



G R A F I X   G A R A G E

# Terms and Conditions

(Design Services)

# 1 Agreed Terms & Interpretation

Unless the context requires otherwise, the following phrases and capitalised words must be interpreted as follows:

1.1 **Acceptable Use Policy** means Grafix Garage’s policy for access to the Network and the Hosted Environment that applies equally to all of Grafix Garage’s customers for the Services, as is available on the Website.

1.2 **Agreement** means the information and the documents listed in clause 2.2.

1.3 **Grafix Garage** means Grafix Garage Pty Ltd, ABN 65 137 836 143.

1.4 **Australian Consumer Law** means the Competition and Consumer Act 2010 (Cth).

1.5 **Back Up Services** means the back up services that are described in the Contract Details.

1.6 **Day** means a week day that is not public holiday in every place in Australia.

1.7 **in Law** means any present or future law, regulation, treaty, order or official directive or request (which, if not having the force of law, would be complied with by a responsible provider of services similar to the Services) commences, is introduced, or changes, after the Effective Date.

1.8 **Confidential Information** means all non-trivial information concerning, or held by, a Party’s business, including information marked as confidential, that the discloser treats as confidential or which the recipient knows or ought to know is confidential, but does not include information that:

- a. is in the public domain (except through unauthorised disclosure);
- b. the recipient already possesses at the time of disclosure (unless the information was received through unauthorised disclosure or is subject to prior confidentiality obligations); or
- c. is independently developed or acquired by the recipient (except through unauthorised disclosure).

Grafix Garage’s Confidential Information includes all business plans, marketing information, market strategies, business practices, financial information, budgets, product roadmaps and details of future developments, products or strategies, details relating to customers, prospects, channel partners, including Grafix Garage partner compensation plans, contractors, suppliers and advisers, Grafix Garage’s intellectual property rights, this Agreement, product and service pricing and business models.



- 1.9 **Consequential Loss** means:
- a. loss of revenues;
  - b. loss of reputation or goodwill;
  - c. consequential loss;
  - d. any pure economic loss;
  - e. loss of profits;
  - f. indirect loss;
  - g. loss of bargain;
  - h. loss of actual or anticipated savings;
  - i. lost opportunities, including opportunities to enter into arrangements with third parties; and
  - j. loss or corruption of data.

1.10 **Contract Details** means the information on the web pages on the Website that describes the Services, Support Pack, Service Levels, Fees and other operational details of the Agreement, that are displayed on the Website on the Effective Date.

1.11 **Data Centre** means Grafix Garage's, its Related Bodies' Corporate or their respective contractors' premises where the Hosted Environment is located, and includes the building, power, power back up, cooling, fire prevention equipment, core network, racks, cabinets and the fixtures at the Data Centre. The term Data Centre specifically excludes the Hosted Environment and the Network.

1.12 **Emergency** means any event or circumstance which in the reasonable opinion of Grafix Garage endangers or threatens to endanger the safety or health of any person or destroys or damages or threatens to destroy or damage any part of the Hosted Environment, Network or the Data Centre.

1.13 **Fee** means the amount payable for the whole or part of a Service, any item or usage, exclusive of GST and all other Taxes, as set out in the Contract Details.



1.14 **Force Majeure** includes:

- a. any consequence of a virus, Trojan horse or any malicious code, denial of service attack or other malicious activity;
- b. an Emergency;
- c. a physical natural disaster including fire, flood, lightning or earthquake;
- d. a war or other state of armed hostilities (whether war is declared or not), insurrection, riot, civil commotion, act of public enemies, national emergency (whether in fact or in law) or declaration of martial law;
- e. an epidemic or quarantine restriction;
- f. any ionizing radiation or contamination by radioactivity from any nuclear waste or from combustion of nuclear fuel;
- g. any confiscation, nationalisation, requisition, expropriation, prohibition, embargo, restraint or damage to property by or under the order of any government agency;
- h. any legally binding requirement placed on Grafix Garage, its Related Bodies Corporate or their respective contractors by a government, regulator or other authority;
- i. any law taking effect after the date of this Agreement;
- j. any strike, lock-out, stoppage, labour dispute or shortage including industrial disputes that are specific to a Party or the Party's contractors;
- k. damage to any part of the Hosted Environment, Network or the Data Centre caused by any event out of Grafix Garage's control;
- l. unauthorised or illegal access by any person to any part of the Hosted Environment, Network or the Data Centre; or
- m. any circumstance beyond the reasonable control of a Party (other than the inability to pay).

1.15 **GST** means the Goods and Services Tax as defined in A New Tax System (Goods and Services Tax) Act 1999 (Cth).

1.16 **Hosted Environment** means the server and/or processing capacity (whether using shared, virtual, cloud or dedicated servers), storage systems, operating system, web server, email server or database server or other equipment provided as part of the Services, as set out in the Contract Details. The Hosted Environment excludes the Network.



- 1.17 **Insolvency Event** in the context of a Party means:
- a. a liquidator, receiver, receiver and manager, administrator, official manager or other controller (as defined in the *Corporations Act 2001 (Cth)*), trustee or controlling trustee or similar official is appointed over any of the property or undertaking of the person;
  - b. the person or the person's property or undertaking becomes subject to a personal insolvency arrangement under Part X *Bankruptcy Act 1966 (Cth)* or a debt agreement under Part IX *Bankruptcy Act 1966 (Cth)*;
  - c. the person is or becomes unable to pay its debts when they are due or is or becomes unable to pay its debts within the meaning of the Corporations Act or is presumed to be insolvent under the Corporations Act;
  - d. the person ceases to, or threatens to cease to, carry on business; or
  - e. an application or order is made for the liquidation of the person or a resolution is passed or any steps are taken to liquidate or pass a resolution for the liquidation of the person, otherwise than for the purpose of an amalgamation or reconstruction.
- 1.18 **Minimum Service Period** means minimum period for which You may acquire a particular Service, which is 12 months from the Production Date, unless stated otherwise in the Contract Details.
- 1.19 **Network** means the telecommunications network comprised of equipment, wiring and circuits within and between the upstream provider's network backbone nodes (points of presence) and the servers in the Hosted Environment. The term Network does not include any:
- a. circuits to a backbone node, Your Premises or any network or equipment not owned or controlled by Grafix Garage; or
  - b. third party networks or equipment not owned or maintained by Grafix Garage, including connections to peer networks and the internet.
- 1.20 **Party** means each of Grafix Garage and You.
- 1.21 **Personal Information** has the meaning given to it by the Privacy Act 1998 (Cth).
- 1.22 **PPSA** means the Personal Property Securities Act 2009 (Cth).
- 1.23 **Privacy Policy** means the document that sets out how Grafix Garage deals with Personal Information and which is available from the Website.
- 1.24 **Production Date** means that date when Grafix Garage commences design Services.



1.25 **Professional Services** includes services that are described in the Contract Details (or other ordering document signed by Grafix Garage) as Professional Services and may include set up, installation, data migration, advice or other consulting services that are provided by Grafix Garage.

1.26 **Related Bodies Corporate** has the meaning given it by the Corporations Act 2001 (Cth).

1.27 **Scheduled Maintenance** means the routine maintenance for any part of the Hosted Environment, Network or the Data Centre that is recommended by the manufacturer or supplier of that item that is designed to be undertaken at regular intervals to prevent failures or defects, and includes implementing updates or new releases of any software and any engineering changes to hardware.

1.28 **Service** includes the provision of Grafix Garage's:

- a. **Shared Web Hosting**, as set out in clause 3.4 of Terms and Conditions (Hosting Services);
- b. **Back Up Services**;
- c. **Support Services**;
- d. **Web Design and Development Services**.
- e. **Corporate Branding**
- f. **Social Media Strategies**
- g. **Search Engine Optimisation**
- h. **Photographic Services**
- i. **Graphic Design Services**

1.29 **Service Credit** means the pre-agreed recourse that may be available to You if there is a failure to meet a Service Level as described in the Service Level Agreement.

1.30 **Security Policy** means document that sets out the security arrangements for certain Services and which is available from the Website.

1.31 **Service Level** means a standard that is specified for a particular Service in the Contract Details.

1.32 **Service Level Agreement** means the document that sets out the Service Levels for certain Services and which is available from the Website.

1.33 **Service Period** means the period during which the Services will be provided and is calculated in accordance with clauses 2.3 and 2.4.

1.34 **Support Pack** means the relevant level of Support Service, as set out in the Contract Details.



- 1.35 **Support Services** means access to Grafix Garage’s hosting support teams during the hours of operation set out in the Contract Details for the Service.
- 1.36 **Tax Invoice** means an invoice that is in a form that complies with A New Tax System (Goods and Services Tax) Act 1999 (Cth).
- 1.37 **Taxes** includes any sales tax, GST, duties, withholding taxes, levies, tariffs, imposts or other charges levied by any federal, state or local government in Australia or elsewhere, that arise out of or in connection with any Service or this Agreement, and any interest, penalties or liabilities incurred on such amounts, but excludes taxes based on the net income of Grafix Garage.
- 1.38 **Website** means Grafix Garage’s website, currently at [www.grafixgarage.com](http://www.grafixgarage.com) .
- 1.39 **You (Your)** means the person, organisation or entity that has been entered into the Contract Details as part of the sign on process, or if that person, organisation or entity has not been described with sufficient accuracy in the Contract Details, the person, organisation or entity that pays the first invoice.
- 1.40 **Your Content and Software** means all content, software and data in any form, (whether permanent or temporary, whether generated by humans or computers,) that You or any person other than Grafix Garage, its Related Bodies Corporate or their respective contractors, installs, stores, loads, edits, uses, transfers to/from or operates on the Hosted Environment or the Network, including software, applets, servlets, scripts, HTML files, materials, code, information, data, text (whether or not perceptible by users), metatags, multimedia information (including sound, music, data, audio, video, graphics, photographs, or artwork), customer domain name(s), e-mail, chat room content, bulletin board postings.
- 1.41 **Your Representative** means the person You nominate to be authorised to act on behalf of You to manage Your account, including ordering of additional (or varying the amount of) Services, including any options, and starting and terminating any Service.
- 1.42 **Materials** content provided to Grafix Garage by you from time to time for incorporation in the Site.
- 1.43 The words “includes”, “including”, “for example” and “e.g.” are not words of limitation.
- 1.44 Headings are for convenience only and do not affect interpretation.



## 2 Services

- 2.1 Subject to the receipt of the Fees and Taxes:
- a. Grafix Garage will provide You the Services described in the Contract Details during the periods set out in the Contract Details;
  - b. You may acquire additional or varied Services for the relevant Service Period of that additional or varied Service in accordance with clause 2.8.

All such Services are provided on the provisions of this Agreement.

2.2 Grafix Garage shall provide Services, and perform its obligations, in accordance with your Proposal document ("Services").

2.3 Grafix Garage shall provide the Services in accordance with your Proposal document and this Agreement and any timeframes set out therein shall be estimates only and time for performance shall not be of the essence.





# 3 Customer Responsibilities

3.1 You shall be responsible for the accuracy and completeness of the Materials.

3.2 Grafix Garage shall not be liable for any delays resulting from your failure to fulfil any of your obligations. Grafix Garage reserves the right to invoice you for any additional expenses reasonably incurred by Grafix Garage as a result of such delays.

3.3 You acknowledges that the ability of Grafix Garage to provide the Services is dependent upon your full and timely co-operation (which you agree to provide), as well as the accuracy and completeness of the design specifications, and any other information and data provided by you or on your behalf.

3.4 You shall provide Grafix Garage with access to, and use of, all information, data and documentation reasonably required by Grafix Garage for its performance of its obligations.



## 4 Service Variations

4.1 You may change the Services by notifying Grafix Garage in writing. Your new Service will take effect from the date Grafix Garage commences provision of the new Services in accordance with the terms agreed in writing by Grafix Garage. Your next invoice will reflect:

- a. Charges applicable to your new Service from the date of the notice;
- b. Charges for any remaining invoice period for your previous Service(s) (whether or not such Service(s) are utilised during such remaining invoice period);
- c. Charges for amounts then due but unbilled for your previous Service(s); and
- d. Charges for costs associated with any Service change or cancellation, where such costs are based on the standard rates of Grafix Garage at the time.

Any amounts or deposits already paid by you for a changed, cancelled or discontinued Service shall not be refunded in any circumstances.



# 5 Guarantees and Warranties

## Warranty Against Defects

5.1 Where You are exercising Your rights in respect of a “Warranty Against Defects” (as defined by Regulation 90, issued under the Australian Consumer Law) then, in accordance with that Regulation:

- You may report any defect in the Service to Grafix Garage via Grafix Garage’s website at [www.grafixgarage.com](http://www.grafixgarage.com) during the Service Period. Grafix Garage must use its best efforts to remedy material defects in the Service within a reasonable period.
- The services are provided by Grafix Garage Pty Ltd ABN 65 137 836 143 of 6 / 170 Montague Rd, West End, QLD 4101, Australia, telephone: +61 (0)7 3844 8344 email address: [admin@grafixgarage.com](mailto:admin@grafixgarage.com)
- The costs for the service that Grafix Garage provides as a Warranty Against Defects are included within the Fees. No additional fees are payable by You for this service. You are responsible for any expenses You incur in using this service.
- The statement in italics below is required to be included in these terms and conditions under Regulation 90.

*“Our goods come with guarantees that cannot be excluded under the Australian Consumer Law. You are entitled to a replacement or refund for a major failure and for compensation for any other reasonably foreseeable loss or damage. You are also entitled to have the goods repaired or replaced if the goods fail to be of acceptable quality and the failure does not amount to a major failure.”*

- The benefits that Grafix Garage provides to consumers under this Warranty Against Defects are in addition to any other rights or remedies the consumer may have in respect of these goods or services under the Australian Consumer Law.

## Warranties for Consumers

5.2 To the extent that You are entitled to any statutory guarantee under sections 54 – 59 of the Australian Consumer Law, then to the extent that Grafix Garage fails to comply with such statutory guarantee in respect of goods which are not goods of a kind that are ordinarily acquired for personal, domestic or household use or consumption, Grafix Garage’s liability is limited to one or more of the following, at Grafix Garage’s option:

- a. the replacement of the goods or the supply of equivalent goods;
- b. the repair of the goods;
- c. the payment of the cost of replacing the goods or of acquiring equivalent goods;
- d. the payment of the cost of having the goods repaired,



5.3 unless it is not fair or reasonable for Grafix Garage to rely on this term of this Agreement. To the extent that You are entitled to any statutory guarantee under sections 60 – 62 of the Australian Consumer Law, then to the extent that Grafix Garage fails to comply with such statutory guarantee, in respect of services which are not services of a kind that are ordinarily acquired for personal, domestic or household use or consumption, Grafix Garage’s liability for a failure to comply with such statutory guarantee is limited to one of the following, at Grafix Garage’s option:

- a. supplying the services again; or
- b. payment of the cost of having the services supplied again,

unless it is not fair or reasonable for Grafix Garage to rely on this term of this Agreement.

## **Express Warranties**

5.4 Grafix Garage warrants that:

- a. it will provide the Services in accordance with the Contract Details;
- b. where the Contract Details state that the particular Service will be performed in accordance with the Service Level Agreement, then Grafix Garage warrants that it will provide those Services in accordance with the Service Level Agreement; and
- c. the Services will be performed with due skill and care.

## **Exclusions from Warranty**

5.5 It is acknowledged and agreed by both Parties that given the nature of the Services:

- a. it is not possible for Grafix Garage to guarantee that any Service is fit for a particular purpose or that any particular outcome will be achieved as a result of any Service, or any product that results from the Service;
- b. it is not reasonable for You to rely on Grafix Garage’s skill and judgment to guarantee that any Service is fit for a particular purpose or that any particular outcome will be achieved as a result of any Service, or any product that results from the Service.

5.6 Grafix Garage does not warrant that:

- a. uninterrupted, secure access or error free operation of the Hosted Environment, Network or Your Content and Software; or
- b. Grafix Garage can prevent any third party disruptions to the Services or that Grafix Garage will correct all defects.



# 6 Payment and Invoicing

## Payment

6.1 All Fees, Taxes or other amounts due by You to Grafix Garage under this Agreement must be paid to Grafix Garage in accordance with this Agreement without any set-off, counter-claim, deduction or withholding. Grafix Garage may set-off any amount that it owes to You against any amount that You owe to Grafix Garage under this Agreement.

6.2 The Fees for any Professional Services are set out in the Contract Details or other ordering document signed by Grafix Garage, or if they are not set out in either of those places, the Fees are charged for all work done to perform the Professional Services at Grafix Garage's then current hourly rates and are charged on a time and materials basis in 30 minute increments.

6.3 Unless otherwise stated, all Charges and other amounts payable are exclusive of GST. If GST becomes payable on any supply made or provided, on which GST is not payable at the date of this Agreement, you will pay Grafix Garage an additional amount equal to value of consideration for the supply multiplied by the prevailing GST rate.

## Invoicing

6.4 You must pay Grafix Garage the Fees and related Taxes within 10 days from the date of the applicable Tax Invoice, unless stated otherwise in the Contract Details. Grafix Garage will send the Tax Invoice:

- a. for Fees that are payable monthly in advance; in the month prior the Services being provided or at the beginning of the month in which the Services are to be provided;
- b. for Fees that are payable in arrears; at the beginning of the month after the month in which the Services were provided.

6.5 Grafix Garage may:

- a. pro rate invoices so that they are billed to coincide with the first or last day of calendar months and/or provide a single billing date for multiple Services;
- b. round up small amounts to the nearest 5c, and/or delay billing of small amounts until subsequent invoices.

6.6 Any Tax Invoice that has not been disputed by You in writing within 3 months of date of issue is deemed to be accurate in absence of fraud or manifest error.



## Late Payment

6.7 Grafix Garage reserves the right to require You to pay a late charge for any failure to make any payment by the date required under this Agreement, calculated daily using a rate that is 4% over the Reserve Bank of Australia's Cash Rate, from the date that the payment first becomes overdue, to the date that the payment is received by Grafix Garage, both dates inclusive.

6.8 Grafix Garage may by notice to you suspend work, and your use of and access to Services (including public access to your web content), until outstanding invoice(s) and interest are paid in full. Charges shall continue to accrue during such period of suspension. Time for payment shall be of the essence.

## Dispute

6.9 Invoices may only be disputed by you by providing Grafix Garage with written details of the dispute within fourteen (14) days of the date of the invoice, failing which the invoice shall be deemed to have been accepted by you. You shall remain liable to make payment of any undisputed portions of an invoice.

## Out of Scope Work

6.10 Additional charges shall be payable for out-of-scope work, that is work not otherwise expressly set out in your Proposal document.



# 7 Taxes

## Payment of GST

7.1 The Fees exclude GST. You must pay any applicable GST in addition to the Fees at the same time as You pay the relevant Fees.

## Indemnity and reimbursement payments

7.2 Where one Party must indemnify or reimburse the other Party (**Payee**) for any loss or expense incurred by the Payee, the required payment does not include any amount which the Payee (or an entity that is in the same GST group as the Payee) is entitled to claim as an input tax credit, but the payment will be increased if it is consideration for a taxable supply.

## Adjustment event

7.3 You must pay any GST without set-off or deduction regardless of any entitlement You may have to a credit or offset. However, if:

- a. the GST paid or payable by You in respect of the supply is different from the amount of GST payable at law; and
- b. an adjustment of that GST is made between Grafix Garage and the relevant taxing authority,

then Grafix Garage and You must make the same adjustment to the GST which You have paid or are otherwise required to pay in accordance with this Agreement.

## Other Taxes

7.4 All payments under this Agreement must be made free and clear and without deduction for any and all present and future Taxes. Payments due to Grafix Garage under the Agreement must be increased so that amounts received by Grafix Garage, after provisions for Taxes and all Taxes on such increase, will be equal to the Australian dollar amounts required under the Agreement, as if no Taxes were due on such payments.



# 8 Information

## Confidentiality

8.1 Subject to clause 10.3, each Party agrees that it will not permit the use of the other Party's Confidential Information by, nor disclose the other Party's Confidential Information to, any third person, other than:

- a. Grafix Garage may disclose Your Confidential Information to its Related Bodies Corporate, and any contractors and employees of Grafix Garage or its Related Bodies Corporate;
- b. Grafix Garage may disclose Your Confidential Information to any person in response to a request of any government or regulatory entity (including subpoenas and court orders);
- c. where You have been introduced to the Services by a channel partner of Grafix Garage then Grafix Garage may disclose such details of Your use of the Services and this Agreement to the relevant channel partner as is necessary identify the amounts that Grafix Garage must pay to the relevant channel partner and to comply with its agreement with that channel partner;
- d. either Party may disclose the other Party's Confidential Information to their professional advisers,

unless such use or disclosure is specifically authorised in writing by the other Party or by law.

8.2 Each Party must only use the other Party's Confidential Information for the purpose of performing the obligations under this Agreement, or if the recipient is a professional adviser, the professional adviser may use the Confidential Information for purposes connected with advising on or reporting on this Agreement.

## Privacy

8.3 Each Party must use any Personal Information of which it becomes aware in connection with this Agreement in accordance with the law.

8.4 You warrant that:

- a. You will obtain or have obtained each informed consent of Your employees' and contractors' and from any person whose Personal Information is in Your Content and Software, for Grafix Garage, its Related Bodies Corporate and their respective contractors to use, store, manipulate or otherwise deal with those individuals' Personal Information for any purpose connected with this Agreement and that such usage may include transferring the data overseas to any of Grafix Garage's Related Bodies Corporate or their respective contractors for any use, storage, manipulation or dealing for any purpose connected with this Agreement;
- b. You have reviewed the security features and responsibilities in this Agreement and have determined that they meet Your needs.





## Marketing

8.5 Each Party agrees to allow reference to the other and the relationship under this Agreement in its marketing presentations, marketing materials, lists of customers or suppliers (as applicable), and websites as well as in discussion with prospective resellers, channel partners and customers, and industry/financial analysts.

8.6 Neither Party may use the other Party's trademarks, logos, get up or other branding without the other Party's prior written consent, such consent not to be unreasonably withheld.



## 9 Liability

9.1 To the extent permitted by law, and subject to any applicable Service level Agreement, clauses 7.1-7.3, 11.2 and 11.3, Grafix Garage is not liable to You in contract (including under an indemnity), tort, breach of statutory duty or otherwise in respect of any loss, damage, cost or expense arising out of or in connection with the Services, this Agreement or the relationship between the Parties that:

- a. is for any Consequential Loss, even if Grafix Garage has been advised of, knows of, or should have known of the possibility of such loss, damage or expense, and irrespective of whether the loss, damage or expense arises naturally, was in the contemplation of the Parties or was reasonably foreseeable;
- b. is for an amount that exceeds the Fee paid for that Service in the 12 months prior to the date that the claim arose unless clause 11.2 applies.

9.2 Where Grafix Garage's liability arises from:

- a. death or bodily injury (including sickness) caused by the willful, unlawful or negligent act or omission of Grafix Garage, its Related Bodies Corporate or their respective contractors;
- b. loss of, or damage to, tangible property caused by the willful, unlawful or negligent act or omission of Grafix Garage, its Related Bodies Corporate or their respective contractors, or
- c. breach of Grafix Garage's obligations of confidence in clause 10.1 or 10.2 or privacy in clause 10.3,

then, for the purpose of clause 11.1(b), Grafix Garage's liability is limited to \$1,000,000.

9.3 Grafix Garage is not liable to You for any loss suffered by You due to Grafix Garage's inability to comply with its obligations under this Agreement as a result of any Force Majeure event.

9.4 Each Party shall make every effort to mitigate any loss, damage, cost or expense that it may suffer arising out of or in connection with the Services, this Agreement or the relationship between the Parties.



# 10 Indemnity

10.1 You must indemnify, hold harmless and defend Grafix Garage from and against all losses, damages, costs and expenses (including legal costs and expenses on an indemnity basis), that may arise directly or indirectly out of or in connection with:

- a. any use of the Hosted Environment, the Network or Your Content and Software, including where the access to Your Content and Software has been obtained through use of any password or other security mechanism issued to You or created by You whether or not You have authorised such use or access;
- b. a dispute between You and any of the users of Your Content and Software;
- c. any failure to ensure that Your Content and Software is free, and at all times remains free, from any virus, worm, Trojan horse, zombie, keylogger or other form of malicious code;
- d. the enforcement of Grafix Garage's rights in connection with any of its rights under this Agreement or any alleged or actual breach of this Agreement by You;
- e. any claim or allegation arising in connection with the exercise of the rights contemplated by clauses 6.6, 6.7 or 14.1;
- f. any unlawful, willful or negligent act or omission of You, Your agents, contractors or invitees, except to the extent that such loss, damage, cost or expense has been caused by:
- g. a breach of this Agreement by Grafix Garage; or
- h. an unlawful, wilful or negligent act or omission of Grafix Garage, its Related Bodies Corporate or their respective contractors.

10.2 Each indemnity contained in this Agreement is a continuing obligation notwithstanding:

- a. any settlement of account; or
- b. the occurrence of any other thing,

and it is not necessary for Grafix Garage to incur expense or make payment before enforcing or making a claim under an indemnity.



# 11 Dispute Resolution

11.1 If any bona fide dispute arises between the Parties under or in relation to this Agreement, before commencing any action or court proceeding, the Party raising the dispute must give the other Party written notice of the dispute setting out the details of the dispute and the required remedy (**Dispute Notice**). Each Party must then nominate a senior representative with authority to resolve the dispute and those representatives must meet within 10 days of receipt of the date of the Dispute Notice to attempt to resolve the dispute in good faith.

11.2 If the dispute is not resolved within 20 days from the date of receipt of the Dispute Notice, either Party may commence any action or court proceeding in relation to the dispute.

11.3 Nothing in this clause prevents either Party from commencing any action or proceeding at any time for urgent interlocutory relief in any court or tribunal having jurisdiction over such action or proceeding.

11.4 Each Party must bear its own costs of complying with this clause 13.



# 12 Intellectual Property Rights

12.1 Grafix Garage retains copyright and all other intellectual property rights in:

- a. all programming modules, code, computer programmes, material, tools, drawings, documents, presentations, specifications, data, designs, know-how and anything else generated, whether as improvements or otherwise, in course of providing (directly or indirectly) Services; and
- b. all intellectual property rights existing prior to commencement of such. Unless agreed otherwise in writing, Grafix Garage shall be entitled to claim authorship for work which it is responsible.

12.2 Grafix Garage licenses to you the right to access the Grafix Garage IP on a non-exclusive basis to such extent as is necessary to enable you to make reasonable use of the relevant Services for the duration of the Agreement.

12.3 You acknowledge that Services may include individual third party software or third party intellectual property rights (including, with limitation, content management system and open source software) ("Third Party IP") and licence in clause 12.2 and your rights to use Services is without prejudice to the Third Party IP. Any rights you may have to access Third Party IP shall be limited to extent of Grafix Garage's right to access same and its ability to pass on such rights to you.

12.4 In relation to the licence in clause 12.2 and the right to access in clause 12.3:

- a. they will both automatically terminate if this Agreement ends; and
- b. they do not include the right to replicate, commercialise, adapt, modify, reverse engineer, decompile or disassemble in whole or in part.

12.5 Subject to clauses 12.2, 12.3 and 12.4, you shall retain copyright in the Materials and you grant Grafix Garage a licence to use same to extent required to perform its obligations herein.

12.6 In relation to any data, content, information or material provided by You to Grafix Garage (including Materials and Site Software), you warrant that same will not infringe the rights of any third party nor contravene any law or industry code.

12.7 Save as required by law, you shall not disclose any confidential information relating to Grafix Garage or its affiliates obtained during or arising out of this Agreement, to anyone (except your employees on an as need basis). You shall procure that anyone else receiving benefit of Services, whether employees or otherwise, comply with terms of this clause as if they were a party to Agreement.



# 13 Site Content

13.1 You shall ensure that Materials do not infringe any applicable laws, regulations, industry codes or third party rights (such as material which is obscene, indecent, pornographic, offensive, defamatory, threatening, liable to incite racial hatred or in breach of any third party intellectual property rights) ("Inappropriate Content").

13.2 Content must be thoroughly reviewed before being supplied to Grafix Garage. Grafix Garage is not responsible for any spelling or grammatical errors.

13.3 You acknowledge that Grafix Garage has no control over any content or links placed on Site by you or anyone else and does not purport to monitor content of the Site. Without limiting the foregoing, Grafix Garage reserves the right to remove content from the Site where it reasonably suspects such content is Inappropriate Content. Notwithstanding, Grafix Garage shall not be deemed to have any control over the Site or its contents.

13.4 You shall indemnify Grafix Garage against all damages, losses and expenses arising as a result of any action or claim that the Materials or any other material posted to, or linked to, the Site constitutes Inappropriate Content.

13.5 Grafix Garage may include statement "Powered by Grafix Garage" on the home page of the Site, together with a hyperlink to the Grafix Garage website.



# 14 Termination and Suspension

## Suspension

14.1 Grafix Garage may suspend access to the Hosted Environment and/or Your Content and Software if:

- a. any amount payable under this Agreement is not paid within 14 days of its due date;
- b. Grafix Garage reasonably believes that You are in breach, or anticipated breach, of the Acceptable Use Policy in a material way;
- c. Grafix Garage reasonably believes that Your use of the Services is detrimental to other users of the Hosted Environment, Network or the Data Centre;
- d. there is an Emergency.

14.2 Where Grafix Garage suspends the Services it will provide You with written notice advising You of the suspension, the reason for the suspension and the steps that You are required to take prior to the Service being resumed (if applicable).

14.3 You acknowledge and agree that:

- a. during any period of suspension the Fees remain due and payable;
- b. there may be a re-activation Fee payable by You prior to Grafix Garage allowing the Services to be resumed.



## Termination

14.4 Grafix Garage may, without liability to You, terminate this Agreement, in part or whole, (including terminating the Service Period for any one or more Services) by giving You at least 60 days' notice (provided that such notice may not be given so that the date of termination is during a Minimum Service Period).

14.5 Grafix Garage may immediately terminate this Agreement, in part or whole, (including terminating the Service Period for any particular Service) by giving You written notice if:

- a. You breach any of the provisions of clauses 5.6, 5.7, 10 or 15.7;
- b. You breach any other provision of this Agreement and the breach has not been remedied within 14 days of written notice from Grafix Garage specifying the breach;
- c. You have not complied with any notice issued under clause 14.2;
- d. You suffer any Insolvency Event;
- e. there is a merger, sale of substantially all of the assets, or change of control, of You. A "change of control" is deemed to occur when an entity acquires 50% or more of the voting shares or equity interest in You or 50% or more of the assets of You, in the event of a change of a majority of the Board of Directors (or majority of the partners if a partnership) of You or if there is a change of effective control of You;
- f. a Force Majeure event prevents Grafix Garage from performing all or substantially all of its obligations under this Agreement for a period exceeding 60 days; or
- g. a Change in Law makes it commercial unviable (in the reasonable opinion of Grafix Garage), or illegal, for Grafix Garage to continue to provide the Services;
- h. our agreement with a contractor ends for any reason and as a consequence Grafix Garage cannot continue to supply all or part of the Service.

14.6 You may immediately terminate this Agreement, (including terminating all the Service Periods of all Services), it by giving Grafix Garage written notice if:

- a. Grafix Garage breaches any provision of this Agreement and the breach has not been remedied within 30 days of written notice from You specifying the breach;
- b. You are entitled to under the provisions of the Service Level Agreement;
- c. Grafix Garage suffers an Insolvency Event; or
- d. a Force Majeure event prevents Grafix Garage from performing all or substantially all of its obligations under this Agreement for a period exceeding 60 days.

14.7 Where this Agreement may be terminated under the provisions of the Australian Consumer Law, You may also terminate this Agreement in accordance with those provisions in the Australian Consumer Law.

14.8 Grafix Garage may use any technological means to enforce its rights under this Agreement, including preventing access to the Hosted Environment, Network or any of Your Content and Software.





## Consequences of Termination

- 14.9 Termination of this Agreement for any reason does not:
- a. release You from the obligation to pay any monies to Grafix Garage whether payable before or after termination of this Agreement; or
  - b. discharge either Party from any liability which has been incurred by that Party prior to termination of this Agreement.
- 14.10 If this Agreement is terminated or the Service Period for a particular Service expires:
- a. You must immediately pay to Grafix Garage all monies that are outstanding under the Service that has been terminated or that are payable in respect of the Service that has been terminated, including any unbilled additional use Fees;
  - b. Grafix Garage may re-assign, re-configure or re-use any IP addresses or other network numbers without any liability to You;
  - c. subject to any provision in this Agreement to the contrary, each Party must immediately return to the other Party or certify in writing to the other Party that it has destroyed, all copies and partial copies of the other Party's Confidential Information or any material that includes the other Party's intellectual property rights.



# 15 General

## Notices

- 15.1 Any notice that is to be given under this Agreement:
- a. must be in writing and signed by the person giving the notice; or
  - b. Grafix Garage may give any notice (including a written notice) to You by sending You an email and such notice does not require a signature.
- 15.2 Any notice must be hand delivered to the address, sent by prepaid mail to the address, sent to the facsimile number of the recipient as set out in this Agreement and any notice provided by Grafix Garage by email may be sent to any email address that Grafix Garage uses to communicate with You, including an email address of Your Representative or of personnel in Your accounts or finance department.
- 15.3 Each Party must promptly notify the other of any change of address or contact details, and such details shall be incorporated into this Agreement from the date following the date of receipt.
- 15.4 Any notice sent in accordance with this Agreement is deemed to have been received:
- a. if hand delivered; on the date of delivery;
  - b. if mailing; 3 Business Days after the date of mailing; or
  - c. if sent by facsimile; at the time set out on a transmission report from the machine from which the facsimile was sent which states that the facsimile was sent in its entirety to the facsimile number of the recipient;
  - d. if sent by Grafix Garage to an email address of You; at the time that the email was sent, provided that Grafix Garage does not receive a system generated notice of non-delivery within 1 hour of the time of sending the email.

## Electronic Communication

- 15.5 The Parties consent to the use of electronic means to communicate and otherwise deal under this Agreement.

## Variation

- 15.6 Except as otherwise stated in this Agreement, the terms and conditions of this Agreement can only be varied by written document signed by both Parties.



## **Subcontracting, Assignment and Novation**

15.7 You must not transfer, assign or novate the whole or any part of this Agreement without the prior written consent of Grafix Garage.

15.8 Grafix Garage may subcontract, transfer, assign or novate the whole or any part of this Agreement, including the right to receive any amount payable under this Agreement without the prior written consent of You. Notwithstanding any other provision in this Agreement, Grafix Garage may disclose any of Your Confidential Information that is reasonably necessary to affect any transfer, assignment or novation. You must promptly sign any documents reasonably requested by Grafix Garage to affect such transfer, assignment or novation or effect any of Grafix Garage's other rights under this Agreement.

## **Waiver**

15.9 No provision of this Agreement shall be deemed waived, amended or modified by either Party, unless the waiver, amendment or modification is in writing and signed by both Parties, unless stated otherwise in this Agreement.

## **Severability**

15.10 If any provision of this Agreement is for any reason declared invalid or unenforceable the validity of the remaining portion of this Agreement will not be affected and the remaining portion will remain in force.

## **Rights are Cumulative**

15.11 Except as expressly provided otherwise in this Agreement, the Parties' rights and remedies under this Agreement are cumulative and there is no obligation to exercise a particular remedy. If a Party is in breach of this Agreement, the non-breaching Party may avail itself of all other rights, remedies and causes of action available at law, in equity or otherwise, unless stated otherwise in this Agreement.

## **Entire Agreement**

15.12 To the extent permitted by law:

- a. this Agreement records the entire agreement between the Parties in relation to its subject matter. The Agreement supersedes all previous negotiations, understandings or agreements in relation to the subject matter and expressly excludes the pre-printed terms and conditions of Your purchase order (if any);
- b. all conditions, warranties, guarantees or rights, including any implied by custom or other circumstance, that are not expressly specified in this Agreement, are excluded.



## **Relationship of Parties**

15.13 Nothing in this Agreement is to constitute or be deemed to constitute a partnership among the Parties, joint venture, fiduciary relationship or franchise arrangement.

15.14 Except as specifically set out in this Agreement, neither Party is authorised to act as agent for the other.

## **Applicable Law**

15.15 The Agreement is governed by the laws of Queensland, and both Parties agree to submit to the exclusive jurisdiction of the courts in Queensland. The United Nations Convention on Contracts for the International Sale of Goods does not apply to this Agreement.

