

Terms and Conditions

1. Definitions

1.1. The following definitions apply in this Agreement:

- (a) **"Agreement"** means the fee proposal, these terms and conditions and any schedules and annexures thereto;
- (b) **"Business Day"** means any day other than a Saturday, Sunday or gazetted public holiday in the state where the Services are being provided by SDSS;
- (c) **"Commencement Date"** means the date specified in Item 1 of the Schedule;
- (d) **"Confidential Information"** means any and all business and financial information (including without limitation, information concerning the business operations and methods) or technical information (including without limitation, any methodologies, products, processes, software design specifications and constructions), hardware design specifications and constructions or the like and acquired either directly or indirectly but excludes information which is known or becomes probably known through no wrongful act of the receiving party, is received without restriction from a third party without breach of any obligation or non-disclosure, is independently developed by the receiving party as shown to the satisfaction of the supplying party by written records, is disclosed to either party's legal or financial advisers or is disclosed pursuant to covenants and all judicial requirements.
- (e) **"Customer"** means the party named in the fee proposal;
- (f) **"Customer's Representative"** means the person specified at Item 5 of the Schedule;
- (g) **"Expiry Date"** means the date specified in Item 4 of the Schedule;
- (h) **"Fee"** means the amount specified in Item 3 of the Schedule;
- (i) **"Force Majeure Event"** means an event or circumstance which is beyond the control and without the fault or negligence of the party affected and which by the exercise of reasonable diligence the party affected was unable to prevent provided that event or circumstance is limited to the following:
 - (i) riot, war, invasion, act of foreign enemies, hostilities (whether war be declared or not) acts of terrorism, civil war, rebellion, revolution, insurrection of military or usurped power, requisition or compulsory acquisition by any

governmental or competent authority;

- (ii) epidemic, pandemic, global health emergency, state health emergency, ionising radiation or contamination, radio activity from any nuclear fuel or from any nuclear waste from the combustion of nuclear fuel, radioactive toxic explosive or other hazardous properties of any explosive assembly or nuclear component; and

- (iii) earthquakes, flood, fire or other physical natural disaster, but excluding weather conditions regardless of severity.

(j) **"GST"** has the meaning given in *A New Tax System (Goods and Services Tax) Act 1999* (NSW).

(k) **"Indemnity Basis"** means all costs, including fees, charges, disbursements and expenses incurred by a party to litigation in taking steps to recover a debt, loss or damage and/or undertaking proceedings, provided they have not been unreasonably incurred or not of an unreasonable amount;

(l) **"Intellectual Property Rights"** means includes any and all intellectual property rights whether subsisting now or in the future, including rights in:

- (i) inventions, discoveries and novel designs, whether or not registered or registrable as patents, innovation patents or designs, including developments or improvements of equipment, technology, software, hardware, processes, methods or techniques;

- (ii) registered and unregistered trademarks and service marks, including goodwill in the business concerned in the relevant goods and/or services;

- (iii) trade, business or company names;

- (iv) internet domain names; and

- (v) proprietary rights, whether created or in existence before or after the date of this Agreement and includes anything, whether tangible or intangible, which incorporates, embodies or is based on any of the things referred to in paragraphs (i) to (v) inclusive of this definition;

(m) **"PPSA"** means the *Personal Property Securities Act 2009* (Cth);

(n) **"PPSR"** has the meaning given in the PPSA;

"Services" means the services specified in Item 4 of the Schedule, as varied under this Agreement;

(p) **"SDSS"** means Strata Construction Consultants Pty Ltd ACN 614 027 851 t/as Strata Defect Specialists Sydney;

(q) **"SDSS's Representative"** means the person specified at Item 6 of the Schedule.

2. Interpretation

2.1. In this Agreement, unless the context otherwise indicates:

- (a) headings are for convenience only and do not affect interpretation and unless the context indicates a contrary intention;

(b) "person" includes an individual, the estate of an individual, a corporation, an authority, an association or a joint venture (whether incorporated or unincorporated), a partnership and a trust;

(c) a reference to a party includes that party's executors, administrators, successors and permitted assigns, including persons taking by way of novation;

(d) a reference to a document (including this Agreement) is to that document as varied, novated, ratified or replaced from time to time;

(e) a reference to a statute includes its delegated legislation and a reference to a statute or delegated legislation or a provision of either includes consolidations, amendments, re-enactments and replacements;

(f) a word importing the singular includes the plural (and vice versa), and a word indicating a gender includes every other gender;

(g) a reference to a party, clause, schedule, exhibit, attachment or annexure is a reference to a party, clause, schedule, exhibit, attachment or annexure to or of this Agreement, and a reference to this Agreement includes all schedules, exhibits, attachments and annexures to it;

(h) a reference to "including" or "includes" is not a word of limitation and shall be deemed to be a reference to "including without limitation";

(i) a reference to "\$" or "dollar" is to Australia currency;

(j) a provision of this Agreement must not be construed to the disadvantage of a party merely because that party was responsible for the preparation of this Agreement or the inclusion of the provision in it;

(k) if an act must be done on a specified day which is not a Business Day, the act must be done instead on the next Business Day;

(l) an obligation imposed on or right conferred on multiple parties binds those parties jointly and severally.

- 3. Term**
- 3.1. This Agreement commences on the Commencement Date and unless terminated under clause 19 or extended clause 3.3 or 3.4 continues from the Commencement Date until the Expiry Date (the **Initial Term**).
- 3.2. If no Expiry Date is specified, the Agreement shall commence on the Commencement Date and continue until terminated clause 19.
- 3.3. Following the expiry of the Initial Term and subject to termination under clause 19, the Agreement will automatically extend for a further term of (1) month (or as otherwise agreed) (the **Renewal Term**), unless the Customer gives SDSS notice in writing not less than one (1) month prior to expiry of the Initial Term that it does not intend to proceed with the Renewal Term.
- 3.4. Following the expiry of the Renewal Term (and each subsequent Renewal Term) the term will automatically extend for an additional (1) one month (or as otherwise agreed) unless the Customer gives SDSS notice in writing no less than one (1) month prior to expiry of the relevant Renewal Term that it does not intend to proceed with the relevant Renewal Term.
- 3.5. Nothing in, or arising out of or connection with, this Agreement, prevents SDSS from performing any services for or supplying any products to any other party.
- 4. Services**
- 4.1. Subject to this Agreement, SDSS will provide the Services to the Customer during the Term on times and at frequencies determined by SDSS acting reasonably.
- 4.2. The Customer acknowledges that, subject to this Agreement, SDSS is entitled to exercise its independent and absolute discretion regarding the most appropriate and effective manner of providing the Services, including but not limited to implementation of specific methods, supply of goods and materials, engagement of personnel, timing allocations and frequency.
- 4.3. The Customer must ensure, safe access to the premises as required by SDSS in order for SDSS to provide the Services.
- 4.4. SDSS may in its absolute discretion, vary the Services if it believes that such a variation is reasonably required in order for it to fulfil its obligations under this Agreement.
- 4.5. In the event that any of the Services are required to be carried out by SDSS outside of SDSS's business hours, the Customer agrees and acknowledges that SDSS will be entitled to any applicable overtime rates associated with the provision of those Services.
- 4.6. In the event that SDSS provides additional services to the Customer in addition to the Services, the Customer agrees and acknowledges that SDSS will be entitled to any applicable rates associated with the provision of those Services as set out in Item 8 of the Schedule (**Out of Scope Fees**).
- 4.7. Variations to the Services instructed by the Customer must be generally consistent with or of a similar nature to the type of work included in the Services.
- 4.8. When requested by the Customer, SDSS must within fifteen (15) Business Days of the request, advise the Customer of its price (including any delay costs) for a proposed variation to the Services and its effect on the time to complete the Services, or on any other matter specified in the request.
- 4.9. Unless the Customer instructs SDSS to proceed with the requested variation within ten (10) Business Days of being notified of the price, SDSS is not required to carry out a variation to the Services.
- 5. Customer Obligations**
- 5.1. The Customer acknowledges and agrees that it must ensure that it will do all things required in order to ensure that the Services can be provided by SDSS under this Agreement.
- 5.2. The Parties agree and acknowledge that the Customer is not a "consumer" as defined in the *Australian Consumer Law* being Schedule 2 to the *Competition and Consumer Act 2010* (Cth).
- 5.3. The Customer warrants and covenants that it will not seek to enforce any remedy under the *Australian Consumer Law* being Schedule 2 to the *Competition and Consumer Act 2010* (Cth) including but not limited to reliance upon the existence of a "consumer guarantee".
- 5.4. The parties acknowledge that SDSS has relied upon the matters set out in this clause in entering into the Agreement with the Customer and in determination of the costs charged by SDSS for the provision of the Services to the Customer under this Agreement.
- 5.5. The Customer acknowledges that if were to contravene the provisions of this clause 5, SDSS would suffer considerable loss and damage.
- 6. Charges and Payment**
- 6.1. SDSS may issue invoices for the Fee (and all other amounts owing under this Agreement) at times and frequencies determined by SDSS in its reasonable discretion provided that no more than two (2) invoices can be issued in one calendar month.
- 6.2. For the avoidance of doubt, SDSS may issue invoices for the Fee (and all other amounts owing under this Agreement), or part thereof prior to providing Services that are the subject of that invoice.
- 6.3. The Customer must pay to SDSS, the amount invoiced within 10 Business Days from the date of the invoice provided by SDSS.
- 6.4. The Customer agrees and acknowledges that the Fee payable pursuant to this Agreement is reasonable and represents the fair and just remuneration for which SDSS is entitled to in providing the Services.
- 6.5. The Customer will, on demand, reimburse the Consultant the reasonable costs, expenses, fees or charges incurred by SDSS limited to those items set out in Item 7 of the Schedule (**Reimbursable Expenses**).
- 6.6. If the Customer fails to pay an invoice within the prescribed time as set out in this clause, SDSS may, in its absolute discretion, suspend, cancel or withdraw from the performance of the Services in whole or in part until such time that the outstanding invoice(s) has been received in clear funds by SDSS from the Customer.
- 6.7. For the purpose of clause 6.6, in addition to repayment of the outstanding amounts owing, the Customer shall be liable for interest charges calculated at prevailing overdraft reference rate of the Commonwealth Bank of Australia, plus eight percent (8%) per annum, accruing at a daily rate. The Customer acknowledges that this is a reasonable estimate and genuine calculation of the loss which SDSS will suffer by virtue of the Customer's failure to pay an amount owing under an invoice in accordance with this clause. For that purpose, the Customer covenants and agrees that it will not challenge this clause as being in the nature of a penalty.
- 6.8. Notwithstanding any other provision in this Agreement, SDSS may, at its absolute discretion increase or decrease the Fee payable if:
- (a) the Services provided by SDSS are not consistent with the original scope of works
- (b) the Services require a variation pursuant to clause 4.4; or
- (c) the rates charged by SDSS have increased or decreased due to a commercial business decision by SDSS; or
- (d) to reflect any changes in laws, taxes, levies, fees, costs or charges which directly or indirectly effect the costs

incurred by SDSS in the provision of the Services under this Agreement, including costs charged by suppliers of SDSS.

7. Warranties

7.1. Each of the parties represents and warrants to the other that:

- (a) it has full power and authority and the legal right to sign and deliver this Agreement and to perform its obligations under this Agreement;
- (b) this Agreement and the matters contemplated by it do not contravene its constituent documents or any laws, regulations or official directive or any of its obligations or undertaking;
- (c) this Agreement has been duly signed and delivered on its behalf;
- (d) the obligations undertaken by it are enforceable against it, in accordance with the provisions of this Agreement; and
- (e) its offices and representatives described in this Agreement or nominated under this Agreement have the authority to act for and on behalf of it in relation to the matters within their authority under this Agreement, unless the party notifies the other party to the contrary.

7.2. The parties acknowledge that each party has entered into this Agreement in reliance upon the warranties provided for in this clause 7.1.

7.3. The Customer further warrants that:

- (a) has examined and reviewed SDSS's proposal to provide the Services and that such proposal is suitable, appropriate and adequate for the purposes which they are being provided;
- (b) the premises to which it is engaging SDSS to provide the Services are suitable and allow for the Services to be provided by SDSS;
- (c) it has adequate resources (including financial, technological, physical and human resources) to comply with its obligations under this Agreement; and
- (d) it has comprehensively reviewed the terms of this Agreement and the terms contained herein are reasonable and necessary for each party.

7.4. The Customer acknowledges that SDSS has entered into this Agreement in reliance upon the warranties provided for in clauses 7.3.

8. Authorised Persons

8.1. SDSS must nominate a person to act as SDSS's Representative, who as at the date of this Agreement is the person specified in Item 6 of the Schedule. SDSS's Representative may act on behalf of SDSS in all dealings with the Customer or the Customer's Representative under this Agreement.

8.2. The Customer must nominate a person to act as the Customer's Representative, who as at the date of this Agreement is the person specified in Item 5 of the Schedule. The Customer's Representative may act on behalf of the Customer in all dealings with SDSS or SDSS's Representative under this Agreement.

8.3. Either party may replace its representative by giving written notice to the other party.

8.4. The Customer must promptly comply with all directions and instructions given by SDSS's Representative.

8.5. Neither this Agreement nor any other document creates a partnership, joint venture or fiduciary relationship between SDSS and the Customer and/or their respective representatives.

8.6. The Customer is not authorised to act as the agent of SDSS and the Customer must not represent itself as an agent of SDSS or as being in partnership or a joint venture with SDSS.

8.7. The Customer must not enter into any contract, agreement, arrangement, deed or other arrangement with any third party as agent for and/or on behalf of SDSS.

9. Intellectual Property

9.1. All Intellectual Property Rights and newly created, designed or invented material that directly relates to or arises from SDSS's provision of the Services will be owned by SDSS and the Customer must do all things necessary to assign or transfer ownership of any newly created materials to SDSS.

9.2. For the purposes of clause 9.1, the Customer acknowledges that all Intellectual Property Rights arising out of, or in connection with the Services (**Developed Material**) will be SDSS's exclusive property, even if the Customer provides input, information, assistance or any other contribution to the creation of the Developed Material or the performance of the Services. The Customer acknowledges that any derivatives, updates or modifications of the Developed Material will be SDSS's exclusive property.

9.3. The Customer has no and will not have any right, title or interest in the Developed Material except for the right to use it as may be permitted by SDSS in its sole discretion.

9.4. Notwithstanding anything contained within his Agreement, SDSS and the Customer will retain ownership of all Intellectual Property Rights which were in existence before provision of these Services by SDSS under this Agreement.

10. Charge over Personal Property

10.1. The Customer, as the beneficial owner, states that it is absolutely entitled to grant security interest and in consideration of SDSS agreeing to enter into this Agreement, hereby charges in favour of SDSS its interest in all personal property, present and future and wheresoever situated with the payment to SDSS of all money secured by this Agreement. Such security interest shall be a non-circulating and specific security interest on all of the above-mentioned personal property, now or in the future belonging to the Customer and a circulating security interest on all other assets and property of the Customer.

10.2. The Customer must not create any security interest ranking in priority or of equal rank to this Agreement without first obtaining SDSS's written consent. The Customer must not, before this circulating security interest becomes non-circulating, create a security interest on any of its personal property.

10.3. In the event of the Customer's default under this Agreement, SDSS may appoint a receiver and/or manager of the Customer, as the case may be without deviating from its rights under this Agreement.

10.4. The Customer irrevocably appoints SDSS and any receiver or manager appointed by SDSS to be the Customer's joint and several attorneys to execute, sign and perform in its name and on its behalf all agreements, contracts, instruments, acts and things whatsoever which the Customer is required or reasonably expected to execute, sign and perform under the covenants contained in this Agreement and generally, to use the Customer's name in the exercise of all or any of the powers conferred on SDSS or any receiver or manager appointed by SDSS as the case may be.

10.5. The Customer agrees that the Customer's execution of the respective parts of this Agreement and the provisions set out herein constitute a Security Agreement for the purposes of PPSA and creates the Security Interest.

10.6. The Customer shall indemnify or pay SDSS, at SDSS's sole discretion, for all expenses incurred or to be incurred in registering a Financing Statement or Financing Change Statement in the PPSR or releasing any interest thereunder.

10.7. The Customer shall not create or cause or set in chain to be created a Financing Statement or Financing Change Statement in respect of a

- security interest without the prior written consent of SDSS.
- 10.8. The Customer shall not register, cause to register or do any action or to execute anything which may enable the registration of a Financing Statement or a Financing Chain Statement in relation to the personal property secured herein, in favour of a third-party without the prior written consent of SDSS.
- 10.9. The Customer shall immediately notify SDSS of any material change in its business practices, corporate structure, financial structure and solvency, which would otherwise jeopardise the security interest of SDSS.
- 10.10. SDSS and the Customer agree that Sections 96, 115 and 125 of the PPSA do not apply to the security interest created by this Agreement.
- 10.11. The Customer hereby waives its right to receive notices under Sections 95-118-121(4), 130, 132(3)(d) and 132(4) of the PPSA.
- 10.12. The Customer waives its, his, her and their rights as a grantor and/or as a debtor pursuant to Sections 142 and 143 of the PPSA.
- 10.13. The parties agree that the Customer is the debtor for the purposes of Section 275(6)(a) of the PPSA and that the parties will not disclose information of the kind mentioned in Section 275(1) of the PPSA. This clause constitutes a confidentiality agreement for the purposes of Section 276, 275(6)(a) of the PPSA.
- 10.14. For the purposes of this clause:
- (a) **Financing Statement** has the meaning given to it by the PPSA;
- (b) **Financing Change Statement** has the meaning given to it by the PPSA;
- (c) **Security Agreement** means the security agreement under the PPSA created between the Customer and SDSS, whether described as security interest, charge or other expression herein, and without limiting those expressions;
- (d) **Security Interest** has a meaning given to it by the PPSA and without limiting the meaning in the PPSA, includes this document, however, described and when executed as a guarantee.
- 11. Debt Collection**
- 11.1. The Customer must pay to SDSS any debt collection costs, including any legal fees on an Indemnity Basis and the costs associated with recovering or attempted recovery of an amount payable under this Agreement.
- 12. Damage**
- 12.1. Insofar as compliance with this Agreement permits, the Customer shall:
- (a) take all measures necessary to protect people and property at the premises to which SDSS are providing the Services;
- (b) avoid unnecessary interference with people at the premises to which SDSS are undertaking the Services; and
- (c) prevent nuisance and unreasonable noise and disturbance at the premises where SDSS are undertaking the Services.
- 12.2. If loss or damage occurs to the premises to which SDSS are providing the Services under this Agreement, the Customer must, at the Customer's cost, rectify such loss or damage so that the premises is restored to the condition it was in prior to the damage occasioned. For the purposes of this clause, the Customer agrees that SDSS shall not be liable under any circumstance for any loss or damage arising at the premises where SDSS are providing the Services, except to the extent caused by the negligence or wilful misconduct of SDSS.
- 12.3. The Customer must attend to rectification of any damage to or contamination at the premises where the Services are being provided immediately, should the damage or contamination be hazardous to the health or safety of any person, the public or any employee, agent or officer of SDSS.
- 12.4. The Customer agrees that SDSS may place or erect its own signage at the premises where it is providing the Services including a display of, amongst other things, its name, logo, contact details, and services it offers.
- 13. Insurance**
- 13.1. Before SDSS commences the Services under this Agreement, the Customer must:
- (a) effect a public liability policy of insurance of not less than \$20,000,000.00 of which the coverage extends to SDSS, SDSS's Representative or consultants, subcontractors and other persons employed by SDSS or with an interest in the premises to which SDSS is providing the Services, in respect of personal injury or death arising by accident of any person whomsoever (not being a person who at the time of the accident is defined as a worker of the insured under any statute relating to Workers Compensation Insurance) and in respect of any injury, loss or damage whatsoever arising by accident to any property, real or personal, including property belonging to the Customer and SDSS or in which it is interested and where the accident arises out of or is caused by provision of the Services.
- (b) obtain any other policy of insurance as may be reasonably required by SDSS from time to time.
- 13.2. Each policy must be maintained until termination or expiry of this Agreement or completion of all Services, whichever occurs last.
- 13.3. Before SDSS provides the Services under this Agreement and in accordance with the provisions of this Agreement and whenever requested in writing by SDSS or SDSS's representative, the Customer must produce evidence to the satisfaction and approval of SDSS of the insurance policy effected, is kept current and maintained.
- 13.4. If the Customer fails to comply with this clause 13, where possible, SDSS may do any of the following at its absolute discretion:
- (a) effect and maintain that insurance policy and pay the necessary premiums. If required to do so, SDSS may recover from the Customer the costs of the premiums and SDSS's reasonable costs of effecting and maintaining the insurance, as a debt due and payable by the Customer to SDSS; or
- (b) terminate this Agreement without notice and penalty.
- 13.5. The Customer must bear all excesses payable under the policies and insurance taken out by the Customer, which are required under this Agreement.
- 13.6. The effecting of insurance shall not limit the liabilities and obligations of the Customer, under any other provision of this Agreement.
- 13.7. The Customer must immediately inform SDSS or SDSS's representative in writing of any occurrence that may give rise to a claim under the policy of insurance required under this clause 14 and must keep SDSS or SDSS's representative informed of subsequent developments concerning that claim.
- 13.8. The Customer hereby and unconditionally irrevocably releases and indemnifies SDSS, its related and associated entities, employees, servants, agents and contractors, and must keep them indemnified from and against any and all claims, demands, liabilities, loss, damages (whether liquidated or otherwise), costs on an Indemnity Basis, and expenses for personal injury or death, or loss of or damage to tangible property caused by the provision of the Services under this Agreement, by SDSS, except to the extent that the claim or liability is caused or contributed to by the negligence or wilful misconduct of SDSS.

14. Indemnity

- 14.1. In consideration for the provision of the Services, the Customer hereby irrevocably indemnifies SDSS and any related or associated entities against all liability relating to or arising out of or in connection with any breach of this Agreement by the Customer. For that purpose, the Customer indemnifies SDSS, and any related or associated entities from all and any actions, costs, claims, demands, proceedings and any loss, expense or damage howsoever arising from any breach of this Agreement by the Customer.
- 14.2. The parties acknowledge that the indemnity provided in clause 14.1 of this Agreement is a continuing obligation and does not merge upon termination or expiry of this Agreement.

15. Limitation of Liability

- 15.1. Under no circumstance shall SDSS be liable for any special, punitive, incidental, exemplary or consequential arising out of or in connection with provision of the Services, failure to perform the Services or any other breach of this Agreement.
- 15.2. For the purpose of limitation of liability set out clause in 15.1 above, SDSS's maximum liability under this contract, whether arising out of Contract, tort, negligence, statute or otherwise, to or on behalf of the Customer, any of its representatives or related or associated entities, shall not exceed the aggregate amount of Fees paid by the Customer to SDSS (less 25%), pursuant to this Agreement as at the date the cause of action accrues.
- 15.3. In the event that the Customer brings any claim against SDSS arising out of or in connection with this Agreement, such claim must be brought within twelve (12) months of when the cause of action first accrues. For the purposes of this clause, the Customer acknowledges that it will not be entitled to bring any claim against SDSS unless that claim is brought within the time prescribed by this clause and acknowledges that the time limit imposed by this clause is entirely reasonable in the circumstances.
- 15.4. The provisions of this clause 15 apply, notwithstanding any representation made by SDSS to the Customer or any representation made by the Customer to SDSS.

16. Restraint

- 16.1. During the term of this Agreement and for two (2) years after the expiry or termination of this Agreement, the Customer or any of its related or

associated entities must not employ or solicit for employment, any person who is an employee of SDSS or its related or associated entities.

16.2. Clause 16.1 applies even in circumstances where:

- (a) a person responds to a general advertisement for employment by the Customer; or
- (b) the person seeks employment with the Customer of his or her own initiative.

16.3. The Customer acknowledges that the restrictions specified in clause 16.1 and are in the circumstances, reasonable and necessary to protect SDSS's legitimate interests and loss which SDSS will suffer if the Customer contravenes those provisions.

16.4. This clause survives expiry and termination of this Agreement.

17. Confidentiality

17.1. The Customer, must not, in any manner whatsoever disclose or communicate to any third party or to any person or entity that has no need to know any Confidential Information or use any Confidential Information for any purpose except for the purpose for which such Confidential Information was supplied, without the prior written consent of SDSS.

17.2. Each party agrees that the terms of this Agreement are confidential and must not be disclosed to any third party (other than as required by law or to a party's legal or financial advisers or as otherwise required for the purposes and performance of this Agreement, without the prior consent of the other party).

17.3. The restrictions in this clause 17 do not apply:

- (a) to the extent that disclosure is required under any lawful court direction, law or the rules of any stock exchange;
- (b) in respect of Confidential Information that is or becomes part of the public domain (other than through breach either of this Agreement or of an obligation of confidence owed to the disclosing party).

17.4. The operation of this clause 17 survives the expiry or termination of this Agreement.

18. Insolvency

18.1. A party to this Agreement shall be insolvent if:

- (a) the party informs the other party in writing or either generally that the party is insolvent or is financially unable to proceed with this Agreement;
- (b) execution is levied against the party by a creditor;

(c) the party is in an individual person or a partnership, including individual person (and if that person):

- (i) commits an act of bankruptcy;
- (ii) as a bankruptcy petition presented against him or her or present its or his or her own petition;
- (iii) is made bankrupt;
- (iv) makes a proposal for a scheme arrangement or a composition;
- (v) has a deed of assignment or a deed of arrangement made (accepts a composition, is required to present a Debtors Petition or has a Sequestration Order made, under Part X of the *Bankruptcy Act 1966* (Cth); and/or

(d) in relation to a party with incorporation:

- (i) notice is given of a meeting with creditors with a view to the incorporation entering a Deed of Company Arrangement;
- (ii) if a party enters a Deed of Company Arrangement with creditors;
- (iii) a receiver, liquidator, controller or administrator is appointed;
- (iv) an application is made to the Court for the winding up of the party;
- (v) a winding up order is made in respect of the party;
- (vi) it is subject to a strike off application by the Australian Securities and Investment Commission;
- (vii) it resolves by Special Resolution that it be wound-up voluntarily (other than for a members' voluntary winding-up); or
- (viii) a mortgagee of any property of the party takes possession of that property.

19. Termination

19.1. This Agreement may be terminated by either party immediately on written notice to the other party if the other party is insolvent as determined under clause 18.

19.2. SDSS may terminate this Agreement at any time and for any reason by giving (2) two weeks written notice to the Customer, without penalty.

19.3. The Customer may terminate this Agreement at any time and for any reason by giving (2) two weeks written notice to SDSS, without penalty.

19.4. In the event that the Customer does any of the following:

- (a) fails to ensure safe access to the premises where the Services are being provided in accordance with clause 4.3;
- (b) fails to make payment to SDSS in accordance with clause 6;

- (c) contravenes the warranties provided in clause 7;
- (d) contravenes the intellectual property provisions provided in clause 9;
- (e) allows damage to be caused to the premises where SDSS are providing the services in contravention of clause 12;
- (f) fails to provide evidence of the required insurance policies pursuant to clause 13;
- (g) contravenes the restraint provisions set out at clause 16;
- (h) contravenes the confidentiality provisions set out at clause 17, SDSS may, without prejudice to any rights under this Agreement or the common law, at its absolute discretion, terminate this Agreement immediately by giving written notice to the Customer specifying the breach of the Agreement to which SDSS relies upon.
- 19.5. In the event that the Customer breaches any other provision of this Agreement and the Customer fails to remedy that breach within ten (10) Business Days of being notified by SDSS, SDSS may, without prejudice to any rights under this Agreement or the common law, terminate this Agreement by giving written notice to the Customer.
- 19.6. In the event that SDSS breaches any provision of this Agreement and SDSS fails to remedy that breach within ten (10) Business Days of being notified by the Customer, the Customer may, without prejudice to any rights under this Agreement or the common law, terminate this Agreement by giving written notice to SDSS.
- 19.7. Upon termination of this Agreement by either party under clause 19.3 or 19.4 or by SDSS under clause 19.1, the Customer must immediately pay to SDSS an amount equal to the greater of (a) seventy percent (70%) of the full amount of the Fee Proposal less any amounts already paid by the Customer under this Agreement; or (b) the amount to which SDSS claims as at the date of termination is due and payable for Services rendered notwithstanding that SDSS has not previously issued an invoice for those Services performed to the Customer. The parties acknowledge that the amounts payable under this clause are a reasonable estimate and genuine calculation of the loss which SDSS will suffer by virtue of the termination of the Agreement.
- 19.8. Upon termination of this Agreement for a reason not contemplated by clause 19.7, the Customer must immediately pay to SDSS all amounts owing to SDSS in respect of the Services provided by SDSS under the Agreement prior to the date of termination. For that purpose, the Customer acknowledges that any amount to which SDSS claims for Services provided as at the date of termination will become immediately due and payable notwithstanding that SDSS has not previously issued an invoice for those Services performed to the Customer
- 20. Dispute Resolution**
- 20.1. If a dispute or a difference arises out of or in connection to this Agreement, the parties must continue to perform their obligations as required under this Agreement, unless the dispute involves a breach of this Agreement which renders performance of the obligations of the respective parties impossible.
- 20.2. Where any dispute or difference arises hereunder or in any way in connection with this Agreement, or the Services, or otherwise, and whether or not this Agreement has been determined, either party shall give notice in writing, adequately identifying and providing details of the dispute and shall deliver by hand or by email or registered post to the other of such dispute or difference (**notice of dispute**).
- 20.3. A party served with the notice of dispute may give a written response to the notice of dispute to the other party within fourteen (14) days of receipt of the notice.
- 20.4. If a dispute cannot be resolved cannot be resolved between the parties or the other party is not making reasonable efforts to resolve the dispute, either party may refer the dispute to expert determination before an expert agreed between the parties.
- 20.5. If the parties cannot agree upon an expert, the chairperson of the New South Wales chapter of the Institute of Arbitrators and Mediators Australia shall nominate the expert.
- 20.6. SDSS and the Customer shall pay one-half (1/2) of the expert's costs each, unless the expert determines otherwise.
- 20.7. The expert must not act as an arbitrator and, as a condition of appointment, the expert must agree to issue a written decision within fourteen (14) days after the expert's appointment, unless the parties agree in writing to a longer period.
- 20.8. Any expert determination is to be conducted in accordance with the Rules for Expert Determination of Commercial Disputes of the Institute of Arbitrators and Mediators Australia.
- 20.9. The decision of the expert is not subject to a review under this Agreement. If any party disputes the decision of the expert, it may begin any legal proceedings available to it.
- 20.10. The parties agree that any communications whether verbally or written specified as being "without prejudice" must not be revealed or used in any other proceedings except for the question of costs.
- 21. Goods and Services Tax**
- 21.1. The Fee (and other amounts) payable under this Agreement are subject to GST. All prices will be treated as GST-exclusive, unless specifically stated in writing to be inclusive of GST or words to a similar effect.
- 21.2. The Customer is the party liable to pay the proper amount of GST applicable under this Agreement, and that are applicable for services provided by SDSS under this Agreement.
- 22. Assignment and Subcontracting**
- 22.1. SDSS may, in its absolute discretion, subcontract or assign this Agreement or any part thereof (including the Services) to an individual, organisation or entity of its choosing.
- 22.2. In the event that this Agreement or any part thereof (including the Services) is assigned by SDSS pursuant to clause 22.1, the Customer hereby irrevocably releases and discharges SDSS from any liability arising out or in connection with the performance of this Agreement insofar as the Agreement was performed by the assignee. For that purpose, the Customer acknowledges that SDSS is not liable under any circumstance for any act or omission of the assignee where this Agreement or any part thereof has been assigned by SDSS.
- 22.3. The Customer must not assign its rights under this Agreement except without the prior written consent of SDSS which may be withheld for any reason.
- 22.4. The Customer must do all things necessary to give effect to this clause 22 of this Agreement.
- 23. Force Majeure**
- 23.1. If, because of any Force Majeure Event, a party is unable to perform fully or in part any of its obligations under this Agreement, the affected party will notify the other party of such Force Majeure Event (**FM Notice**).
- 23.2. Within ten (10) Business Days after receipt of an FM Notice, the other party shall notify the affected party whether it agrees that a Force Majeure Event has occurred and that Force Majeure Event has affected the affected party's ability to perform all or part of its obligations under this Agreement.
- 23.3. If the other party agrees that a Force Majeure Event has occurred and that

- Force Majeure Event has affected the affected party's ability to perform all or part of its obligations under this Agreement, the affected party shall be relieved of its affected obligations under this Agreement until cessation of the Force Majeure Event.
- 23.4. If the other party does not agree that a Force Majeure Event has occurred or that Force Majeure Event has affected the affected party's ability to perform all or part of its obligations under this Agreement, the matter will be referred to an expert for determination under clause 20.
- 23.5. Upon cessation of the Force Majeure Event (where it has been agreed or determined that a Force Majeure Event has occurred and that Force Majeure Event has affected the affected party's ability to perform all or part of its obligations under this Agreement), the affected party will immediately resume compliance with all of its obligations under this Agreement.
- 24. Privacy**
- 24.1. The Customer agrees that SDSS may collect, use and/or provide information provided by the Customer or obtained in connection with the provision of the Services to third parties for the purposes of:
- (a) improving the Services provided by SDSS to the Customer or any other customer;
 - (b) the marketing of SDSS's other goods and services;
 - (c) disclosing statistics and data in connection with the provision of the Services to the Customer and other customers;
 - (d) notifying a credit reporting agency or other credit providers of a default by the Customer;
 - (e) processing any payment instructions, direct debit facilities and/or credit facilities requested by the Customer;
 - (f) exchanging information with other credit providers, where the Customer is in default with other credit providers; and
 - (g) assessing the creditworthiness of the Customer.
- 24.2. SDSS may and the Customer consents to SDSS giving information about the Customer to a credit reporting agency to obtain a consumer credit report on the Customer or to allow the credit reporting agency to create or maintain a credit information file containing information about the Customer.
- 25. Notices**
- 25.1. A notice (and other documents) shall be deemed to have been given and received if:
- (a) served personally on the Customer or the Customer's Representative at the address stated the Schedule or on SDSS or SDSS's representative at the address stated in the Schedule, as the case may be;
 - (b) sent by prepaid post addressed to the person to whom it is necessary or required to be given at the address specified in the Schedule or at its last known place of abode or business, three (3) days after posting; or
 - (c) emailed directly to the Customer or the Customer's Representative's email address or SDSS or SDSS's Representative's email address as specified in the Schedule, upon confirmation of correct transmission of the email.
- 25.2. A notice (and other documents) shall be deemed to have been served on the following Business Day if it is served after 5pm on a Business Day.
- 26. Relationship**
- 26.1. SDSS are an independent contractor to the Customer and neither party has authority to bind the other party by Contract or otherwise, and neither SDSS nor its employees are agents or employees of the Customer by virtue of this Agreement.
- 27. Further assurance and good faith**
- 27.1. Each party must promptly, at its own cost, do all things (including, but not limited to executing all documents) necessary or desirable to give full effect to this Agreement.
- 27.2. Each party must act in good faith, honestly and reasonably in the performance of its obligation under this Agreement, with the object of achieving the commercial efficacy intended under this Agreement.
- 28. Severability**
- 28.1. Each covenant, obligation and restriction and any part of covenant, obligation and restriction is deemed to be severable and independent covenant, obligation or restriction.
- 28.2. If the provisions or part of any provisions of this Agreement are held by a Court of a competent jurisdiction to be void, invalid or otherwise enforceable, that any such provision or part provision is deemed to be eliminated or modified to the extent that it is necessary to make the remainder of the clause enforceable and the remainder of the agreement shall have full force and effect.
- 29. Waiver**
- 29.1. A waiver of a breach of this Agreement or any right, power, authority, discretion or remedy arising upon a breach of or default under this Agreement must be in writing and signed by the party granting the waiver.
- 29.2. A breach or default under this Agreement is not waived by any failure to exercise or delay in exercising or partial exercise of any right, power, authority, discretion or remedy under this Agreement.
- 29.3. A right, power, authority, discretion or remedy created or arising upon a breach or default under this Agreement is not waived by any failure or delay in the exercise or a partial exercise of that or any other right, power, authority, discretion or remedy.
- 30. Variation**
- 30.1. Any variation to this Agreement has no force or effect, unless effected by a document executed by the parties.
- 31. Prior agreements**
- 31.1. This Agreement supersedes all prior agreements, arrangements and undertakings between the parties and constitutes the entire agreement between the parties relating to the subject matter of this Agreement.
- 31.2. The Customer acknowledges that it has not relied on any statement or representation made by SDSS or any of its representatives in the course of negotiations or discussions leading to or arising out of this Agreement.
- 31.3. To the extent permissible by law, must not make, and waives any right it may have to make any claim against SDSS in connection with or arising out of this Agreement pursuant to:
- (a) section 18 of the Australian Consumer Law being Schedule 2 of the Competition and Consumer Act 2010 (Cth); and
 - (b) any corresponding or similar state legislation.
- 32. Governing law**
- 32.1. The Law governing this Agreement, its interpretation and construction is the law of New South Wales. The parties hereto submit to the non-exclusive jurisdiction of the Courts of that state and any Court in appeal therefrom.

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FOR FURTHER INFORMATION PLEASE CONTACT

THE SDSS OFFICES

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