise:

- (a) the singular includes the plural and vice versa;
- (b) a gender includes the other genders;
- (c) the headings are used for convenience only and do not affect the interpretation of this Agreement;
- (d) other grammatical forms of defined words or expressions have corresponding meanings;
- (e) a reference to a document includes the document as modified from time to time and any document replacing it;
- (f) if something is to be or may be done on a day that is not a Business Day then it must be done on the next Business Day;
- (g) the word "person" includes a natural person and any body or entity whether incorporated or not;

- (h) the word "month" means calendar month and the word "year" means 12 months;
- (i) the words "in writing" include any communication sent by letter, facsimile transmission or email or any other form of communication capable of being read by the recipient;
- (j) a reference to a thing includes a part of that thing;
- (k) a reference to all or any part of a statute, rule, regulation or ordinance (statute) includes that statute as amended, consolidated, re-enacted or replaced from time to time;
- (l) wherever "include" or any form of that word is used, it must be construed as if it were followed by "(without being limited to)";
- (m) money amounts are stated in Australian currency unless otherwise specified; and
- (n) a reference to any agency or body, if that agency or body ceases to exist or is reconstituted, renamed or replaced or has its powers or functions removed (**defunct body**), means the agency or body which performs most closely the functions of the defunct body.