

SuttonNet Web Development & Hosting Agreement: Terms & Conditions

Valid from 1 June 2021

1 Introduction

1.1 Agreeing Parties

This Agreement is entered into between D.P SUTTON & W.T SUTTON ABN 68 252 718 370 and the person, organisation or entity described in the Schedule, together the Parties and each a Party.

1.2 Acceptance

1. You accept this Agreement by the earlier of:
 - a) signing and returning this Agreement to us;
 - b) confirming by email that you accept this Agreement;
 - c) instructing us (whether orally or in writing) to proceed with the provision of the Services; or
 - d) making part or full payment of the Fees.
2. In consideration of your payment of the Fees, we will provide the Services in accordance with this Agreement, whether ourselves or through our Personnel.

1.3 Commencement

Unless otherwise specified in this Agreement, we will commence the provision of the Services within a reasonable time after the later of:

1. the Commencement Date;
2. to the extent Fees are required in advance, receipt of payment of such Fees;
3. you providing us with any information we require to provide the Services to you, including your Content, logos, any images, files or text we require to perform the Services or as set out in the Specifications; and
4. the satisfaction of any other conditions precedent contemplated by this Agreement.

2 Special Terms of Service

2.1 Combined Services

1. Some of our services cannot be provided unless we also provide you with Managed Hosting and Support. These include:
 - a) certain functions on websites which we have developed; and
 - b) all Bizazz Services.
2. You acknowledge that if you host your SuttonNet-developed website with another hosting provider, this may result in reduced functionality.

2.2 Development

2.2.1 Materials

1. You agree to supply all materials and information needed by us to complete the work.
2. We will inform you as soon as practicable if materials are not suitable.

2.2.2 Variations

1. You may request a Variation to Development by written notice to us, with details of the Variation. We may advise or suggest a Variation to you. Each is a *Variation Request*.
2. We will:
 - a) advise you if we see technical or other reasons not to proceed with, or to amend, a Variation Request that you make; and
 - b) advise you of any associated costs before a Variation Request is accepted.
3. We will not be obliged to proceed with a Variation unless:
 - a) we accept the Variation Request in writing; and
 - b) the Fee has been adjusted to reflect the Fee Variation.

4. Where:
 - a) the Development Services are varied or changed; or
 - b) the costs of providing the Development Services increase (*Variation Event*); and
 - c) the cause of that Variation Event relates to, or is connected with, an event or circumstance beyond our reasonable control,

you agree to pay us our reasonable additional costs and expenses that we may suffer or incur as result of the Variation Event, as a debt due and immediately payable.

2.2.3 Approvals: Design & Content

1. To the extent that we develop or subcontract any Content or Designs as part of Development, we will submit these to you for your approval, including the webpage template, home page layout and any Content we create for you.
2. If within 10 Business Days of receiving the Designs or Content, you notify us in writing of any required amendments which comply with the agreed Specifications, we will make these amendments. Where the amendments are different from the initial instructions that you provided to us, those amendments will be considered a Variation Request for the purposes of this Agreement.
3. If you do not notify us of your approval or rejection of the Content or Designs within the 10 Business Days, you agree that you will be deemed to have accepted those Designs or Content.
4. Where applicable: following initial design approval and creation of a draft website, we will give you access to view the draft website any time as a work in progress.

2.2.4 Acceptance Tests: Web Development

1. The Schedule sets out any parts of the Development Services which require your Acceptance Tests. You will be notified and given access for testing, when our Development work is ready for this step.
2. You agree:
 - a) to test the work and assess it thoroughly on the basis of your knowledge of likely users and its application to your business;
 - b) to notify us of any queries, discrepancies from specifications, failures in performance or dissatisfaction with the work done to date;

- c) to undertake these tests and provide your feedback within 10 business days.
- 3. We agree:
 - a) to answer your queries; and
 - b) to remedy faults in accordance with the Specifications at no extra cost to you, within the limits of these service terms.
- 4. You agree that:
 - a) if you reject the work, you will provide us with the reasons for it;
 - b) your rejection cannot be unreasonably given; and
 - c) you may only reject the work where it fails the Acceptance Tests and was not provided in accordance with the terms of this Agreement.
- 5. If you do not notify us of your acceptance or rejection within the 10 Business Days, you agree you will be deemed to have accepted the parts of the work to which these Acceptance Tests applied.

2.3 Managed Webhosting and Support

2.3.1 Other Web Software

- 1. If you request us to host a website not built by SuttonNet:
 - a) your website software must be kept up to date and secure at all times;
 - b) we do not guarantee that we are able to provide all necessary support, updates and upgrades for all kinds of web software;
 - c) additional fees may apply for hosting and support tasks we carry out which result from the web software that you use; and
 - d) we will advise you if any task which you have requested, or which we deem necessary or advisable, is not covered by your Managed Hosting and Support fee.
- 2. WordPress websites that we host must have regular software updates. If you host a WordPress site with us, you agree to pay our annual fee for Smart Updates software licence and our management of this product for your website.

2.3.2 Email

1. All email accounts that we host must use secure (encrypted) sending/receiving protocols. We will assist you to set up and maintain your email account(s) on your hardware.
2. You agree not to utilise permanent or long term mail forwarding from an email account which we host, to an email account hosted by another mail provider. Inadvertent forwarding of spam could lead to our mail server being blocked by other email services.

2.3.3 Security Certificates

1. All websites that we host must maintain a valid website security (SSL/TLS) certificate at all times.
2. From time to time we may review available security certificates and refuse to accept on our server, or recommend against, certain certificates for reasons of security, performance, issuance integrity or other known problems.
3. We will notify you of our decision and, at your request, the reasons for it.
4. You agree to us removing and replacing any non-accepted certificate for your website:
 - a) in the case of a free certificate, within 30 days of our notification;
 - b) in the case of a paid (commercial) certificate, at or near the current certificate's expiry date; and
 - c) with a certificate of your choice.

2.4 Bizazz Services

2.4.1 Licence

1. To the extent that we have agreed to provide the Bizazz Services under this Agreement (as set out in the Schedule and any subsequent Additional Services or Variations), we grant you and your Authorised Users a non-exclusive, non-transferrable (except with our written permission), non-sublicensable, personal and revocable licence to access and use the Bizazz Services from the time as specified in the Schedule until the date that this Agreement or the Bizazz Services are terminated in accordance with this Agreement, whichever is sooner (*Licence*).
2. You agree that the Licence permits you to access and use the Bizazz Services in accordance with the number of Authorised Users.

2.5 Accounts

1. Where applicable, we will create Accounts for you and your Authorised Users to access and use:
 - a) the Bizazz Services;
 - b) specific hosting and/or FTP services for your website(s) on our server.
2. You must ensure that any information you provide to us, or we request from you, for your Accounts, is complete and accurate and that you are authorised to provide this information to us.
3. You are the Account owner and regardless of any change in any contact details, you will remain responsible for your Accounts, as set out in this Agreement.
4. If you wish to change the Account owner, you must provide us with a written request to transfer the ownership of the Accounts to the incoming party, which must also include the incoming party's written consent to take over full responsibility for the Accounts, in a form acceptable to us.
5. It is your responsibility to keep your Account details confidential. You are responsible for all activity on your Accounts, including activity by any of your Authorised Users and for ensuring that activities on your Accounts comply with this Agreement.
6. We are not responsible for the management or administration of your Accounts.

3 Changes We Make to Services

1. You agree that we may make changes to the Bizazz Services and Managed Hosting and Support Services at any time without your consent, provided those changes do not substantially and adversely affect your use and enjoyment of the Bizazz Services or the Managed Hosting and Support Services.
2. If we make changes that would substantially and adversely affect your use and enjoyment of the Bizazz Services or Managed Hosting and Support Services (each a *Change*), we will provide written notice to you. By continuing to use the services 30 days after our notification, and without making an objection to us, you agree to the Change.
3. If you do not agree to a Change and you can demonstrate that the Change will have a material adverse effect on you, you may:
 - a) cancel all or part of the relevant Service in accordance with Section 6.1 and continue to receive other Services; or
 - b) terminate this Agreement in accordance with the 'Term' clause in the Schedule.
4. You agree that we may amend the Bizazz Fee or Managed Hosting and Support Fee upon notice to you. The updated Fees will apply to the next billing cycle. If you do not agree to the Fee change, you may:
 - a) cancel all or part of the relevant Service in accordance with Section 6.1 and continue to receive other Services; or
 - b) terminate this Agreement in accordance with the 'Term' clause in the Schedule.

4 Third Party Inputs

1. You agree that:
 - a) the Services we provide may include Third Party Inputs that interface, or inter-operate with, the Services; and
 - b) our provision of the Services may be contingent upon, or impacted by, such Third Party Inputs (for example, our Managed Hosting and Support Services may use or rely on third party hosting providers).
2. To the extent that any Third Party Inputs are required by us in order to provide the Services to you:
 - a) we agree to obtain and maintain the required licences for access and use of any Third Party Inputs (at no additional cost to you); and
 - b) you agree to:
 - i. adhere to the terms and conditions of any such Third Party Input licences as updated from time to time, which we will make available to you on request; and
 - ii. comply with our reasonable instructions and directions.
3. You acknowledge and agree that the benefit of the Third Party Input's interface, or inter-operation with, the Services, is subject to your compliance with the above clause.

5 Payment Terms

5.1 General

1. You agree to pay us:
 - a) the Fees;
 - b) all pre-approved Expenses; and
 - c) any other amount payable to us under this Agreement, in accordance with these Payment Terms.
2. We will invoice you:
 - a) where the Services are on a fixed-fee basis, at the times set out in the Schedule;
 - b) for any Additional Services you request, after that request; and
 - c) otherwise, on a monthly basis for Services performed during the previous period.
3. You must pay the amount in the invoice, by the method set out there, within 30 days of the invoice date; or as otherwise agreed between the parties.
4. Where GST is payable on any supply made under this Agreement, you must pay us the amount of the GST.
5. If an adjustment event arises in respect of any supply made under this Agreement, a corresponding adjustment will be made and a revised tax invoice issued.

5.2 Fees for Ongoing Service Plans

1. You agree that your Managed Hosting and Support Fee or Bizazz Licence Fees may change, to the extent of changes in (as applicable):
 - a) your Managed Hosting and Support plan; or
 - b) the Bizazz Services you have been given access to.
2. Such Bizazz or Hosting Fee Variation will be payable:

- a) from the start of the next month following the change in your service plan; and
 - b) as a single, pro rata adjustment fee covering your changed services for the remainder of the billing cycle.
3. In the event that the Bizazz or Hosting Fee Variation results in a credit from amounts already paid for these Services: we will (at our discretion) either:
- a) retain a credit in your account towards current or future invoices; or
 - b) provide you with a pro-rata refund.

5.3 Non Payment

1. If any payment has not been made in accordance with the Payment Terms, we may (at our absolute discretion):
 - a) immediately cease or suspend providing the Services, and recover, as a debt due and immediately payable from you, our additional costs of doing so;
 - b) charge a re-instatement fee after payment is made and services are resumed; and/or
 - c) charge interest at a rate equal to the Reserve Bank of Australia's cash rate, from time to time, plus 8% per annum, calculated daily and compounding monthly, on any such amounts unpaid after the due date for payment in accordance with the Payment Terms.
2. If you rectify such non-payment within a reasonable time after the Services have been suspended, then we may, at our discretion, recommence the provision of the Services as soon as reasonably practicable.

6 Termination

1. You may only terminate this Agreement in accordance with this clause or as set out in the Schedule.
2. To the maximum extent permitted by law and except as specified in this Agreement, we do not allow refunds of the Fees.

6.1 Ongoing Services: Cancellation in Part or in Full

1. You may terminate all or part of the Bizazz Services or Managed Hosting and Support Services at any time, by giving 30 days' notice in writing to us.
2. We will:
 - a) cease providing the relevant Services; and
 - b) provide you with either a credit or a pro-rata refund if applicable.
3. Some of our Services cannot be provided unless we provide Managed Hosting and Support Services. This may mean that if you terminate the Managed Hosting Services, you also cancel other parts of this Agreement.

6.2 Immediate Termination of the Agreement

This Agreement will terminate immediately upon written notice by:

1. us, if:
 - a) you (or any of your Personnel) breach any provision of this Agreement and that breach has not been remedied within 10 Business Days of being notified by us;
 - b) you attempt to terminate this Agreement early, including through repudiation;
 - c) you fail to provide us with clear or timely instructions or information to enable us to provide the Services;
 - d) for any other reason outside our control which has the effect of compromising our ability to provide the Services; or

- e) you are unable to pay your debts as they fall due; and
2. (b) you, if we:
- a) are in breach of a material term of this Agreement, and that breach has not been remedied within 10 Business Days of being notified by you;
 - b) are unable to pay our debts as they fall due; or
 - c) issue you with a notice of a Change and you choose to terminate the Agreement in accordance with Chapter 3.

6.3 Actions Upon Expiry or Termination

1. Upon expiry or termination of this Agreement:
- a) we will immediately cease providing the Services;
 - b) you are to pay for all Services provided prior to termination, including Services which have been provided and have not yet been invoiced to you, and all other amounts due and payable under this Agreement;
 - c) you also agree to pay us our additional costs arising from, or in connection with, such termination;
 - d) if you require any disengagement services, including to transfer to another hosting provider:
 - i. we may provide these to you; and
 - ii. if we do, you agree to pay us our additional costs arising from, or in connection with such disengagement services;
 - e) if requested by you within 30 days from the date of termination or expiry of this Agreement, we will assist you to obtain a static copy of the website, by a secure means, in a form of our choosing;
 - f) we will provide you a pro-rata refund for any amounts already paid for the Bizazz Services and Managed Hosting and Support Services for the remainder of the Term, less any commenced month; and
 - g) each Party agrees to promptly return (where possible), or delete or destroy (where not possible to return), any of the other Party's property (including any Confidential Information, and any Intellectual Property).
2. We will retain your documents (including copies) as required by law or regulatory requirements. Your express or implied agreement to this Agreement constitutes your authority for us to retain or destroy documents in accordance with the statutory periods, or on expiry or termination of this Agreement.

3. Termination of this Agreement will not affect any rights or liabilities that a Party has accrued under it.
4. This clause will survive the termination or expiry of this Agreement.

7 Abuse of Services

1. You must not (and you must ensure that your Authorised Users do not) access or use our Services except as permitted by this Agreement, and you must not and must not permit any other person (including any of your Authorised Users) to:
 - a) introduce any software without our knowledge and approval into our hardware and software or Systems;
 - b) introduce any malicious software into our hardware and software or Systems;
 - c) use our services for storage of data, other than for legitimate website files, website databases and temporary email storage to the limit of your hosting plan;
 - d) reveal or allow others access to your passwords or authentication details or allow others to use your Account or authentication details (other than Authorised Users);
 - e) use our services in any way that damages, interferes with or interrupts their supply;
 - f) use our services for sending spam or in any way which is in breach of any applicable Laws or which infringes any person's rights, including Intellectual Property Rights, libel laws and privacy rights;
 - g) use our services for activities or web content that are, at our absolute discretion, unsuitable for publication. As a rule of thumb we require the websites which we host to be, in our judgment, fit for a child to read and/or view. For more guidance on our standards, visit our website <https://suttonnet.com.au>.
2. We may suspend or delete Accounts, email accounts, webpages or websites which, at our absolute discretion, breach this clause. In that case, we reserve our right to:
 - a) recover from you our additional costs of doing so and of rectifying your abuse of our Services; and
 - b) charge a re-instatement fee after services are resumed.

8 Warranties & Responsibilities

1. You represent, warrant and agree that:
 - a) you will comply with this Agreement, our reasonable requests or requirements, and all applicable Laws;
 - b) you will co-operate with us and provide us with all assistance, information, documentation, Content, materials, access, facilities, authorities, consents, licences and permissions reasonably necessary to enable us to comply with our obligations under this Agreement or at Law, in a format agreed with us;
 - c) there are no legal restrictions preventing you from entering into this Agreement;
 - d) all information and documentation that you provide to us in connection with this Agreement is true, correct and complete;
 - e) you have not relied on any representations or warranties made by us in relation to the Services (including as to whether the Services are or will be fit or suitable for your particular purposes), unless expressly stipulated in this Agreement;
 - f) the Services are provided to you solely for your benefit and you will not (or you will not attempt to) disclose, or provide access to, our Services to third parties without our prior written consent;
 - g) you will notify us of any breach or suspected breach of this Agreement within 48 hours of becoming aware of it;
 - h) to the maximum extent within your power, you will rectify any breach of this Agreement within 48 hours of your becoming aware of it, including editing or deleting website Content that is in breach of our terms;
 - i) you will be responsible for the use of any part of the Services, and you must ensure that no person uses any part of the Services:
 - i. to break any Law or infringe any person's rights (including Intellectual Property Rights);
 - ii. to transmit, publish or communicate material that is defamatory, abusive, indecent, menacing or fails to meet our Content guidelines;
or

- iii. in any way that damages, interferes with or interrupts the supply of the Services;
- j) your use of the Services will not result in the transmission of a computer virus (or any similar or other damaging component) to our Systems;
- k) Client Data supplied by you is virus-free, accessible and usable in order for us to provide the Services;
- l) we will have reasonable access to your Systems where necessary for the purpose of supplying the Services;
- m) you are responsible for all users using the Services, including your Personnel and any Authorised Users;
- n) you use the Services and any associated programs and files at your own risk;
- o) you have reviewed this Agreement, including our Privacy Policy, and you understand them and will use the Services in accordance with them;
- p) the provision of the Services may be contingent on, or impacted by, Third Party Inputs;
- q) we may use third party service providers to integrate with the Services or to host the Services. If the providers of third party applications or services cease to make their services or programs available on reasonable terms, we may cease providing any affected features without Liability or entitling you to any refund, credit, or other compensation;
- r) we do not make any warranty or representation in respect of any third party products, facilities or services which the Services may use;
- s) we are not responsible for the integrity or existence of any data on the Computing Environment, network or any device controlled by you, your Authorised Users or your Personnel;
- t) you have all the hardware, software and services which are necessary to access and use the Services;
- u) you are not and have not been the subject of an Insolvency Event;
- v) if applicable, you hold a valid ABN which has been advised to us; and
- w) if applicable, you are registered for GST purposes.

9 Intellectual Property

1. This clause will survive termination or expiry of this Agreement.
2. The Parties agree that nothing in this Agreement constitutes a transfer or assignment of any Intellectual Property Rights.

9.1 Our Intellectual Property

1. You agree that we own all Intellectual Property Rights in:
 - a) Designs, where these have been developed by us or on our behalf, with the exception of graphic designs noted in clause 2 (a) of Section 9.2;
 - b) Our Materials;
 - c) New Materials, except any subject to Section 9.2; and
 - d) any Feedback,

and these Intellectual Property Rights will at all times vest, or remain vested, in us (or, if applicable, our third-party service providers).

2. To the extent that ownership of these Intellectual Property Rights does not automatically vest in us, you agree to do all acts necessary or desirable to assure our title to such rights.
3. We grant you an exclusive licence, revocable, worldwide, non-sublicensable and non-transferable right and licence, for the duration of the Term, to use Designs developed by us under this Agreement.
4. We grant you a non exclusive licence, revocable, worldwide, non-sublicensable and non-transferable right and licence, for the duration of the Term, to use Our Materials that we provide to you, including New Materials, solely for the purposes for which they were developed and for your use and enjoyment of the Services.
5. In the event that you move your website to another hosting service, you may continue to use our Designs and Our Materials (with the exceptions noted in Section 2.1), on the same website for which we provided them under this Agreement. If you have a new website developed, you may not continue to use our Intellectual Property.

9.2 Your Intellectual Property

1. Intellectual Property Rights in any graphic designs, Content or any eligible New Materials which we have created or modified for you will only vest in you after we have received full payment for that work under this Agreement.
2. We agree that you own all Intellectual Property Rights in:
 - a) any unique graphic designs (logos, colour schemes and 'site looks' uniquely characteristic of your website and entity) which were developed for you by us, or on our behalf, and approved by you;
 - b) subject to the clause above and excluding any third party Intellectual Property (eg stock photos, third party software):
 - i. the Content;
 - ii. any New Materials which you and we have agreed will become your Intellectual Property, and which are thus described in the Schedule or Specifications; and
 - c) other Client Data, except third party Intellectual Property which you have used and/or collected by permission of the Intellectual Property owner.
3. You grant us a non-exclusive, revocable, worldwide, non-sublicensable and non-transferable right and licence, for the duration of the Term, to use the Intellectual Property Rights in the Client Data for the performance of our obligations under this Agreement and as contemplated by this Agreement.
4. If you or any of your Personnel have any Moral Rights in any material provided, used or prepared in connection with this Agreement, you agree to (and agree to ensure that your Personnel) consent to our use or infringement of those Moral Rights for the performance of our obligations under this Agreement and as contemplated by this Agreement.
5. You grant us a limited licence to copy, transmit, store and back-up or otherwise access the Client Data during the Term (and for a reasonable period after the Term), to:
 - a) supply the Services to you;
 - b) modify, edit or re-arrange the Content for the purposes of search engine optimisation, site visitor experience, readability, website speed and navigability;
 - c) diagnose problems with the Services;
 - d) enhance and otherwise modify the Services, and
 - e) as reasonably required, perform our obligations under this Agreement.

6. You must, at all times, ensure the integrity of the Client Data and that your use of it is compliant with all Laws.
7. You represent and warrant that:
 - a) you have obtained all necessary rights, releases and permissions to provide all Client Data to us and to grant the rights granted to us in this Agreement; and
 - b) the Client Data (and its transfer to and use by us) as authorised by you, under this Agreement does not violate any Laws (including those relating to export control and electronic communications) or rights of any third party, including any Intellectual Property Rights, rights of privacy, or rights of publicity.
8. We assume no responsibility or Liability for the Client Data. You are solely responsible for the Client Data and the consequences of using, disclosing, storing or transmitting it.

10 Privacy & Confidential Information

10.1 Confidentiality

1. Each Receiving Party agrees:
 - a) not to disclose the Confidential Information of the Disclosing Party to any third party;
 - b) to use all reasonable endeavours to protect the Confidential Information of the Disclosing Party from any unauthorised disclosure; and
 - c) to only use the Confidential Information of the Disclosing Party for the purposes for which it was disclosed or provided by the Disclosing Party, and not for any other purpose.
2. The obligations in the above clause do not apply to Confidential Information that:
 - a) is required to be disclosed in order for the Parties to comply with their obligations under this Agreement;
 - b) is authorised to be disclosed by the Disclosing Party;
 - c) is in the public domain and/or is no longer confidential, except as a result of a breach of this Agreement; or
 - d) must be disclosed by Law or by a regulatory authority, including under subpoena.
3. Each Party agrees that monetary damages may not be an adequate remedy for a breach of this clause. A Party is entitled to seek an injunction, or any other remedy available at law or in equity, at its discretion, to protect itself from a breach (or continuing breach) of this clause.
4. This clause will survive the termination or expiry of this Agreement.

10.2 Personal Information: Privacy

1. You are responsible for the collection, use, storage and otherwise dealing with Personal Information related to your business and all matters relating to the Client Data.

2. You must, and must ensure that you, your Personnel and Authorised Users comply with the legal requirements of the Australian Privacy Principles as set out in the *Privacy Act 1988 (Cth)* and any privacy or anti-spam Laws (Privacy Laws) applicable to you in respect of all Personal Information collected, used, stored or otherwise dealt with under or in connection with this Agreement.
3. Without limiting this clause, you may only disclose Personal Information in your control to us, if:
 - a) you are authorised by Privacy Laws to collect the Personal Information and to use or disclose it in the manner required by this Agreement;
 - b) you have informed the individual to whom the Personal Information relates, that it might be necessary to disclose the Personal Information to third parties; and
 - c) where any Personal Information is Sensitive Information, you have obtained the specific consent to that disclosure from the individual to whom the Sensitive Information relates.
4. We agree to handle any Personal Information you provide to us, solely for the purpose of performing our obligations under this Agreement and in accordance with any applicable Laws and our Privacy Policy.

10.3 Analytics & Marketing

1. We may monitor, analyse and compile statistical and performance information based on and/or related to your use of the Services, in an aggregated and anonymised format (*Analytics*).
2. You agree that we may make such Analytics publicly available, provided that it:
 - a) does not contain information that identifies your entity; and
 - b) does not make the underlying Client Data or Personal Information identifiable.
3. You agree that we may advertise or publicise the broad nature of our provision of the Services to you, including on our website or in our promotional material, unless you otherwise provide us with notice that you do not approve of such publicity.

11 Australian Consumer Law

1. Certain legislation, including the Australian Consumer Law, and similar consumer protection laws and regulations, may confer you with rights, warranties, guarantees and remedies relating to the provision of the Services by us to you which cannot be excluded, restricted or modified (*Statutory Rights*). Nothing in this Agreement excludes your Statutory Rights under the ACL.
2. You agree that our Liability for the Services is governed solely by the ACL and this Agreement.
3. Subject to your Statutory Rights, we exclude all express and implied warranties, and all material, work and services (including the Services) are provided to you without warranties of any kind, either express or implied, whether in statute, at Law or on any other basis.
4. This clause will survive the termination or expiry of this Agreement.

12 Exclusions to & Limitations on Liability

These clauses will survive the termination or expiry of this Agreement.

12.1 Exclusions

Despite anything to the contrary, to the maximum extent permitted by law, we will not be liable for, and you waive and release us from and against, any Liability caused or contributed to by, arising from or connected with:

1. your, your Authorised User's or your Personnel's acts or omissions;
2. any use or application of the Services by a person or entity other than you, or other than as reasonably contemplated by this Agreement;
3. any works, services, goods, materials or items which do not form part of the Services (as expressed in this Agreement), or which have not been provided by us;
4. any relocation, configuration or reconfiguration of any Services by you or any user;
5. the loss of, corruption to, or errors in the Client Data;
6. any virus, fault or defect in any item in your System;
7. any Third Party Inputs;
8. the Services being unavailable, or any delay in us providing the Services to you, for whatever reason; and/or
9. any event outside of our reasonable control (including a Force Majeure event, a fault defect, error or omission in the Client Data).

12.2 Limitations

Despite anything to the contrary, to the maximum extent permitted by law:

1. neither Party will be liable for Consequential Loss;

2. a Party's liability for any Liability under this Agreement will be reduced proportionately to the extent the relevant Liability was caused or contributed to by the acts or omissions of the other Party (or any of its Personnel), including a failure to mitigate; and
3. our aggregate liability for any Liability arising from or in connection with this Agreement will be limited:
 - a) to us resupplying the Services to you; or, in our sole discretion,
 - b) to us repaying you the amount of the Fees paid by you to us in the last 12 months respect of the supply of the relevant Services to which the Liability relates.

13 General Terms

1. *Amendment:* This Agreement may only be amended by written instrument executed by the Parties.
2. *Counterparts:* This Agreement may be executed in any number of counterparts that together will form one instrument.
3. *Disputes:* A Party may not commence court proceedings relating to any dispute, controversy or claim arising from, or in connection with, this Agreement (including any question regarding its existence, validity or termination) (Dispute) without first meeting with a senior representative of the other Party to seek (in good faith) to resolve the Dispute. If the Parties cannot agree how to resolve the Dispute at that initial meeting, either Party may refer the matter to a mediator. If the Parties cannot agree on who the mediator should be, either Party may ask the Law Society of New South Wales to appoint a mediator. The mediator will decide the time, place and rules for mediation. The Parties agree to attend the mediation in good faith, to seek to resolve the Dispute. The costs of the mediation will be shared equally between the Parties. Nothing in this clause will operate to prevent a Party from seeking urgent injunctive or equitable relief from a court of appropriate jurisdiction.
4. *Entire agreement:* This Agreement contains the entire understanding between the Parties, and supersedes all previous discussions, communications, negotiations, understandings, representations, warranties, commitments and agreements, in respect of its subject matter.
5. *Further assurance:* Each Party must promptly do all things and execute all further instruments necessary to give full force and effect to this Agreement and their obligations under it.
6. *Force Majeure:* We will not be liable for any delay or failure to perform our obligations under this Agreement if such delay is due to any circumstance beyond our reasonable control (including but not limited to epidemics, pandemics, and Government sanctioned restrictions and orders, whether known or unknown at the time of entering into this Agreement).
7. *Governing law:* This Agreement is governed by the laws of New South Wales. Each Party irrevocably and unconditionally submits to the exclusive jurisdiction of the courts operating in New South Wales and any courts entitled to hear appeals from those courts and waives any right to object to proceedings being brought in those courts.

8. *Notices:* Any notice given under this Agreement must be in writing addressed to the relevant address last notified by the recipient to the Parties. Any notice may be sent by standard post or email, and will be deemed to have been served on the expiry of 48 hours in the case of post, or at the time of transmission in the case of transmission by email or where the time of transmission is not on a Business Day, 9am on the next business day.
9. *Online execution:* This Agreement may be executed by means of such third party online document execution service as we nominate subject to such execution being in accordance with the applicable terms and conditions of that document execution service.
10. *Publicity:* You agree that we may advertise or publicise the broad nature of our provision of the Services to you, including on our website or in our promotional material, unless you otherwise provide us with notice that you do not approve of such publicity.
11. *Relationship of Parties:* This Agreement is not intended to create a partnership, joint venture, employment or agency relationship between the Parties.
12. *Severance:* If a provision of this Agreement is held to be void, invalid, illegal or unenforceable, that provision is to be read down as narrowly as necessary to allow it to be valid or enforceable, failing which, that provision (or that part of that provision) will be severed from this Agreement without affecting the validity or enforceability of the remainder of that provision or the other provisions in this Agreement.

14 Definitions

In this Agreement, unless the context otherwise requires, capitalised terms have the meanings given to them in the Schedule, and:

1. *Acceptance Tests* means testing, in either a live or non-live environment, of specified parts of the Development Services for their efficacy, suitability and correct performance in accordance with the Specifications; such testing to be carried out as fully and nearly as possible to the anticipated live conditions when published to your website.
2. *Account* means an account accessible to you and/or your Authorised Users to use the Bizazz Services or the Managed Hosting Services;
3. *ACL or Australian Consumer Law* means the Australian consumer laws set out in Schedule 2 of the *Competition and Consumer Act 2010 (Cth)*, as amended, from time to time;
4. *Agreement* means these terms and conditions and any documents attached to, or referred to in, each of them;
5. *Authorised User* means a user permitted to access and use the Bizazz Services or Managed Hosting Services under your Account;
6. *Business Day* means a day on which banks are open for general banking business in New South Wales, excluding Saturdays, Sundays and public holidays;
7. *Change* has the meaning given in Chapter 3;
8. *Client Data* means:
 - data uploaded to your website (eg via website forms), or transmitted to or from your email accounts, hosted by us;
 - all of the Content you create, including using the Bizazz Services;
 - Content created by us for you under this Agreement and for which IP Rights have been assigned to you under its terms; and
 - your information, documents and other data, including any personal information, provided by you, your Authorised Users or your Personnel to us or our Systems or otherwise accessible by us in providing the Services;
9. *Computing Environment* means your computing environment including all hardware, software, information technology and telecommunications services and Systems;

10. *Confidential Information* includes information which:
 - a) is disclosed to the Receiving Party in connection with this Agreement at any time;
 - b) is prepared or produced under or in connection with this Agreement at any time;
 - c) relates to the Disclosing Party's business, assets or affairs; or
 - d) relates to the subject matter of, the terms of and/or any transactions contemplated by this Agreement, whether or not such information or documentation is reduced to a tangible form or marked in writing as 'confidential', and howsoever the Receiving Party receives that information;
11. *Consequential Loss* includes any consequential loss, indirect loss, real or anticipated loss of profit, loss of benefit, loss of revenue, loss of business, loss of goodwill, loss of opportunity, loss of savings, loss of reputation, loss of use and/or loss or corruption of data, whether under statute, contract, equity, tort (including negligence), indemnity or otherwise;
12. *Content* means the content on, or to be placed on, your website, that is:
 - a) created, modified or loaded by either Party in connection with this Agreement; &/or
 - b) posted to your website by a third party using our Services;
13. *Designs* means any designs, drawings, templates and layouts created or modified for the purpose of the Development Services;
14. *Disclosing Party* means the party disclosing Confidential Information to the Receiving Party;
15. *Expenses* means any disbursements, including third party software costs, travel and accommodation costs and any other third party costs, reasonably and directly incurred by us for the purpose of the provision of the Services.
16. *Fee Variation* means a change or proposed change to the agreed fee, which is associated with a Variation Request or Variation Event.
17. *Feedback* means any idea, suggestion, recommendation or request by you (or any of your Authorised Users or Personnel), whether made verbally, in writing, directly or indirectly, in connection with the Services;
18. *Insolvency Event* means any of the following events or any analogous event:
 - a) a Party disposes of the whole or any part of the Party's assets, operations or business other than in the ordinary course of business;
 - b) a Party ceases, or threatens to cease, carrying on business;
 - c) a Party is unable to pay the Party's debts as the debts fall due;

- d) any step is taken by a mortgagee to take possession or dispose of the whole or any part of the Party's assets, operations or business;
 - e) any step is taken for a party to enter into any arrangement or compromise with, or assignment for the benefit of, a Party's creditors or any class of a Party's creditors; or
 - f) any step is taken to appoint an administrator, receiver, receiver and manager, trustee, provisional liquidator or liquidator of the whole or any part of a Party's assets, operations or business;
19. *Intellectual Property* means any domain names, knowhow, inventions, processes, trade secrets or Confidential Information; or circuit layouts, software, computer programs, databases or source codes, including any application, or right to apply, for registration of, and any improvements, enhancements or modifications of, the foregoing;
20. *Intellectual Property Breach* means any breach by you (or any of your Personnel) of any of our Intellectual Property Rights (or any breaches of third party rights including any Intellectual Property Rights of third parties), including, but not limited, to you (or your Personnel):
- a) copying, altering, enhancing, adapting or modifying any of our Intellectual Property;
 - b) creating derivative works from our Intellectual Property;
 - c) providing or disclosing our Intellectual Property to, or allowing our Intellectual Property to be used by, any third party;
 - d) assigning or transferring any of our Intellectual Property Rights or granting sublicenses of any of our Intellectual Property Rights, except as expressly permitted in this Agreement;
 - e) reverse engineering or decompiling any of our Intellectual Property Rights, except where permitted by Law; or
 - f) using or exploiting our Intellectual Property for purposes other than as expressly stated in this Agreement (including, without limitation, using our Intellectual Property for commercial purposes or on-selling our Intellectual Property to third parties);
21. *Intellectual Property Rights* means for the duration of the rights in any part of the world, any industrial or intellectual property rights, whether registrable or not, including in respect of Intellectual Property;
22. *Laws* means all applicable laws, regulations, codes, guidelines, policies, protocols, consents, approvals, permits and licences, and any requirements or directions given by any person with the authority to bind the relevant Party in connection with this Agreement or the provision of the Services;

23. *Liability* means any expense, cost, liability, loss, damage, claim, notice, entitlement, investigation, demand, proceeding or judgment (whether under statute, contract, equity, tort (including negligence), indemnity or otherwise), howsoever arising, whether direct or indirect and/or whether present, unascertained, future or contingent and whether involving a third party or a Party to this Agreement or otherwise. Moral Rights has the meaning given in the *Copyright Act 1968 (Cth)*;
24. *Licence* has the meaning given to it in Section 2.4.1;
25. *New Materials* means all Intellectual Property:
 - developed, adapted, modified or created by or on behalf of us in connection with this Agreement or the provision of the Services, whether before or after the date of this Agreement; but
 - excluding Client Data and Designs;
26. *Our Materials* means all work, models, processes, technologies, code, strategies, materials, information, documentation, specifications and services that we may provide to you under this Agreement, and which may contain material which is owned by or licensed to us, and is protected by Australian and international laws;
27. *Personnel* means, in respect of a Party, any of its employees, consultants, suppliers, subcontractors or agents;
28. *Receiving Party* means the party receiving Confidential Information from the Disclosing Party;
29. *Schedule* means the schedule to this Agreement;
30. *Statutory Rights* has the meaning given in Chapter 11;
31. *System* means all hardware, software, networks and other IT systems used by a Party from time to time, including a network;
32. *Third Party Inputs* means third parties or any goods and services provided by third parties, including hosting providers, customers, end users, suppliers, transportation or logistics providers or other subcontractors which the provision of the Services may be contingent on, or impacted by;
33. *Variation*, *Variation Request* and *Variation Event* have the meanings given to them in the Schedule and in Section 2.2.2.

15 Interpretation

In this Agreement, unless the context otherwise requires:

1. a reference to this Agreement or any other document includes the document, all schedules and attachments as amended, supplemented, varied or replaced from time to time
2. a reference to any legislation or law includes subordinate legislation or law and all amendments, consolidations, replacements or re-enactments from time to time;
3. a reference to a natural person includes a body corporate, partnership, joint venture, association, government or statutory body or authority or other legal entity and vice versa;
4. no clause will be interpreted to the disadvantage of a Party merely because that Party drafted the clause or would otherwise benefit from it;
5. a reference to a party (including a Party) to a document includes that party's executors, administrators, successors, permitted assigns and persons substituted by novation from time to time;
6. a reference to a covenant, obligation or agreement of two or more persons binds or benefits them jointly and severally;
7. a reference to time is to local time in New South Wales; and
8. a reference to \$ or dollars refers to the currency of Australia from time to time.