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# **Sophia's Paint N'Sip**

## **Terms and Conditions**

**Sarah Chowis Pty Ltd**  
trading as "Sophia's Paint N'Sip"  
(ABN 17 668 895 547)

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These Terms of Business constitute a legal agreement between you (“**you**” or “**the Customer**”) and Sarah Chowis Pty Ltd trading as “Sophia’s Paint n’Sip” (ABN 17 668 895 547) (“**we/us**” or “**the Provider**”). Please read this agreement carefully because it governs the goods and/or services received by you. We may modify this agreement from time to time, subject to clause 13.7.

By clicking “**I agree**” (or similar button or checkbox) or by ordering through this website or through the Provider, you indicate that you agree to be bound by this agreement. If you do not agree to this agreement, do not make payment or purchase any services with us.

We will rely on the authority of the person making the booking or Order to act on behalf of any other individual on the booking (regardless of whether other individuals have made separate payments) and that person will bind all such individuals to these terms and conditions.

These terms and conditions do not grant you any other rights other than those expressly contained herein and any rights pursuant to the law.

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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:

**Authorised Third Party Disclosee** means any Representative of a Disclosee to whom that Disclosee discloses Confidential Information in accordance with clause 8.

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

**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).

**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.

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

**Customer** means the Customer of the Services as named in the Order.

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

**Deposit** has the meaning given in clause 4.1.

**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.

**Engagement** has the meaning given in clause 3.1, being each individual engagement for the Provider to provide specific Services to the Customer pursuant to an Order.

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

- (e) committing any material or persistent breach of this agreement;
- (f) repudiating or, or, in the reasonable opinion of the Provider, evincing an intention to repudiate, this agreement;
- (g) if the Customer is a company, undergoing a Change of Control without the prior written consent of the Provider;
- (h) misleading the Provider in any material way; and/or
- (i) an Insolvency Event occurring in respect of the Customer.

**Expenses** mean the expenses of the Provider for which the Provider is entitled to be reimbursed by the Customer pursuant to clause 4.8.

**Fees** has the meaning given in clause 4.1.

**Fixed Price** means, in respect of a particular Engagement, the price (exclusive of GST) specified in the relevant Order for all of the Services.

**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.

**Hourly Rate** means the hourly rate set out in the relevant Order, if applicable.

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

- (j) 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;
- (k) 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;
- (l) a receiver or manager or receiver and manager is appointed to the assets or undertaking of the party or any part thereof; or
- (m) 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.

**Losses** means any loss, damage, debt, cost, charge, expense, fine, outgoing, penalty, diminution in value, deficiency or other liability of any kind or character, whether:

- (n) arising in contract, negligence, tort, equity, statute or otherwise; and
- (o) it be consequential, indirect, incidental, special, punitive, exemplary or otherwise, including loss of profits or revenue, loss of goodwill or reputation, business interruption, loss of data and failure to realise any anticipated savings or benefits of any kind,

that a party pays, suffers or incurs or is liable for, including all:

- (p) liabilities on account of Tax;
- (q) interest and other amounts payable to third parties;
- (r) 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
- (s) all amounts paid in settlement of any Claim.

**Order** means, in respect of a particular Engagement, the document headed "Order" or similar setting out the scope of the Services for that Engagement as provided by the Provider to the Customer and accepted by the parties in accordance with this agreement.

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

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

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

**Services** means the services provided by the Provider to the Customer under this agreement in respect of each Engagement, as set out in the relevant Order.

**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 this agreement 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:

- (t) 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);
- (u) unless the context otherwise requires, Stamp Duty and GST; and
- (v) any interest, penalty, charge, fine or fee or other amount of any kind assessed, charged or imposed on or in respect of the above.

## **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 Adelaide, South Australia 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 Provider**

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2.1. The Customer hereby engages the Provider on a non-exclusive basis to provide the Services to the Customer, and the Provider hereby accepts that engagement and agrees to provide the Services to the Customer, in accordance with the terms of this agreement.

### **Commencement and duration**

2.2. The Provider’s engagement with the Customer will:

- (a) commence on the Start Date; and
- (b) continue indefinitely unless and until it is terminated in accordance with clause 11.

### **Nature of relationship**

2.3. The Provider is an independent contractor of the Customer 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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### **Order**

3.1. In respect of each individual engagement for the Provider to provide Services to the Customer under this agreement (each an **Engagement**), the parties must first agree on the Order. The Provider’s obligation to provide the Services that are the subject of each Engagement does not arise unless and until the Customer has notified the Provider of the Customer’s acceptance of the relevant Order.

## Standards and duties

- 3.2. The Provider must, in providing the Services, comply with the standards and duties set out in Schedule 1.

## 4. Pricing and invoicing

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### Pricing

- 4.1. The Provider reserves the right to change the Prices for Services displayed on its website or in-person at any time before the Customer places an Order.
- 4.2. Subject to clause 3.1, in respect of each Engagement, the parties have agreed that the total price for the relevant Services (exclusive of GST and Expenses, and including a Deposit where relevant) (the **Fees**) will be, if as designated in the relevant Order:
- (a) (**Fixed Price**) a Fixed Price applies – that Fixed Price payable in advance. The Provider will invoice the Customer for all relevant Charges in accordance with clause 5; and
  - (b) (**Hourly Rate**) the Hourly Rate applies – calculated on the basis of the time spent by the Provider in exclusively providing those Services on an hourly rate basis at the Hourly Rate in accordance with clause 4.5 and payable in arrears (subject to clause 4.2(b)(i)) upon completion of the Services. The Provider will invoice the Customer by way of a single invoice for all relevant Charges following completion of all relevant work to the reasonable satisfaction of the Customer, provided that if, as designated in the relevant Order, a deposit is specified (the **Deposit**):
    - (i) the Deposit will be payable upon commencement of the Services. The Provider will invoice the Customer for the Deposit at any time, but not less than 10 Business Days, prior to commencement of the Services and the Customer must pay the Deposit prior to the commencement of the Services; and
    - (ii) the balance of all relevant Charges will be payable in arrears upon completion of the Services. The Provider will invoice the Customer for that balance following completion of all relevant work to the reasonable satisfaction of the Customer.

### Deposit (if any) non-refundable

- 4.3. The Customer may be required to pay a Deposit to the Provider at the time of booking.
- 4.4. Subject to Australian Consumer Law, all Deposits are non-refundable for changes of mind or cancellations.

### Hourly Rates

- 4.5. Hourly Rates shall be proportionately charged for work.
- 4.6. The Provider must keep and maintain accurate records of the number of hours of Services in respect of which the Hourly Rate applies and provide the Customer with a copy of such records upon reasonable notice as may be requested by the Customer from time to time.



- 4.7. The Hourly Rate may only be changed by way of an amendment to this agreement pursuant to clause 13.7.

### **Reimbursement of Expenses**

- 4.8. The Customer will pay all reasonable expenses properly and necessarily incurred by the Provider in the course of providing the Services, provided that:
- (a) the Provider:
    - (i) obtains the Customer's written consent before incurring the expenses;
    - (ii) provides the Customer with acceptable documentation for the expenses incurred; and
    - (iii) complies with any applicable expenses policy of the Customer in force from time to time, provided that a copy of the policy has been provided to the Provider by the Customer prior to the relevant expense being incurred; and
  - (b) the Customer will not be required to reimburse the Provider for any amount of GST that the Provider has paid, or is liable to pay, in relation to any supply acquired by the Provider from any third party if the Provider has received, or is entitled to receive, an Input Tax Credit for that GST.

## **5. Orders**

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### **Order constitutes offer**

- 5.1. By placing an order through the Provider, whether by way of the Provider's online website or in-person, the Customer makes an irrevocable offer to the Provider to purchase the Services that they have selected pursuant to these Terms and Conditions. Information contained on the Provider's website constitutes an invitation to treat only. No information in the Provider's website constitutes an offer to supply any services to the Customer – however, the Provider will endeavour to supply the Customer's selected services to the Customer.
- 5.2. The Provider will not commence processing any Order made through its website or in-person unless and until:
- (a) payment for the Order has been received by the Provider in full; and
  - (b) the Order has passed the Provider's internal validation procedures, which are undertaken in order to verify the bona fides of each Order for the purpose of preventing credit card and other fraud.
- 5.3. The Provider reserves the right in its full discretion to:
- (a) at any time prior to the Customer's Order being accepted in accordance with these Terms, cancel all or part of the Order; and
  - (b) at any time:
    - (i) refuse to provide the Services to the Customer; and/or
    - (ii) terminate and refuse the Customer access or entry to the Provider's physical business premises on which the provision of Services occurs.

## **Acceptance of orders**

- 5.4. Acceptance of each Order will take place if and when the Provider either:
- (a) provides the Services to the Customer, at the time at which the Provider commences providing the Services; or
  - (b) notifies you in writing that the Customer's Order has been accepted, at the time at which such notification is sent by the Provider.

## **6. Payment**

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### **Timing of payments**

- 6.1. The Deposit (if any) is payable in accordance with the provisions of clause 4. The Customer must pay to the Provider all other Charges pursuant to clause 4 and clause 5 in full.
- 6.2. For Fixed Prices, the Customer must pay to the Provider the Price upfront upon making the Order or booking.
- 6.3. For Services charged by way of the Provider's Hourly Rate, the Customer may pay to the Provider all Charges invoiced on or before the date that is 10 Business Days after the Customer's receipt of the relevant invoice.

### **Method of payment**

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

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

- 6.5. 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).
- 6.6. 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**

- 6.7. 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 6.7 is in addition to any other remedies that the other party may have in respect of such late payment.

- 6.8. 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.

## **7. GST**

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### **Definitions regarding GST**

7.1. In this clause 7:

- (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 7; 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 7.

### **Consideration is exclusive of GST**

7.2. 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 7.

### **Receiving Party to pay additional amount**

7.3. If GST is imposed on any supply made under or in accordance with this agreement, the Customer 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**

7.4. The amount recoverable on account of GST under this clause 7 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 7.

### **Reimbursement**

7.5. 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**

- 7.6. 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 7.3 and payments to give effect to the adjustment must be made and the Providing Party must issue an adjustment note.

## **8. Confidentiality**

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- 8.1. Subject to clauses 8.3 and 8.4, 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.
- 8.2. 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**

- 8.3. 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.
- 8.4. Subject to clause 8.5, the obligations in clause 8.1 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 8.1(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.

8.5. The exceptions in clause 8.4 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.

## **9. Non-disparagement**

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9.1. Subject to clause 9.2, 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.

9.2. Clause 9.1 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.

## **10. Liability and remedies**

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### **Indemnity**

- 10.1. The Customer shall have personal liability for, and hereby irrevocably indemnifies and covenants to hold the Provider harmless from and against, any and all Losses that may be suffered by the Provider and which arise, directly or indirectly, in connection with any breach of this agreement by the Customer and/or any negligent or other tortious conduct in the provision of the Services.
- 10.2. The Customer agrees that its attendance at the Provider's business premises and participation of in the Provider's provision of the Services is at the Customer's own discretion and risk. The Customer agrees to release the Provider and its officers, employees, agents, consultants, licensors, partners and affiliates from any claim, demand or cause of action that the Customer may have against any of them arising from this agreement or the use of the Provider's website and the Services by the Customer and the Customer on behalf of any other individual on the booking and/or Order. The Provider may plead this release as a bar and complete defence to any claims or proceedings.

### **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, the Provider and its Representatives expressly:

- (a) **(Disclaimer of warranties)** disclaim all conditions, representations and warranties (whether express or implied, statutory or otherwise) in relation to the Services, including any implied warranty of merchantability, fitness for a particular purpose or non-infringement. Without limitation to the foregoing, the Provider and its Representatives make no representation, and provide no warranty or guarantee, that:
  - (i) the Customer will achieve any particular results from the provision of the Services;
  - (ii) any particular individuals will perform the Services on behalf of the Provider; or
  - (iii) the Services will be:
    - (A) error-free or that errors or defects will be corrected; or
    - (B) meet the Customer's requirements or expectations; and
- (b) **(Limitation of liability)** limit their aggregate liability in respect of any and all Claims for any Losses that the Customer and/or any of its Representatives may bring against the Provider under this agreement or otherwise in respect of the Services to the following remedies (the choice of which is to be at the Provider'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 Customer to the Provider under this agreement in respect to the Services,

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

and the Customer acknowledges and agrees that the Provider 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, the Provider and its Representatives expressly exclude liability for any damage and/or delay in the performance of any obligation of the Provider under this agreement where such damage or delay is caused by circumstances beyond the reasonable control of the Provider and the Provider shall be entitled to a reasonable extension of time for the performance of such obligations, and the Customer acknowledges and agrees that the Provider 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 8 (Confidentiality), clause 9 (Non-disparagement) or damages may not be an adequate remedy and the first-mentioned party may, in

addition to any other remedies, obtain an injunction restraining any further violation by the other party and other equitable relief, without the necessity of showing actual damage and without any security being required, together with recovery of costs. Any Claims asserted by such other party against the first-mentioned party shall not constitute a defence in any such injunction action, application or motion.

## **11. Termination and Cancellation of Order**

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### **Termination for breach**

- 11.1. Each party may terminate this agreement immediately by notice to the other party if an Event of Default occurs in respect of the other party.
- 11.2. If a party commits any material or persistent breach of this agreement (the **Defaulting Party**), the other party may (but is not obliged to) provide the Defaulting Party with a notice of breach in writing. If the Defaulting Party fails to remedy the breach within 20 Business Days after the date of its receipt of such notice, the other party may terminate this agreement with immediate effect upon providing the Defaulting Party with a further notice of termination in writing.

### **Cancellation with notice**

- 11.3. The Customer may, without limitation to its rights under clause 11.2, terminate this agreement at any time by giving at least two (2) Business Days' notice to the Provider.
- 11.4. The Customer will only be entitled to a full refund of any amounts paid under this agreement if it terminates this agreement in accordance with clause 11.3.
- 11.5. For the avoidance of doubt and subject to clause 11.4, the Customer will otherwise not be entitled to any refund of any amounts paid under this agreement should it wish to cancel its Order for change of mind, cancellations or any reason whatsoever.
- 11.6. The Provider may, without limitation to its rights under clause 11.2, terminate this agreement at any time by giving at least 2 Business Days' notice to the Customer. The Customer may waive all or part of such notice period.

### **Effect of termination**

- 11.7. In the event of any termination of this agreement in any circumstances and for any reason whatsoever:
  - (a) the Customer 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 Customer, including Charges incurred by the Provider for the purchase of materials for those Services prior to such termination); and
  - (b) the Provider will send to the Customer 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**

11.8. In the event that the Provider's engagement under this agreement is terminated upon notice by either party the Customer may, at its absolute discretion, require the Provider to refrain from providing the Services during the relevant notice period.

### **Partially completed deliverables**

11.9. Upon the cessation of the Provider's engagement under this agreement, subject to payment of all outstanding Charges by the Customer in accordance with the terms of this agreement, the Provider will deliver to the Customer any and all partially completed deliverables that are included within the scope of the Services.

### **Legislation**

11.10. 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**

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

### **Survival**

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

## **12. Notices**

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12.1. A notice given to a party under this agreement must be:

- (a) in writing in English;
- (b) sent to the address, fax number 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:
  - (i) personally;
  - (ii) by commercial courier;

- (iii) by pre-paid post;
- (iv) if the notice is to be served by post outside the country from which it is sent, by airmail;
- (v) by fax; or
- (vi) by e-mail.

12.2. 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;
- (d) if sent by airmail, five days after the date of posting;
- (e) if sent by fax, at the time shown in the transmission report generated by the machine from which the fax was sent; or
- (f) 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.

12.3. 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;
- (b) in the case of fax – the notice was transmitted to the fax number of the party; and
- (c) in the case of email – the email was transmitted to the party's email server or internet service provider.

## **13. General**

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### **Further assurances**

13.1. 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**

13.2. 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**

13.3. 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**

13.4. 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**

13.5. 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**

13.6. 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**

13.7. This agreement may not be varied except by written instrument executed by all of the parties.

## **Assignment**

13.8. 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**

13.9. 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**

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

13.11. If a party delivers an executed counterpart of this agreement under clause 13.10:

- (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**

- 13.12. 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 South Australia, Australia.
- 13.13. The parties irrevocably agree that the courts of South Australia, 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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## 1. | Standard and duties

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### 1.

The Provider will, in providing the Services:

1. **(Honesty and diligence)** be honest and diligent and provide the Services to it to the best of its knowledge and abilities;
2. **(Standards)** at all times maintain reasonable ethical, professional and technical standards;
3. **(Discrimination and harassment)** not unlawfully discriminate against, sexually harass or otherwise physically or verbally abuse any person; and
4. **(Privacy)** in relation to any Personal Information of any customer, client, supplier or Representative of the Customer, any user or prospective user or any other person, comply with:
  - (a) the Privacy Act and any guidelines, information sheets and other relevant material issued from time to time by the Commonwealth Privacy Commissioner; and
  - (b) any approved privacy policy and procedures adopted from time to time by the Customer.