

## SPS ENGAGEMENT TERMS AND CONDITIONS

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### Operative provisions

#### 1. Definitions and interpretation

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##### Definitions

1.1 The following definitions apply in this Agreement unless the context requires otherwise:

**Agreement** means the Letter of Engagement entered into by the parties and these terms and conditions.

**Authorised Third Party Disclosee** means any Representative of a Disclosee to whom that Disclosee discloses Confidential Information in accordance with clause 7.

**Business Day** means a day (other than a Saturday, Sunday or public holiday) when banks in Melbourne, Victoria are open for business.

**Change of Control** means, in respect of a particular entity, a person who Controls that entity ceasing to do so or another person acquiring Control of it.

**Charges** means Fees and Expenses.

**Claim** means any claim, complaint, demand, proceeding, suit, litigation, action, cause of action or other legal recourse (whether in contract, tort, under statute or otherwise).

**Client** means the party that will receive the Services as named in the Letter of Engagement.

**Confidential Information** means all information relating to a party, any customer, clients, suppliers, distributors or joint venture partners, of the party and/or any of the business or financial affairs of any of them, including:

- (a) any information that is specifically designated by any of them as confidential;
- (b) any information which, by its nature, may reasonably be regarded as confidential;
- (c) any information relating to any:
  - (i) agreements, arrangements or terms of trade with any existing or prospective customers, clients, suppliers, distributors or joint venture partners or other contractual counterparties;
  - (ii) customers, clients, suppliers, distributors, joint venture partners, employees, technologies, products, services, proposals, market opportunities, business or product development plans, pricing, financial position or performance, capabilities, capacities, operations or processes; or
  - (iii) Intellectual Property Rights,of any of them; and
- (d) any note, calculation, conclusion, summary or other material derived or produced partly or wholly from any such information.

**Control** has the meaning given in Section 50AA of the Corporations Act.

**Copyright Act** means the *Copyright Act 1968* (Cth).

**Corporations Act** means the *Corporations Act 2001* (Cth).

**Default Rate** means a rate of interest of 10.00% per annum.

**Disclosee** means, in respect of any particular Confidential Information, any party that has received that Confidential Information (whether directly or indirectly) from another party.

**Discloser** means, in respect of any particular Confidential Information, any party that has disclosed or discloses that Confidential Information (whether directly or indirectly) to another party.

**Event of Default** means any of the following on the part of the Client:

- (a) committing any material or persistent breach of this Agreement;
- (b) repudiating or, or, in the reasonable opinion of SPS, evincing an intention to repudiate, this Agreement;
- (c) if the Client is a company, undergoing a Change of Control without the prior written consent of SPS;
- (d) misleading SPS in any material way; and/or
- (e) an Insolvency Event occurring in respect of the Client.

**Expenses** mean the expenses of SPS for which SPS is entitled to be reimbursed by the Client pursuant to clause 4.

**Fees** means the fees (exclusive of GST and Expenses) specified in the Letter of Engagement.

**Governmental Agency** means any government or governmental, semi-governmental, administrative, fiscal or judicial body, department, commission, authority, tribunal, agency or entity whether foreign, federal, state, territorial or local.

**GST** has the same meaning given to that expression in the GST Law.

**GST Act** means *A New Tax System (Goods and Services Tax) Act 1999* (Cth), as in force from time to time.

**GST Law** has the same meaning given to that expression in the GST Act.

**Insolvency Event** means, in respect of a party:

- (a) where the party is an individual, that party commits an act of bankruptcy or is declared bankrupt or insolvent or that party's estate otherwise becomes liable to be dealt with under any law relating to bankruptcy or insolvency;
- (b) where the party is a company, a resolution is passed or court order made for the winding up of that party or an administrator is appointed to that party pursuant to any relevant law;
- (c) a receiver or manager or receiver and manager is appointed to the assets or undertaking of the party or any part thereof; or
- (d) the party is otherwise unable to pay its debts as and when they fall due.

**Input Tax Credit** has the meaning given in the GST Law.

**Intellectual Property Rights** means patents, rights to inventions, copyright and related rights, moral rights, trademarks and service marks, trade names and domain names, rights in get-up, rights to goodwill or to sue for passing off or unfair competition, rights in designs, rights in computer software, database rights, rights in confidential information (including know-how, trade secrets and marketing secrets) and any other intellectual property rights, in each case whether registered or unregistered and including all applications (or rights to apply) for, and renewals or extensions of, such rights and all similar or equivalent rights or forms of protection which subsist or will subsist now or in the future in any part of the world.

**Letter of Engagement** means the letter of engagement entered into by the parties.

**Losses** means any loss, damage, debt, cost, charge, expense, fine, outgoing, penalty, diminution in value, deficiency or other liability of any kind or character (including legal, cost recovery and other professional fees and expenses on a full indemnity basis) that a party pays, suffers or incurs or is liable for, including all:

- (a) liabilities on account of Tax;
- (b) interest and other amounts payable to third parties;
- (c) legal and other professional fees and expenses (on a full indemnity basis) and other costs incurred in connection with investigating, defending or settling any Claim, whether or not resulting in any liability; and
- (d) all amounts paid in settlement of any Claim.

**Moral Rights** has the same meaning as that term has in Part IX of the Copyright Act.

**Non-Solicitation Period** means a period of 3, 6, 9 and/or 12 months.

**Personal Information** has the meaning given in the Privacy Act.

**Privacy Act** means the *Privacy Act 1998* (Cth).

**Relevant IP** means all Intellectual Property Rights that SPS makes, develops or conceives (whether alone or in conjunction with someone else, and whether during or outside normal working hours) in the course of, or arising out of, the provision of the Services and/or SPS's engagement with the Client, including any Intellectual Property Rights so made, developed or conceived:

- (a) using the premises, resources or facilities of the Client or any of its customers, clients or suppliers;
- (b) in the course of, as a consequence of, or in relation to, the provision of the Services by SPS and/or the performance (whether proper or improper) of SPS's duties and responsibilities to the Client under this Agreement or otherwise;
- (c) as a direct or indirect result of any person's access to any Confidential Information or Intellectual Property Rights of the Client or any of its customers, clients or suppliers; or
- (d) in respect of any of the products or services of the Client or any of its customers, clients or suppliers, or any alterations, additions or methods of making, using, marketing, selling or providing such products or services.

**Representatives** means, in respect of a person, the employees, officers, consultants, agents and professional advisers of that person.

**Services** means the services provided by SPS to the Client under this Agreement as set out in the relevant Letter of Engagement and as agreed in writing from time to time.

**SPS** means Speech Pathology for Schools Pty Ltd (ACN 616 734 537).

**Stamp Duty** means any stamp, transaction or registration duty or similar charge imposed by any Governmental Agency and includes any interest, fine, penalty, charge or other amount in respect of the above, but excludes any GST.

**Start Date** means the date of the Letter of Engagement is signed or such other date as the parties may agree in writing.

**Tax Acts** means the *Income Tax Assessment Act 1936* (Cth) and the *Income Tax Assessment Act 1997* (Cth).

**Tax or Taxation** means:

- (a) any tax, levy, impost, deduction, charge, rate, compulsory loan, withholding or duty by whatever name called, levied, imposed or assessed under the Tax Acts or any other statute, ordinance or law by any Governmental Agency (including profits tax, property tax, interest tax, income tax, tax related to capital gains, tax related to the franking of dividends, bank account debits tax, fringe benefits tax, sales tax, payroll tax, superannuation guarantee charge, group or Pay as You Go withholding tax and land tax);
- (b) unless the context otherwise requires, Stamp Duty and GST; and
- (c) any interest, penalty, charge, fine or fee or other amount of any kind assessed, charged or imposed on or in respect of the above.

**Works** means all programs and programming and literary, dramatic, musical and artistic works within the meaning of the Copyright Act.

## Interpretation

1.2 The following rules of interpretation apply in this Agreement unless the context requires otherwise:

- (a) headings in this Agreement are for convenience only and do not affect its interpretation or construction;
- (b) no rule of construction applies to the disadvantage of a party because this Agreement is prepared by (or on behalf of) that party;
- (c) where any word or phrase is defined, any other part of speech or other grammatical form of that word or phrase has a cognate meaning;
- (d) a reference to a document (including this Agreement) is a reference to that document (including any schedules and annexures) as amended, consolidated, supplemented, novated or replaced;
- (e) references to recitals, clauses, subclauses, paragraphs, annexures or schedules are references to recitals, clauses, subclauses, paragraphs, annexures and schedules of or to this Agreement;
- (f) in each schedule to this Agreement, a reference to a paragraph is a reference to a paragraph in that schedule;

- (g) a reference to any statute, proclamation, rule, code, regulation or ordinance includes any amendment, consolidation, modification, re-enactment or reprint of it or any statute, proclamation, rule, code, regulation or ordinance replacing it;
- (h) an expression importing a natural person includes any individual, corporation or other body corporate, partnership, trust or association and any Governmental Agency and that person's personal representatives, successors, permitted assigns, substitutes, executors and administrators;
- (i) a reference to writing includes any communication sent by post, facsimile or email;
- (j) a reference to time refers to time in Melbourne, Victoria and time is of the essence;
- (k) all monetary amounts are in Australian currency;
- (l) a reference to a "**liability**" includes a present, prospective, future or contingent liability;
- (m) the word "**month**" means calendar month and the word "**year**" means 12 calendar months;
- (n) the meaning of general words is not limited by specific examples introduced by "**include**", "**includes**", "**including**", "**for example**", "**in particular**", "**such as**" or similar expressions;
- (o) a reference to a "**party**" is a reference to a party to this Agreement and a reference to a "**third party**" is a reference to a person that is not a party to this Agreement;
- (p) a reference to any thing is a reference to the whole and each part of it;
- (q) a reference to a group of persons is a reference to all of them collectively and to each of them individually;
- (r) words in the singular include the plural and vice versa; and
- (s) a reference to one gender includes a reference to the other genders.

## **2. Engagement as Company**

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- 2.1 Upon signing the Letter of Engagement, the Client engages SPS on to provide the Services to the Client, and SPS accepts that engagement and agrees to provide the Services to the Client, in accordance with the terms of this Agreement.
- 2.2 The Letter of Engagement will prevail to the extent of any inconsistency with these terms and conditions.

### **Commencement and duration**

- 2.3 SPS's engagement with the Client starts on the Start Date and continues until the end of the school year or other date stated in the Letter of Engagement.
- 2.4 The Client can request to be consulted prior to the allocation of the speech pathologist to their school for the purpose of endorsing any school-fit considerations.

## Nature of relationship

- 2.5 SPS is an independent contractor of the Client and nothing in this Agreement constitutes a relationship of employer and employee, principal and agent, partnership or joint venture between the parties.

## 3. Provision of the Services

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### Letter of Engagement

- 3.1 SPS is not obliged to provide the Services unless the Client has entered into the Letter of Engagement and is and remains compliant with this Agreement.

### Standards and duties

- 3.2 SPS must, in providing the Services, comply with its legal obligations and the following standards and duties
- (a) **(Honesty and diligence)** be honest and diligent and provide the Services to the best of its knowledge and abilities;
  - (b) **(Standards)** at all times maintain reasonable ethical, professional and technical standards;
  - (c) **(Discrimination and harassment)** not unlawfully discriminate against, sexually harass or otherwise physically or verbally abuse any person;
  - (d) **(Privacy)** in relation to any Personal Information of any child, customer, client, supplier or Representative of the Client, any user or prospective user or any other person, comply with its obligations under the Privacy Act, the [SPS Privacy Policy](#), and any privacy policy and procedure provided to it by the Client in advance of the Services being provided; and
  - (e) **(Child Safety)** to hold the care, safety and wellbeing of children and young people as a central and fundamental responsibility, with a values-based, legal and purpose-driven responsibility to create a nurturing culture where children and young people are respected, their voices are heard, and they are safe and feel safe, in accordance with the *SPS Child Safety & Wellbeing policy*, the *SPS Child Safety Code of Conduct*, and any child safety policy and procedure provided to it by the Client in advance of the Services being provided.

## 4. Reimbursement of Expenses

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- 4.1 The Client will pay all reasonable expenses properly and necessarily incurred by SPS in the course of providing the Services, provided that SPS:
- (i) obtains the Client's written consent before incurring the expenses; and
  - (ii) provides the Client with acceptable documentation for the expenses incurred;

## 5. Payment

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### Timing of payments

- 5.1 The Client must pay SPS for Charges invoiced to the Client in full within 7 days of the issue of an invoice.

### **Method of payment**

- 5.2 All amounts to be paid by a party to another party under or in connection with this Agreement must be paid by way of bank cheque or electronic funds transfer into the account nominated by the other party.

### **No set-off or deduction**

- 5.3 All amounts payable under or in connection with this Agreement must be paid without set-off, counterclaim, withholding, deduction or claim to a lien whatsoever, whether or not any such set-off, counterclaim, withholding, deduction or lien arises under this Agreement (unless otherwise required by law).
- 5.4 If a party is required by law to make a deduction or withholding in respect of any sum payable under or in connection with this Agreement to another party, it must, at the same time as the sum that is the subject of the deduction or withholding is payable, make a payment to the other party of such additional amount as is required to ensure that the net amount received by the other party will equal the full amount that would have been received by it had no such deduction or withholding been required to be made.

### **Default interest**

- 5.5 If a party fails to pay any sum payable by it under this Agreement to another party at the time and otherwise in the manner provided in this Agreement, it must pay interest on that sum from the due date of payment until that sum is paid in full at the Default Rate, calculated daily on the basis of a 365-day year and compounded monthly. Interest will accrue from day to day and will be payable on demand. The payment of interest by a party to another party in respect of any late payment under this clause 5.5 is in addition to any other remedies that the other party may have in respect of such late payment.
- 5.6 If a liability of a party to another party under this Agreement becomes merged in a judgement or order and the interest rate that applies under that judgement or order is lower than the Default Rate, that party must, as an independent obligation, pay to the other party, at the same time and in the same manner as the sum that is the subject of that judgement or order is to be paid, such additional interest on that sum as is required to ensure that the total amount of interest that the other party receives in respect of that liability is equal to the Default Rate.

## **6. GST**

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### **Definitions regarding GST**

- 6.1 In this clause 6:
- (a) expressions that are not defined, but which have a defined meaning in the GST Law, have the same meaning as in the GST Law;
  - (b) any part of a supply that is treated as a separate supply for GST purposes (including attributing GST payable to tax periods) will be treated as a separate supply for the purposes of this clause 6; and
  - (c) any consideration that is specified to be inclusive of GST must not be taken into account in calculating the GST payable in relation to a supply for the purpose of this clause 6.

### Consideration is exclusive of GST

- 6.2 Unless expressly stated otherwise, any sum payable, or amount used in the calculation of a sum payable, under this Agreement has been determined without regard to GST and must be increased on account of any GST payable under this clause 6.

### Receiving Party to pay additional amount

- 6.3 If GST is imposed on any supply made under or in accordance with this Agreement, the recipient of the supply (**Receiving Party**) must pay to the supplier (**Providing Party**) an additional amount equal to the GST payable on the supply, subject to the Receiving Party receiving a valid tax invoice, or a document that the Commissioner will treat as a tax invoice, in respect of the supply at or before the time of payment. Payment of the additional amount will be made at the same time and in the same manner as payment for the supply is required to be made in accordance with this Agreement.

### Fines, penalties and interest

- 6.4 The amount recoverable on account of GST under this clause 6 by the Providing Party will include any fines, penalties, interest and other charges incurred as a consequence of any late payment or other default by the Receiving Party under this clause 6.

### Reimbursement

- 6.5 If any party is required to pay, reimburse or indemnify another party for the whole or any part of any cost, expense, loss, liability or other amount that the other party has incurred or will incur in connection with this Agreement, the amount must be reduced by the amount for which the other party can claim an Input Tax Credit, partial Input Tax Credit or other similar offset.

### Adjustment events

- 6.6 If, at any time, an adjustment event arises in respect of any supply made by a party under this Agreement, a corresponding adjustment must be made between the parties in respect of any amount paid to the Providing Party by the Receiving Party pursuant to clause 6.3 and payments to give effect to the adjustment must be made and the Providing Party must issue an adjustment note.

## 7. Confidentiality

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- 7.1 Subject to clauses 7.3 and 7.4, a Disclosee must:
- (a) keep all Confidential Information confidential;
  - (b) not use or exploit any Confidential Information in any way except in the proper performance of the Services in accordance with this Agreement;
  - (c) not disclose or make available any Confidential Information in whole or in part to any third party;
  - (d) not copy, reduce to writing or otherwise record any Confidential Information except in the proper performance of the Services in accordance with this Agreement (and any such copies, reductions to writing and records will be the property of the Discloser); and
  - (e) ensure that any and all Authorised Third Party Disclosees:



- (i) comply with the obligations in this Agreement as if each of them was a party to this Agreement in the place of the Disclosee; and
- (ii) do not do, or omit to do, anything which, if done or omitted to be done by the Disclosee, would constitute a breach of this Agreement by the Disclosee.

7.2 The Disclosee shall be responsible for, and liable to the Discloser in respect of, the actions or omissions of any and all of its Authorised Third Party Disclosees in relation to the Confidential Information as if they were the actions or omissions of the Disclosee.

### Exceptions

7.3 The Disclosee may disclose Confidential Information to those of its Representatives who have an actual need to know the Confidential Information but only in the proper provision of the Services and performance of its duties under this Agreement and provided that it informs such Representatives of the confidential nature of the Confidential Information before such disclosure.

7.4 Subject to clause 7.5, the obligations in clause 7.1 will not apply to any Confidential Information which (as shown by appropriate documentation and other evidence in the relevant Disclosee's possession):

- (a) was already known to the Disclosee on a non-confidential basis prior to the time of its first disclosure by the Discloser to the Disclosee, unless it came to be so known as a direct or indirect result of having been:
  - (i) unlawfully obtained by the Disclosee, whether from a third party or otherwise; or
  - (ii) received by the Disclosee from a third party that owed a confidentiality obligation to the Discloser in respect of that information at the time of such receipt, in circumstances in which the Disclosee knew, or ought reasonably to have known after due enquiry, that the third party owed that confidentiality obligation to the Discloser;
- (b) is or becomes generally available to the public, unless it became so generally available as a direct or indirect result of having been disclosed by any person:
  - (i) in circumstances that constitute a breach of this Agreement by the Disclosee (for the avoidance of doubt, including any breach by the Disclosee of its obligations under clause 7.1(e) to ensure that its Authorised Third Party Disclosees comply with the obligations in this Agreement as if they were parties to this Agreement in the place of the Disclosee); or
  - (ii) that owed a confidentiality obligation to the Discloser in respect of that information at the time of such disclosure, in circumstances in which the Disclosee knew, or ought reasonably to have known after due enquiry, that the person owed that confidentiality obligation to the Discloser;
- (c) is, after the time of its first disclosure by the Discloser to the Disclosee, lawfully received by the Disclosee from a third party and the Disclosee reasonably believed, after due enquiry, that the information was not so received as a direct or indirect result of a breach by any person of a confidentiality obligation owed to the Discloser;
- (d) is required by law or court order to be disclosed, provided that the Disclosee must:

- (i) promptly notify the Discloser in writing in advance of any such disclosure, if reasonably practicable; and
  - (ii) reasonably assist the Discloser in obtaining confidential treatment for, or avoiding or minimising such disclosure of, the relevant Confidential Information to the extent reasonably requested by the Discloser;
- (e) is independently developed by the Disclosee without any direct or indirect use of, reference to, or reliance on any Confidential Information; or
  - (f) is authorised for release or use by the written pre-approval of the Discloser but only to the extent of such written pre-approval.

7.5 The exceptions in clause 7.4 shall not apply to any specific Confidential Information merely because it is included in more generally non-confidential information, nor to any specific combination of Confidential Information merely because individual elements, but not the combination, are included in non-confidential information.

## **8. Non-disparagement**

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8.1 Subject to clause 8.2, on and from the date of this Agreement, each party must not:

- (a) make, express, transmit, speak, write, verbalise or otherwise communicate in any way (directly or indirectly, in any capacity or manner) any remark, comment, message, information, declaration, communication or other statement of any kind (whether verbal, in writing, electronically transferred or otherwise) that might reasonably be construed to be critical of, or derogatory or negative towards, any other party or any Representative of any other party; or
- (b) cause, further, assist, solicit, encourage or knowingly permit any other person to do so, or support or participate in any other person doing so,

and must take all reasonable steps to prevent its Representatives from doing so.

8.2 Clause 8.1 shall not prohibit any party from making any statement or disclosure as required by law or court order, provided that such party must:

- (a) promptly notify the other party in writing in advance of any such statement or disclosure, if reasonably practicable; and
- (b) reasonably assist the other party in obtaining confidential treatment for, or avoiding or minimising the dissemination of, such statement or disclosure to the extent reasonably requested by any party.

## **9. Intellectual Property**

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9.1 The parties agree that all Relevant IP will be owned by, and vest in, SPS.

### **Assignment**

9.2 The Client hereby assigns, transfers and conveys to SPS all current and future right, title and interest in all Relevant IP and acknowledges that all future Relevant IP will vest in SPS on and from creation.

### **Client's duty to assist SPS**

9.3 The Client must do anything necessary, including executing any documents, for the purpose of effecting, perfecting and/or protecting SPS's title to any Relevant IP, in Australia or in such other countries as SPS may require at its discretion.

### **Permitted use**

9.4 The Client may not use or reproduce any Relevant IP or any other Intellectual Property Rights of SPS or any of SPS's customers, clients or suppliers without SPS's prior written approval, except in the performance of its duties under this Agreement.

### **Moral rights**

9.5 The Client consents to the doing of any acts, or making of any omissions, by SPS or any of SPS's employees, officers, contractors, agents, licensees or assigns that infringes its Moral Rights in any Works that constitute Relevant IP, including:

- (a) not naming the Client as the author of a Work; or
- (b) amending or modifying (whether by changing, adding to or deleting/removing) any part of a Work but only if the Client is not named as the author of the amended or modified Work,

whether those acts or omissions occur before, on or after the date of this Agreement. The Client acknowledges that its consent pursuant to this clause 9.5 is genuinely given without duress of any kind and that it has been given the opportunity to seek legal advice on the effect of giving that consent.

## **10. Liability and remedies**

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### **Indemnity**

10.1 SPS shall have personal liability for, and hereby irrevocably indemnifies and covenants to hold the Client harmless from and against, any and all Losses that may be suffered by the Client and which arise, directly in connection with any breach of this Agreement by SPS and/or any grossly negligent conduct in the provision of the Services.

10.2 The Client shall have personal liability for, and hereby irrevocably indemnifies and covenants to hold SPS harmless from and against, any and all Losses that may be suffered by SPS and which arise, directly or indirectly, in connection with any breach of this Agreement by the Client and/or any negligent or other tortious conduct in the provision of the Services.

### **Indemnities continuing**

10.3 Each indemnity contained in this Agreement is an additional, separate, independent and continuing obligation that survives the termination of this Agreement despite any settlement of account or other occurrence and remains in full force and effect until all money owing, contingently or otherwise, under the relevant indemnity has been paid in full and no one indemnity limits the generality of any other indemnity.

### **Limitation of liability**

10.4 To the maximum extent permitted by law, SPS and its Representatives expressly limits their aggregate liability in respect of any and all Claims for any Losses that the Client and/or any of its Representatives may bring against SPS or its Representatives under this Agreement or

otherwise in respect of the Services to the following remedies (the choice of which is to be at SPS's sole discretion):

- (i) re-supply of the Services;
- (ii) payment of the costs of supply of the Services by a third party; or
- (iii) the refund of any amounts paid by the Client to SPS under this Agreement in respect to the Services,

even if SPS has been advised of the possibility of such Losses,

and the Client acknowledges and agrees that SPS holds the benefit of this clause 10.4 for itself and as agent and trustee for and on behalf of each of its Representatives.

### **Force majeure**

10.5 To the maximum extent permitted by law, SPS and its Representatives expressly exclude liability for any damage and/or delay in the performance of any obligation of SPS under this Agreement where such damage or delay is caused by circumstances beyond the reasonable control of SPS and SPS shall be entitled to a reasonable extension of time for the performance of such obligations, and the Client acknowledges and agrees that SPS holds the benefit of this clause 10.5 for itself and as agent and trustee for and on behalf of each of its Representatives.

### **Remedies for breach**

10.6 Each party acknowledges and agrees that, in the event of any breach by the other party of the provisions of clause 7 (Confidentiality), clause 8 (Non-disparagement) or clause 12 (Non-solicitation), damages may not be an adequate remedy and the first-mentioned party may, in addition to any other remedies, obtain an injunction.

## **11. Termination**

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### **Termination for breach**

- 11.1 SPS may terminate this Agreement immediately by notice to the Client if an Event of Default occurs in respect of the Client.
- 11.2 If SPS commits any material or persistent breach of this Agreement, the Client may (but is not obliged to) provide SPS with a notice of breach in writing. If SPS fails to remedy the breach within 30 Business Days after the date of its receipt of such notice, the Client may terminate this Agreement with immediate effect upon providing SPS with a further notice of termination in writing.

### **Termination with notice**

- 11.3 The Client acknowledges that SPS invests significantly, in advance, in order to provide the Services under this Agreement. The Client may, without limitation to its rights under clause 11.2, terminate this Agreement at any time by giving at least 6 months' notice to SPS. SPS may waive all or part of such notice period.
- 11.4 SPS may, without limitation to its rights under clause 11.1, terminate this Agreement at any time by giving at least 6 months' notice to the Client. The Client may waive all or part of such notice period.

### **Effect of termination**

- 11.5 In the event of any termination of this Agreement in any circumstances and for any reason whatsoever:
- (a) the Client will remain liable to pay all Charges accrued up to and including the date of termination, whether or not invoiced prior to the date of termination (for the avoidance of doubt, in the event of any termination of this Agreement by the Client, including Charges incurred by SPS for the purchase of materials for those Services prior to such termination); and
  - (b) SPS will send to the Client a final invoice for the balance of any unbilled Charges accrued up to and including the date of termination and clause 5 will apply in respect thereof.

### **During notice period**

- 11.6 In the event that SPS's engagement under this Agreement is terminated upon notice by either party the Client may, at its absolute discretion, require SPS to refrain from providing the Services during the relevant notice period.

### **Partially completed deliverables**

- 11.7 Upon the cessation of SPS's engagement under this Agreement, subject to payment of all outstanding Charges by the Client in accordance with the terms of this Agreement, SPS will deliver to the Client any and all partially completed deliverables that are included within the scope of the Services.

### **Ipsa facto legislation**

- 11.8 If any provision of this Agreement is otherwise unenforceable by virtue of the operation of the *Treasury Laws Amendment (2017 Enterprise Incentives No. 2) Act 2017* (Cth), upon the occurrence of an Insolvency Event in respect of a particular party, notwithstanding any other provision of this Agreement, to the maximum extent permitted by law:
- (a) time is of the essence in respect of all obligations of that party under this Agreement (whether falling due for performance before, upon or after the occurrence of that Insolvency Event); and
  - (b) any breach of this Agreement by that party (whether occurring before, upon or after the occurrence of that Insolvency Event), however minor, will (alone or, severally, in combination with the occurrence of that Insolvency Event) be deemed to be a material breach of this Agreement,

and, if any such material breach has occurred or occurs, the parties acknowledge and agree that such provision will instead be enforceable by virtue of the occurrence of that material breach.

### **Accrued rights**

- 11.9 Termination of this Agreement will not affect any rights or liabilities that the parties have accrued under it prior to such termination.

## Survival

11.10 The obligations of the parties under clause 7 (Confidentiality), clause 8 (Non-disparagement), clause 9 (Intellectual Property), clause 10 (Liability and remedies), clause 12 (Non-solicitation) and this clause 11 will survive the termination of this Agreement.

## 12. Non-solicitation

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12.1 During SPS's engagement with the Client under this Agreement and for each Non-Solicitation Period thereafter, the Client must not, without SPS's prior written consent (which SPS may withhold or delay in its absolute discretion), directly or indirectly:

- (a) **(non-solicitation suppliers)** interfere with or disrupt, or attempt to interfere with or disrupt, any relationship, whether contractual or otherwise, between SPS and any of SPS's suppliers, distributors or joint venture partners, or identified prospective suppliers, distributors or joint venture partners; or
- (b) **(non-solicitation of staff)** induce, encourage or solicit any of SPS's officers, employees, contractors or agents to cease their employment, engagement or agency with SPS.

12.2 The Client acknowledges and agrees that:

- (a) the restraints in clause 12.1 constitute several separate covenants and restraints consisting of each of clauses 12.1(a) and (b) combined with each separate Non-Solicitation Period severally;
- (b) each of those separate covenants and restraints is a fair and reasonable restraint of trade that goes no further than is reasonably necessary to protect SPS's goodwill and business;
- (c) the Client has received substantial and valuable consideration for each of those separate covenants and restraints, including its receipt of the Services; and
- (d) breach by the Client of any of those separate covenants and restraints would be unfair and calculated to damage SPS's goodwill and business and would lead to substantial loss to SPS. The Client will, at a minimum, indemnify and reimburse SPS for all costs and Losses suffered directly or indirectly by SPS or its Representatives because of any breach of clause 12.1

12.3 The parties intend the covenants and restraints under clauses 12.1 to operate to the maximum extent. If any of those separate covenants and restraints would, in the absence of this clause 12.3, be void as unreasonable for the protection of the interests of SPS but would not be so void if any part of the wording in this clause 12 was deleted or amended, the separate covenants and restraints will apply with the minimum modifications necessary to make them effective.

## 13. Notices

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13.1 A notice given to a party under this Agreement must be:

- (a) in writing in English;
- (b) sent to the address or email address of the relevant party as the relevant party may notify to the other party from time to time; and

- (c) delivered/sent either: personally, by commercial courier, by pre-paid post or by e-mail.

13.2 A notice is deemed to have been received:

- (a) if delivered personally, at the time of delivery;
- (b) if delivered by commercial courier, at the time of signature of the courier's receipt;
- (c) if sent by pre-paid post, 48 hours from the date of posting; or
- (d) if sent by e-mail, 4 hours after the sent time (as recorded on the sender's e-mail server), unless the sender receives a notice from the party's email server or internet service provider that the message has not been delivered to the party,

except that, if such deemed receipt is not within business hours (meaning 9:00 am to 5:30 pm on a Business Day), the notice will be deemed to have been received at the next commencement of business hours in the place of deemed receipt.

13.3 To prove service, it is sufficient to prove that:

- (a) in the case of post – that the envelope containing the notice was properly addressed and posted; and
- (b) in the case of email – the email was transmitted to the party's email server or internet service provider.

## **14. General**

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### **Further assurances**

14.1 Each party must (at its own expense, unless otherwise provided in this Agreement) promptly execute and deliver all such documents, and do all such things, as any other party may from time to time reasonably require for the purpose of giving full effect to the provisions of this Agreement.

### **Third parties**

14.2 This Agreement is made for the benefit of the parties to it and their successors and permitted assigns and is not intended to benefit, or be enforceable by, anyone else.

### **Costs**

14.3 All costs and expenses in connection with the negotiation, preparation and execution of this Agreement, and any other agreements or documents entered into or signed pursuant to this Agreement, will be borne by the party that incurred the costs.

### **Entire agreement**

14.4 This Agreement contains the entire understanding between the parties in relation to its subject matter and supersedes any previous arrangement, understanding or agreement relating to its subject matter. There are no express or implied conditions, warranties, promises, representations or obligations, written or oral, in relation to this Agreement other than those expressly stated in it or necessarily implied by statute.

### **Severability**

14.5 If a provision of this Agreement is invalid or unenforceable in a jurisdiction:

- (a) it is to be read down or severed in that jurisdiction to the extent of the invalidity or unenforceability; and
- (b) that fact does not affect the validity or enforceability of that provision in another jurisdiction, or the remaining provisions.

#### **No waiver**

14.6 No failure, delay, relaxation or indulgence by a party in exercising any power or right conferred upon it under this Agreement will operate as a waiver of that power or right. No single or partial exercise of any power or right precludes any other or future exercise of it, or the exercise of any other power or right under this Agreement.

#### **Amendment**

14.7 This Agreement may not be varied except by written instrument executed by all of the parties.

#### **Assignment**

A party must not assign or otherwise transfer, create any charge, trust or other interest in, or otherwise deal in any other way with, any of its rights under this Agreement without the prior written consent of the other party.

#### **Counterparts**

14.8 This Agreement may be executed in any number of counterparts, each of which is an original and which together will have the same effect as if each party had signed the same document.

#### **Electronic exchange**

14.9 Delivery of an executed counterpart of this Agreement by email in PDF or other image format, will be equally effective as delivery of an original signed hard copy of that counterpart.

14.10 If a party delivers an executed counterpart of this Agreement under clause 14.9:

- (a) it must also deliver an original signed hard copy of that counterpart, but failure to do so will not affect the validity, enforceability or binding effect of this Agreement; and
- (b) in any legal proceedings relating to this Agreement, each party waives the right to raise any defence based upon any such failure.

#### **Governing law and jurisdiction**

14.11 This Agreement and any disputes or claims arising out of or in connection with its subject matter or formation (including non-contractual disputes or claims) are governed by, and shall be construed in accordance with, the laws of Victoria, Australia.

14.12 The parties irrevocably agree that the courts of Victoria, Australia have exclusive jurisdiction to settle any dispute or claim that arises out of, or in connection with, this Agreement or its subject matter or formation (including non-contractual disputes or claims).

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