

## Terms and Conditions of Business

Version March 2016

This document sets out the Terms and Conditions of Business where Engagis Pty Limited provides goods and services to its customers ("Customer"). These terms and conditions may be changed by Engagis from time to time without notice to you. Please check the website [www.engagis.com/legal-documents](http://www.engagis.com/legal-documents) for the most up to date version.

The Customer acknowledges and agrees that these Terms of Business shall be deemed to apply upon the Customer approving any Quote or Job Proposal attached to these Terms of Business.

The Customer acknowledges and agrees that these Terms of Business shall exclusively govern the supply relationship contemplated between the parties for any goods or services completed under these Terms of Business, and shall be deemed to automatically override any and all of the Customer's own business terms and conditions or trading terms, whether made known at the time of the Customer's initial inquiries, or at the time of Engagis providing any quotation, job proposal or order confirmation or otherwise.

### 1. DEFINITIONS

'Confidential Information' of a party means all information treated by that party as confidential except information that is public knowledge (other than as a result of a breach of any obligation of confidentiality by the other party).

'Defect' means any performance characteristic of any Deliverables which Engagis is to provide to the Customer pursuant to the Job Proposal or any part thereof which do not meet or which are inconsistent with the Specifications agreed between the parties for those Deliverables or any part thereof or which do not operate effectively.

'Deliverable' means the products and services provided by Engagis to the Customer and set out in the Job Proposal or Quote as applicable, (including but not limited to the Services, hosting services, maintenance services and any other services, hardware, goods and products).

'Hosting Fees' means the fees payable for hosting services as set out in the Quote or the Job Proposal as applicable.

'Intellectual Property Rights' means any and all of Engagis's intellectual property rights throughout the world, subsisting whether now or in the future, including rights of any kind in relation to concepts, ideas, or other expressions in verbal, written or electronic form; inventions, discoveries and novel designs, copyright, registered and unregistered trademarks and service marks including names and logos, design, patents, trade secrets, moral rights, trade, business or company names or other proprietary rights, or any rights to registration of such rights ("Intellectual Property").

'Job' means any digital marketing project or other job which the Customer has engaged Engagis to undertake under these Terms of Business.

'Job Proposal' means the proposal document or statement of work (SOW) document prepared by Engagis prior to the commencement of the Job setting out the scope of work to be undertaken for the Customer.

'Maintenance Fees' means the fee payable for maintenance of the Site as set out in the Quote or Job Proposal as applicable.

Personal Property has the same meaning as personal property as defined in the *Personal Properties Security Act 2009*.

‘Quote’ means the quote or estimate provided by Engagis for the Job.

‘Revision’ means a small or minor modification, at the request of the Customer, which is within the confines of the agreed scope of the Job.

‘Scope/Creative Change’ means a scope or creative change, or any change other than a Revision, to the Job at the request of the Customer after the Job Proposal has been approved.

‘Services’ includes Site design, Site development, database development, creative design, concept design, and any other development and associated design/creative/advertising services set out in the Job Proposal or Quote, but excludes maintenance and hosting services.

‘Service Fees’ means the fees payable for the Services as set out in the Quote or Job Proposal as applicable, but excludes any Maintenance and Hosting Fee.

‘Site’ means the specific website or digital platform to be created by Engagis as set out in the Job Proposal or Quote as applicable, including but not limited to the website, microsite, landing page, banner advertisement, and competition form.

‘Specifications’ means the specifications set out in the Job Proposal. ‘Terms of Business’ means these Terms and Conditions of Business.

‘Warranty Period’ means the 30 days from the date that all Deliverables for the Job are delivered to the Customer.

## 2. ENGAGIS OBLIGATIONS

Engagis’ obligations under this clause 2 are subject at all times to the Customer meeting its obligations under clause 3 (eg: providing information or assistance required of the Customer to enable Engagis to carry out the Deliverables).

2.1 Engagis will use good faith endeavours to carry out the Deliverables.

2.2 Engagis will carry out the Deliverables in a professional and businesslike manner, and must ensure that the personnel assigned to carry out the Deliverables will have the proper skills and expertise to carry out the Deliverables in a competent manner.

2.3 Engagis must ensure that the Deliverables supplied by Engagis will be of merchantable quality and of good workmanship.

2.4 Deliverable time frames will be as set out in the Job Proposal or Quote as applicable. While Engagis will use its best efforts to meet these time frames, it reserves the right to extend these time frames provided that it will endeavour to keep the Customer informed and updated of progress for all steps.

2.5 Engagis agrees to rectify any Defect in any Deliverable provided under these Terms of Business which is notified to Engagis in writing with documented examples of each Defect pursuant to clause 3.6, within the Warranty Period.

2.6 Engagis will not be liable for any Defect and/or alteration to the Deliverables provided by Engagis and any consequences thereof, resulting from a misuse of the Deliverables by the Customer and/or any employee or agent thereof, and/or any intervention by a third party, or arising out of the combination of the Deliverables with any non-compatible third party software or third party equipment, being software or equipment not created or supplied by Engagis.

## 3. CUSTOMER OBLIGATIONS AND WARRANTIES

3.1 The Customer must provide Engagis with assistance and any such information as Engagis reasonably requires to enable Engagis to provide the Deliverables, including, without limitation, information from third parties. The Customer is responsible for the cost of obtaining such information and for ensuring that such information is accurate and complete and provided within a reasonable time.

3.2 The Customer must ensure the Site is presented in a responsible manner. It must also ensure that the Site does not:

- (a) cause a nuisance to any person;
- (b) breach any law at any place where it will be viewed or received;
- (c) contain material that is defamatory, offensive, abusive or illegal under any law at any place where it is viewed or received;
- (d) contain material that the Customer has no right to put on the Site or otherwise for which the Customer has no right to distribute (for example, a third person's copyrighted works without permission);
- (e) expose Engagis to a liability to a third party.

3.3 The Customer must ensure that all safeguards are taken to ensure that any content supplied to Engagis and/or inserted onto the Site, does not contain any viruses or have any impact on the systems security of Engagis's server.

3.4 The Customer agrees to indemnify Engagis for all expenses incurred by Engagis as a result of a failure to observe the conditions in clauses 3.2 and 3.3.

3.5 Where Engagis gathers any information on the Customer's behalf during the operation of the Site, the Customer grants Engagis a right to use that information as is reasonably necessary (including reproducing it) for the operation of the Site.

3.6 The Customer shall notify Engagis in writing of the existence of all Defects, material problems or difficulties it discovers concerning the functioning and operation of the Deliverables and provide details/examples of these and corrective action necessary to Engagis within the Warranty Period.

3.7 The Customer must ensure that all third party software and third party equipment that it provides to Engagis is either the Customer's property or is licensed to the Customer and, that Engagis is permitted to use such third party software and third party equipment for the Job.

3.8 The Customer is liable for direct and indirect costs arising out of a delay caused to Engagis in the Customer failing to properly perform its obligations under this clause 3.

3.9 The Customer agrees not to use the Deliverables or the Site for any purpose, which is illegal and the Customer will use its best endeavours to ensure that any party under its control does not use the Deliverables or Site for any illegal purposes.

#### 4. QUOTES, REVISIONS AND SCOPE/CREATIVE CHANGES

4.1 Quotes issued by Engagis are valid for thirty (30) days from the date of issue.

4.2 Revisions: Quotes are typically inclusive of two rounds of Revisions unless otherwise agreed between the parties in writing. Any further rounds of Revisions will be charged separately by Engagis on a time and materials basis.

4.3 Scope/Creative Changes requested by the Customer after a Quote or Job Proposal has been issued will require the Job to be re-quoted by Engagis.

4.4 Engagis will determine in its absolute discretion as to whether a change requested by the Customer is a Scope/Creative Change or a Revision.

## 5. HARDWARE

Engagis agrees to provide the hardware set out on the Quote or Job Proposal to the Customer.

In the event that the Customer orders hardware and seeks to cancel the hardware purchase after the order has been submitted, Engagis may, but is not obliged to, seek to redeploy the hardware. Any shortfall as a result of redeployment will be a debt recoverable from the Customer. For the avoidance of doubt, the liability to pay for the cost of the hardware at all times remains the responsibility of the Customer.

If the specified hardware is or becomes unavailable, Engagis may provide alternative hardware that can fulfil the same functionality and performance as the original hardware.

Engagis will use reasonable endeavours to procure the warranty offered by the manufacturer is passed onto the Customer. Engagis provides no additional warranty, representation or guarantee as to the hardware, as to its fitness for purpose, merchantability or otherwise.

## 6. SERVICE FEES AND PAYMENT

5.1 In consideration of Engagis providing the Deliverables, the Customer will pay the Service Fees, Maintenance Fees, and/or Hosting Fees (as applicable) to Engagis in accordance with the terms of payment set out in this clause. Fees for Deliverables will be set out in the Quote or Job Proposal attached to these Terms of Business or otherwise provided to the Customer.

5.2 The Customer will pay the agreed Service Fees to Engagis in accordance with the payment terms set out in the Quote or Job Proposal.

5.3 Maintenance Fees and Hosting Fees are separate to the Service Fees. Any applicable Maintenance will be invoiced monthly in arrears, and any Hosting Fees will be invoiced monthly in advance, unless otherwise agreed in writing by both the parties.

5.4 Unless otherwise agreed, the Customer agrees to pay for:

- disbursements and third party costs incurred by Engagis on behalf of Customer including but not limited to sourcing software, images or artwork, sound files, or recording charges and other licence or royalty fees;
- reasonable travel, taxi, courier and parking expenses

5.5 The Customer must pay all invoices within 30 days of receipt. If any payment that is due by the Customer pursuant to these Terms of Business is not made within 14 days of the due date, then the Customer agrees to pay interest at an annual interest rate two percentage points above the Commonwealth Bank 90 day bank bill rate, calculated daily.

5.6 Any fees and charges payable pursuant to these Terms of Business are exclusive of all taxes (including GST that may be applicable), duties and surcharges payable in respect of the Deliverables. The Customer must pay any such taxes, duties and surcharges upon Engagis's request that the Customer do so. In particular, the

Customer is required to pay the GST that Engagis may be obliged to pay under the applicable legislation or pursuant to contractual obligations to suppliers of services to Engagis to enable Engagis to perform the Job.

5.7 Payment may not be withheld because of minor defects or omissions in the Deliverables which do not materially affect use. The Customer agrees that it may not make any deductions or set offs against any payments due under these Terms of Business.

## 6. SUB-CONTRACTING

6.1 Engagis may sub-contract the whole or any part of its obligations under these Terms of Business at its discretion.

## 7. CONFIDENTIAL INFORMATION AND INTELLECTUAL PROPERTY

7.1 Both parties agree to keep the Confidential Information confidential and use the Confidential Information solely for the purposes of carrying out the Deliverables.

7.2 The Customer acknowledges and agrees that Engagis owns the Intellectual Property Rights, save for any express rights granted to the Customer. For the avoidance of doubt, the Customer must not modify, sell, distribute or create derivative works of the Intellectual Property nor seek to exploit those rights whatsoever without the prior written consent of Engagis (which may be withheld in its absolute discretion).

## 8 RETENTION OF TITLE AND RISK

All title in any goods and Personal Property which are the subject of these Terms and Conditions remain the sole and absolute property of Engagis as legal and equitable owner until the Customer has paid these amounts in full. The Customer gives Engagis permission to recover any goods immediately upon Engagis advising the Customer of its intention to do so (and must provide access to the Customer's premises to enable Engagis to recover the goods).

Engagis may, at its option and at its own cost, register any interest it has in Personal Property on the Personal Property Security Register (PPSR).

Risk in all goods or Personal Property passes to the Customer upon shipment to the Customer's nominated address.

## TERM AND TERMINATION

8.1 These Terms of Business will continue until all Deliverables for the Job are completed by Engagis, or where the Job is otherwise terminated in accordance with this clause.

8.2 Either party may terminate the Job, without cause, on 90 days written notice.

8.3 Engagis may terminate the Job immediately by giving notice where the other party breaches any obligation of confidentiality; or materially breaches any term of these Terms of Business; or enters into Administration, bankruptcy, receivership, liquidation, or is otherwise insolvent or unable to meet its debts in Engagis' absolute opinion.

8.4 The Customer must pay Engagis for all work completed by Engagis up to and including the effective date of termination, whether or not Engagis has delivered any Deliverables to Customer by that time.

8.5 Termination of expiry of these Terms of Business do not affect the accrued rights or remedies of either party, and clauses 3.2, 3.3, 3.4, 3.8, 5, 7, 8.5, 8.6, 9.2, 11.1, 11.2, 15 shall survive the termination or expiry of these Terms of Business.

8.6 Upon termination for any reason, unless otherwise expressly agreed in writing, any Deliverable which has not been paid for in full, must be returned to Engagis and not used in any way by the Customer. In addition, the Customer shall deliver to Engagis all Intellectual Property, trade secrets, know-how, ideas and concepts and any other information whether in writing or otherwise, relating to any of Engagis's products, services, systems, methodologies, affairs, businesses, strategies and test data, compilations of information and data and computer programs, whether owned by, licensed to, or otherwise in the possession or control of Engagis, which are disclosed to the Customer under, in contemplation of, or in connection with the terminated Job, in material form possessed by or in the control of the Customer, its employees, servants or agents, but excluding any information which is generally and readily available in the public domain.

## 9. AMENDMENT OR CANCELLATION

9.1 In the event that the Customer requests that Engagis amend, cancel or stop any or all Deliverables in progress, Engagis shall take all reasonable steps to comply with the Customer's request provided that Engagis can do so within its contractual obligations to third parties.

9.2 In the event of any amendment or cancellation of the Job or Deliverable the Customer will:

- (i) reimburse Engagis for any charges or expenses to which Engagis is committed (including third parties) but no longer required; and
- (ii) reimburse Engagis for any materials and goods ordered to provide the Deliverables for which Engagis has paid or is legally bound to pay but no longer required; and
- (iii) pay Engagis its remuneration for the Deliverables provided and work completed to date.

Such costs are payable immediately on presentation of an invoice by Engagis.

## 10. WARRANTY AND ACCEPTANCE

10.1 Engagis warrants that the Deliverables will substantially conform to the Specifications contained in the Job Proposal or Quote, as applicable, for 30 days from the delivery date to Customer.

10.2 The Deliverable(s) are deemed to be accepted 7 days from delivery to the Customer, unless the Customer shows, or does not advise in writing to Engagis, within 7 days of receipt of the Deliverable(s) that the Deliverable(s) fail to substantially comply with the design contained in the Job Proposal or Quote, as applicable. Upon acceptance, the Customer is bound to pay the full amount specified for the Development Services within 30 days of invoice.

10.3 Where the Customer demonstrates that a Deliverable fails to comply with the Specifications agreed between the parties, Engagis must use reasonable endeavours to modify the Deliverable so that it substantially complies with those Specifications.

10.4 The Deliverables will be deemed accepted if they substantially conform with the Specifications.

10.5 Engagis does not warrant that the Deliverables are free of computer viruses or are tamper proof or immune from or resistant to (i) computer viruses or (ii) tampering or hacking by third parties.

## 11. LIMITATION OF LIABILITY AND INDEMNITY

11.1 The Customer hereby indemnifies and holds harmless Engagis in respect of any loss, claim, damage, action, suit or proceeding against Engagis by any person arising from:

- (i) any content provided to Engagis pursuant to these Terms of Business, including but not limited to the breach of any third party intellectual property rights, or breach of any laws;

(ii) any content approved by Engagis pursuant to these Terms of Business, including breach of any laws but excluding third party intellectual property claims in relation to any property that is owned, or used under licence by Engagis including without limitation methodologies, equipment, software, applications or tools; or  
(iii) any act or omission or breach of these Terms of Business by the Customer.

11.2 To the extent permitted by laws, Engagis excludes all liability for costs, loss or damage suffered in connection with these Terms of Business. Except as expressly provided in these Terms of Business and to the full extent permitted by law, Engagis excludes all terms and conditions, warranties and representations, whether express or implied. In relation to any liability that cannot be lawfully excluded, the liability of Engagis is limited in its discretion to the replacement or repair of the goods, or re-supply of the Deliverables affected by the breach, or payment of the cost of replacement or repair of those goods or re-supply of those Deliverables.

11.3 Engagis is not required to perform any obligation where the performance of that obligation would involve Engagis being in breach of any third party Intellectual Property Rights.

## 12. FORCE MAJEURE

12.1 Notwithstanding any other provision of these Terms of Business neither party will be liable for any failure to fulfil any condition in these Terms of Business where that fulfilment is delayed, prevented, restricted or interfered with for any reason outside that party's control, including but not limited to, fire, storm, flood, accident, war, labour dispute, materials or labour shortage other than its own staff or staff under its control, law or regulation or act or omissions of any third person including telecommunications carrier or Internet Service Provider.

## 13. ENTIRE AGREEMENT AND VARIATION

13.1 Any variations to these Terms of Business are only valid if provided in writing and agreed by Engagis and the Customer.

## 14. ASSIGNMENT

14.1 The Customer must not assign or attempt to assign any right or obligation under these Terms of Business without Engagis's written consent. Engagis may assign its rights and obligations without restriction.

## 15. GOVERNING LAW

15.1 These Terms of Business shall be governed by and interpreted under the laws of the State of New South Wales.

## 16. LICENCES AND COPYRIGHT

16.1 Subject to clause 16.4, Engagis grants the Customer:

- (a) a licence to use the Deliverables supplied by Engagis to the Customer for the purposes of administering or running the Site;
- (b) a licence to reproduce, and authorise the reproduction for the purpose of down-loading of, any part of the Site created by Engagis pursuant to these Terms of Business;
- (c) a licence to change, amend, or adapt the Deliverables as the Customer sees fit for the purposes of administering or running the Site, but such licence does not include a licence to sub-licence the Deliverable to a third party.

16.2 Subject to clause 16.4, Engagis does not grant any license where such a grant would preclude Engagis from making use of the techniques or know-how underlying the Deliverable, Site or any part of it. All original

Customer logos and any written, verbal or electronic documentation, information or images provided to Engagis by the Customer for publication on the Site will remain the legal property of the Customer.

16.3 Any license granted under these Terms of Business is conditional upon full payment of the Development Service Fees.

16.4 For the purposes of granting the licenses under clause 16.1, Engagis undertakes to provide the facilitation or information needed by the Customer to use the licenses.