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## WEBSITE DEVELOPMENT

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### Who should use this information sheet?

This information sheet is to help you to engage a website developer (**web developer**) to create a website. It assumes that you are happy that the website developer you have found has the necessary skills, expertise and resources to deliver the website you want.

### Why should you have a written agreement with your website developer?

Having a written agreement helps to ensure that you receive what you want from your website developer, for example:

- by setting out the scope of work you want the web developer to do;
- when you want the website to be delivered, tested and live;
- how much you are to pay and when;
- what rights each party has in relation to the website.

Arts Law recommends you discuss and finalise an agreement **before** the web developer starts work and **before** you pay any money to the web developer.

### What should you do if the web developer gives you a 'standard' agreement?

If a web developer gives you an agreement, it will generally reflect a position which is most favourable to the website developer. If you are not satisfied with some of the terms, you can try to negotiate changes. Alternatively, consider if it is better to prepare a new agreement. Look at the agreement in light of the issues discussed below and consider:

- if you – or anyone you know – has dealt with the web developer before. You might discover problems that have come up in the past;
- the potential costs of engaging the web developer;
- how important and complex the website is;
- what each party is responsible for;
- whether you are likely to have a long term relationship with the web developer, for instance in relation to ongoing website hosting, maintenance or hosting;
- whether you can continue using and modifying the website if the relationship turns sour.

## What issues should a website development agreement cover?

### Who is the web developer?

It is important to establish who the web developer is and in which capacity the web developer is entering into the website development agreement. For example, is the web developer an individual or are you dealing with a company? It is important to establish who is entering into the agreement or it may be difficult or impossible to enforce if something goes wrong. Business or trading names are not proof of a separate legal entity. Accordingly, you should ask any individuals you are dealing with under which business structure they operate, and for the details of any company if they are using a separate legal entity.

The ASIC website ([www.search.asic.gov.au/gns001.html](http://www.search.asic.gov.au/gns001.html)) has a search function which allows you to do a quick check of possible company names or relevant numbers to the legal entity such as Australian Business Numbers (**ABN**).

### What are your obligations?

- **Payments:** You should consider how you want the fees to be structured.

Set fees can be useful, for instance a set maximum payable fee for the completion of the entire website or a set fee per identified stage completed.

If you agree to pay on the basis of time spent, there is a risk that you will be charged more than you expected if the project becomes larger than expected. Try to cap hours that can be spent on the project and ensure that the web developer can only carry out additional hours with your prior written approval, or be very specific about what you want the web developer to do.

- **When do you have to pay?** Paying set fees at different stages of the project rather than upfront can be helpful.

You should think about whether you want to be able to withhold payment if you are not happy with what the web developer has delivered.

### What are the web developer's obligations?

- **Website:** be as clear and detailed as possible in the agreement about what you want the web developer to create. You should specify what you want the website to do and what you want it to look like.
- **Timetable:** you should set out a clear timetable for the web developer to comply with for the various stages including final delivery, testing (if applicable) and live date. If the web developer causes a delay or is unable to deliver, what should your options be under the agreement? One option may be to withhold money until the web developer continues or completes the development work. Another option might be to terminate the agreement (see below) but this generally means that the web developer will not complete your website and you will need to spend more time and money with a new website developer coming up to speed on the project.
- **Testing:** if your website is large or complicated, you should request acceptance testing at various stages of the website development and agree that you do not pay for delivery until the tests are passed. If you do not do this, you risk paying for a website which does not work in the agreed manner. For a testing regime to be useful, you will need to make sure that you can actually test the website in this way.

- **Confidentiality:** if your plan to launch the website is confidential, or you have other confidential information you need to share with the web developer, you should require that the web developer promises to keep that information confidential, not share it with anyone else and only use it for the purpose of developing the website for you. Please refer to Arts Law's information sheet on "Confidential Information - Protecting Your Ideas" for more information as well as a sample confidentiality agreement.
- **Domain names:** if the web developer is applying for domain name registration on your behalf, you should require that the application is in your name rather than the web developer's name. For .au second level domains (any domain ending in .au) this can be checked through the AusRegistry website at [www.mywebname.com.au](http://www.mywebname.com.au). If the web developer uses their own name, it may be more difficult to ensure the domain name is renewed and to transfer the domain name if you decide to sell this part of your business in the future.
- **Deliverables:** make sure the agreement is clear as to what 'deliverables' the web developer must provide to you for you to operate the website, as well as any technical requirements that you may need from a web host (should the requirement to change hosts arise).
- **Code:** you should ask the web developer to provide you with a copy of all website code created for each stage so that if you need to get another web developer to complete the project you have the information they require.
- **Source code:** the agreement should also cover whether the web developer is giving you the source code (the "human readable" code) and related materials. If the web developer does not agree to give the source code, you should require the web developer to put the source code and materials in escrow for you to be held by an independent third party escrow agent. This will enable you to access the source code if the developer fails to support the website or becomes insolvent. If you do not have the source code and you cannot access it, it may be difficult to support the website without the web developer.

## Rights in the website

Even though you are paying the web developer to create the website, they will own any intellectual property in the website if the agreement is silent on ownership. It is, however, preferable for you to own the intellectual property. To achieve this, you must include an express written assignment of copyright and other rights by the web developer to you in the agreement.

This is often a contentious issue and the web developer might not accept an assignment to you. The web developer may want to retain some rights in the website, for example if the web developer uses code that they had written before working on your website. You could request a combination of assignment of certain aspects and a licence of other aspects which the web developer wants to retain. You should identify what, if any, code you want to own in order to continue using, maintaining and building on the website if your relationship with the web developer ends.

A licence should be:

- perpetual. It should not be limited in time;
- granted worldwide;
- transferable. This is important should you sell your business or the website in the future;
- allow you to amend, modify and support the website or sub-licence another developer to do this.

The assignment and/or licence should apply to any material delivered in accordance with your agreement. If you fall out with the web developer and one of you terminates the agreement, you want to have the right to use and develop (or have another person develop) the website using the material created by the first web developer.

### **Third party software**

You should ask the web developer not to use any third party software without your consent.

The web developer may want to use some third party software, for instance a “content management system” in the website. If so, request the web developer to evidence a licence allowing the use of that software to operate or change your website prior to actually using the software. You should review that licence carefully, because it will cover how you can use that software and if you can further develop it. Some open source licences (eg. GNU General Public Licence) require that notice be given to the original software developer if there is any development to the core system components.

### **Web developer’s warranties and indemnities**

It is common in agreements for parties to provide certain warranties (i.e. promises) to the other party. You should request the following warranties from the web developer:

- the use of the website does not infringe anyone else’s rights. If you are providing content to the website, it would be appropriate to carve out the material you provide;
- the web developer has obtained “moral rights consents” from any person involved in the creation of the website, including any underlying software. Very generally, moral rights include the right to be attributed as the author of a work and the right not to have the work treated in a derogatory manner. It is normal to specify that the party providing material in relation to which moral rights exist has the responsibility of obtaining any moral rights consents;
- the web developer has the required expertise and resources to fulfil their obligations under the agreement; and
- the website will perform to the agreed specifications.

An indemnity is an obligation on one party to compensate the other party for all of their loss and expenses should certain things happen. You should ask for an indemnity from the web developer in relation to a breach of any warranty, for example any claim by a third party that the use of the website infringes their rights.

### **Termination rights**

You should include a right for you to end the agreement if the developer fails to meet deadlines, or the website deliverables are not acceptable.

You should ensure the agreement sets out what happens if it is terminated. For example, you should specify that the developer must provide to you the partially or fully completed website deliverables.

### **Further information**

- Arts Law’s information sheet on [Contracts: Introduction](#) offers basic advice about problems with agreements that are not in writing, and some general advice about contracts.

- Other Arts Law resources that may be helpful in relation to the content that you want to put on your website are:
  - Information sheet: [Legal issues for bloggers](#)
  - Checklists and guides: [Displaying Visual Art on the Internet](#)

## Need more help?

Contact Arts Law if you have questions about any of the topics discussed above

Telephone: (02) 9356 2566 or toll-free outside Sydney 1800 221 457

Also visit the Arts Law website ([www.artslaw.com.au](http://www.artslaw.com.au)) for more articles and information sheets.

## Disclaimer

The information in this information sheet is general. It does not constitute, and should be not relied on as, legal advice. The Arts Law Centre of Australia (**Arts Law**) recommends seeking advice from a qualified lawyer on the legal issues affecting you before acting on any legal matter.

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