

Terms of Business (201806)

These Terms of Business apply in respect of the services set out in the Engagement Letter, Agreement, Program Document, Appraisal or proposal ("Services") to be performed by H.S.C. Business Solutions Pty Ltd ATF Clark Family Trust trading as either SCS Performance OR Next Element ABN 99 799 714 895 ("HSC" or "we" or "us"), for the client named in the Engagement Letter, Agreement, Program Document, Appraisal or proposal ("Client" or "you").

1. Authorisations

Each of HSC and the Client confirms that it has obtained all necessary authorisations to enter and perform this contract ("Contract").

2. Confidentiality

2.1 For the purposes of this Contract, "Confidential Information" means all non-public information or documents which either party receives or produces in connection with the Services and includes HSC's working papers, any proposal or tender document, information and methodologies, but does not include any information which is:

- or becomes generally available to the public other than as a result of a breach of this clause;
- known to either party prior to HSC starting to provide the Services;
- received from a third party who owes no obligation of confidence in respect of the information; or
- developed by either party independently of the Services to which this Contract relates.

2.2 Neither HSC nor the Client may disclose Confidential Information about or belonging to the other without the other's written consent.

2.3 Notwithstanding the above, HSC may disclose Confidential Information to other HSC related entities in relation to the provision of the Services, to assist in quality assurance reviews or for its business purposes and either party may disclose Confidential Information to:

- its insurers or legal advisors, provided that the Confidential Information remains confidential;
- if required to do so by law; or
- if required for the proper performance of the Services.

2.4 Subject to Clauses 2.1 and 2.2 we may cite the performance of the Services to clients as an indication of our experience

3. Intellectual property

3.1. Unless otherwise specified in the Engagement Letter or proposal, intellectual property rights in all documentation, systems, materials, methodologies and processes brought to the engagement by HSC or created in the course of the engagement by HSC shall remain and be vested in HSC.

3.2. Subject to clause 2, HSC will not be restricted by the Contract from developing and using in the future any techniques, methodologies, ideas, concepts, information or general know-how.

3.3. Except as permitted by clause 5.1, you must not use the HSC name or logo on any website or in any public statement, (including filing all or part of a report with a regulator or including all or part of a report in any public document) without obtaining our prior written consent.

3.4. The working papers for this engagement, including electronic documents and files, are our property and constitute Confidential Information.

4. Performance of the Services

4.1. To perform the Services successfully, we require your timely co-operation, including:

- providing in a timely fashion all information and documents that we reasonably require to enable us to provide the Services and (if stated in your brief, our proposal, or our Engagement Letter) your staff to work with us;
- arranging access to third parties where applicable;
- ensuring that appropriate back-up, security and virus checking procedures are in place for any computer facilities you provide;
- making senior executives available for consultation on request;
- providing reasonable working facilities for us; and
- making decisions promptly to facilitate the performance of the Services.

4.2. Unless both parties agree otherwise in writing, dates in any timetable set out in the Engagement Letter or proposal or otherwise advised are intended for planning and estimating purposes only and are not contractually binding. The timely completion of the Services requires your co-operation in the provision of information and explanations relevant to the Services. Estimates of time for completion of the Services are given on the assumption that we receive this co-operation. We may charge additional fees and expenses which result from delays in providing this co-operation.

4.3. The scope of the Services is limited to the work specified in our proposal or Engagement Letter.

4.4. Unless expressly stated otherwise in the Engagement Letter, the Services are not legal services and do not constitute legal advice. Either of us may request changes to the Services but no changes take effect unless agreed in writing.

4.5. Our work will be based on the documentation and information provided to, or obtained by, us. We rely on you bringing to our attention any changes in the documentation and information as originally presented, as it may affect our advice. You will ensure that documentation and information supplied by you or on your behalf, to the best of your knowledge and belief, is not false or misleading and does not omit material particulars. Unless otherwise stated in our Engagement Letter or proposal, we will not verify the accuracy and completeness of such documentation or information.

4.6. In the course of providing the Services, we may provide oral comments or draft reports, presentations, letters, schedules and other documents. No reliance shall be placed on such oral comments or draft documents, conclusions or advice as they may be subject to further work, revision and other factors which may mean that such drafts are substantially different from any final report or advice issued. The final results of our work will be set out in our final report or advice.

4.7. Changes in the law may take place before our advice is acted upon or may be retrospective in effect. Unless specifically stated in the engagement letter, confirmation

or proposal we accept no responsibility to inform you of changes in the law or interpretations affecting advice previously given by us.

4.8. You acknowledge that information made available by you or by others on your behalf, to partners or staff of HSC who are not engaged in the performance of the Services or information relating to you which is otherwise known by them, shall not be deemed to have been made available to the individuals within HSC who are engaged in the provision of the Services.

5. Electronic presentation and filing of information

5.1. If the Services involve statutory audit or statutory review work, and you intend to electronically present a financial report and our audit/review report on your web site, you are responsible for the security and controls over the information on the web site to maintain the integrity of the data presented.

6. Liability

6.1. HSC will use reasonable skill and care in providing the Services.

6.2. The liability of HSC for loss or damage arising from or in relation to the Services, whether arising from breach of contract, tort (including negligence) or otherwise, is limited to a maximum of 20% of the fees payable by you for the Services. ("Liability Cap").

6.3. However, the Liability Cap does not apply if prohibited by:

- the Corporations Act 2001
- any other relevant legislation

6.4. To the extent permitted by law, HSC excludes all liability for any indirect, incidental or consequential expense, loss, damages or cost, loss of profits or revenue, business interruption, loss of data, or failure to realise anticipated savings or benefits whatsoever incurred by or awarded against the Client (whether or not HSC has been advised of the possibility of such expense, loss, damage or costs) arising in any way out of or in relation to the Services.

6.5. You agree that if you make any claim against us for loss arising out of or in connection with the Services or this agreement, and you contribute to that loss by your own actions, liability for your loss will be apportioned having regard to the respective responsibility for the loss, and the amount you may recover from us if successful in your claim will be reduced to the extent of your contribution to that loss.

6.6. You agree to indemnify and hold harmless HSC, other HSC entities and our respective partners, directors and employees from and against any liabilities, losses, claims, costs, damages or expenses (or actions that may be asserted by any third party) that may result from any third party claims arising out of or in relation to the provision of the Services or any use by you of any deliverable under this Contract, and will reimburse HSC for all costs and expenses (including legal fees on a solicitor and own client basis) incurred by HSC in connection with any such action or claim. This does not apply if prohibited by the Corporations Act 2001.

6.7. You accept and acknowledge that we have not made any, and to the extent permitted by law we exclude all warranties, conditions or guarantees of any nature in respect of the Services or the satisfactory conclusion of the Services or with respect to the economic, financial or other results which you may experience as a result of the provision of the Services.

6.8. Where warranties, conditions or guarantees or any other rights are implied in this Contract or otherwise conferred by the Competition and Consumer Act 2010 (Cth) or other laws, and it is not lawful or possible to exclude them, then those warranties, conditions or guarantees or other rights will (but only to the extent required by law) apply to this Contract. To the extent permitted by law, we limit our liability in respect of such warranties, conditions or guarantees to the supply of the Services again or the payment of the cost of having the Services supplied again.

6.9. You agree not to bring any claim (whether in contract, tort (including negligence) or otherwise) arising out of or in connection with the Services against any of our employees personally, but this will not limit or exclude any liability we may have for their acts or omissions. The provisions of this clause are expressly for the benefit of our employees, and you agree that each employee is entitled to rely on this clause as if they were parties to this Contract.

7. Fees and expenses

7.1. Our fees for the Services will be charged on the basis set out in our Engagement Letter or proposal. Where applicable, Goods and Services tax ("GST") at the prevailing rate will be added to and forms part of our fees.

7.2. We will charge you for our reasonable out-of-pocket expenses such as travel, subsistence incurred in connection with the Services. The charges will be calculated as the amounts we incur (net of any GST input tax credit to which we are entitled) plus GST as applicable.

7.3. Unless otherwise specified in our Engagement Letter, fees and expenses will be invoiced monthly in advance and are payable within 7 days after date of issue the invoice. Interest on overdue accounts will be charged in terms of the current rate stipulated in the Penalty Interest Rates Act 1983 (Vic). Any fee estimate is given in good faith but is not contractually binding.

7.4. We revise our fee scale six monthly. Rates quoted to you remain in force until the next 31 December or 30 June, as appropriate, and we may increase our fees for any work performed after those dates.

7.5. Unless agreed otherwise, your obligation to pay us fees and expenses will not arise until we have issued a fee account to you. Where an amount for GST is stated to be a component of the fees and expenses, our fee account will be a compliant "tax invoice" for GST purposes.

7.6. Based on the information presently available to us, including representations made by you, we have assessed that GST should be payable in respect of the Services, goods or other items we agree to supply under this engagement, our fee or hourly rates and, where applicable, out-of-pocket expenses and other expenses (our "Billings") will be calculated on this basis.

7.7. Where you dispute all or part of an invoice, each of us agrees to seek to resolve the dispute under clause 16. Where you dispute part of an invoice, you agree to pay the undisputed part of the invoice as and when it is or becomes due and payable.

- 7.8. If we receive any legally enforceable notice or demand issued by any third party, including the Australian Securities & Investments Commission, the Australian Taxation Office, the Australian Stock Exchange, any government statutory body or instrumentality or any court or tribunal in relation to or in connection with the Services, you agree to pay our reasonable professional costs and expenses (including solicitor and own client expenses) in complying with or challenging any such notice or demand to the extent that our costs and expenses are not recovered or recoverable from the party issuing the notice or demand. We will notify you as soon as practicable (unless restricted by law) where we receive any such legally enforceable notice or demand.
- 7.9. In the event of HSC having to institute legal proceedings against you to recover any amounts due or to enforce its rights in terms of these Terms of Business or the Contract, then you acknowledge that you will be liable for our reasonable legal costs on a solicitor and own client basis.
- 8. Services solely for Client benefit**
- 8.1. The Services will be provided solely for your benefit and use unless provided otherwise in the Engagement Letter or proposal. Except as required by law, you must not provide any documentation or deliverables in respect of the Services to any third party (including without limitation, the filing of information containing or referring to any of our reports with regulators or the inclusion of our reports in any public document) without our written consent. We accept no liability or responsibility to any third party in respect of the Services.
- 9. Use of software**
- 9.1. We may use or develop software, including spreadsheets, databases and other electronic tools ("tools") in providing the Services. If we provide these tools to you, you acknowledge that (except where these tools are a specific deliverable under our Contract with you) they are not your property, were developed for our purposes and without consideration of any purpose for which you might use them, are made available on an "as is" basis for your use only and must not be distributed to or shared with any third party. To the full extent permitted by law, we make no representations or warranties as to the sufficiency or appropriateness of the tools for any purpose for which you or a third party may use them.
- 10. Electronic communications**
- 10.1. We may communicate with you electronically. Electronically transmitted information cannot be guaranteed to be secure or virus or error free and consequently such information could be intercepted, corrupted, lost, destroyed, arrive late or incomplete or otherwise be adversely affected or unsafe to use. We will use commercially reasonable procedures to check for the then most commonly known viruses before sending information electronically, but we will not be liable to you in respect of any error, omission or loss of confidentiality arising from or in connection with the electronic communication of information to you. You remain responsible for protecting your own systems and interests in relation to electronic communications. If you do not accept these risks, you should notify us in writing that you do not want us to communicate electronically with you.
- 11. Documents**
- 11.1. Subject to any statutory provisions to the contrary, it is our practice to destroy documents belonging to us after they are more than seven years old. Your acceptance of these terms includes your consent for us to destroy any documents that belong to you which have been filed amongst our own papers. You agree that the above data retention arrangements are acceptable for your purposes.
- 12. Subcontractors and third parties**
- 12.1. We reserve the right to employ subcontractors, and any reference to our staff includes subcontractor staff. Subject to any contrary provision in our Engagement Letter we will remain liable to you for any of the Services that are provided by our subcontractors.
- 13. Privacy of personal information**
- 13.1. You agree that you will only disclose personal information (as that term is defined under the Privacy Act 1988 (Cth)) ("Privacy Act") to us if necessary for us to perform the Services, and only if such disclosure by you will not infringe protections afforded by the Privacy Act to individuals about whom the personal information relates.
- 13.2. If the performance of the Services requires a third party to this Contract to supply personal information to us on your request, it is your obligation to ensure that the third party has satisfied the requirements of the Privacy Act and is permitted by the Privacy Act, to disclose such personal information to us.
- 13.3. If the Services require HSC to collect personal information from a third party you will ensure that such collection of personal information complies with the Privacy Act, and do and be responsible for, all things necessary (including obtaining appropriate consents) for HSC to collect such personal information.
- 13.4. If personal information is disclosed to us in the course of our engagement, it will be treated in accordance with the Privacy Act and the terms of our privacy policy.
- 14. Term and termination**
- 14.1. This Contract will apply from the commencement date stated in our proposal or Engagement Letter, or where no commencement date is specified, from the date of acceptance of the Contract as specified in our proposal or Engagement Letter.
- 14.2. Subject to any statutory provisions that apply to the Services, either party may terminate this Contract at any time by giving at least 30 days written notice to the other. On termination, you shall immediately pay on request all fees and expenses due in respect of the Services provided up to the date of termination and, unless the Contract is terminated for cause, you will pay our reasonable costs and expenses incurred in connection with the termination of the Contract.
- 14.3. For the avoidance of doubt, the date of termination shall be the date on which any period of notice expires.
- 14.4. On termination or completion of this Contract, we may retain our working papers and documentation or software prepared by us and any other documentation on which our Services are based to enable us to maintain a professional record of our involvement. You may retain your originals and any copies of our reports and letters made in accordance with the provisions of this Contract.
- 14.5. Termination of the Contract shall be without prejudice to any accrued rights of both parties.
- 14.6. The terms of the Contract which expressly or by implication are intended to survive its termination or expiry will survive and continue to bind the parties.
- 15. General**
- 15.1. Relationship with other clients - We provide services to other clients, some of whom may be in competition with you or have interests which conflict with your own. We will not be prevented or restricted by virtue of our relationship with you under this Contract from providing services to other clients.
- 15.2. Our relationship with you - You acknowledge and agree that our relationship with you is that of an independent contractor and is not a partnership, joint venture, fiduciary or employment relationship. Neither of us may claim or make any representation whatsoever to any third party that it is an agent of, or in partnership with, the other party and each party acknowledges that it has no power or authority to bind the other in respect of any matter whatsoever and it will not represent to any person that it has such power or authority.
- 15.3. Waiver - A failure or delay by a party in exercising a power or right given to it under this Contract does not operate as a waiver of that power or right; nor does a single or partial exercise of a power or right prevent any other or further exercise of it. A waiver by a party of a power or right given to it under this Contract does not affect any other provision of this Contract.
- 15.4. Address for service - Any written notice to be given to a party may be delivered in person, by letter or by facsimile transmission, to:
- in the case of notices to us, to our address, clearly marked for the attention of the Managing Director, appearing in our Engagement Letter or proposal; and
 - in the case of notices to you, to the address last notified by you.
- Unless proven to the contrary, documents delivered by facsimile will be deemed to have been received on the date of transmission and documents sent by post will be deemed to have been received three days after posting.
- 15.5. Governing law - This Contract shall be governed by and interpreted in accordance with the laws of Victoria, Australia and the courts of that State shall have exclusive jurisdiction in relation to any claim, dispute or difference concerning the interpretation of the Contract and any matter arising out of the Contract.
- 15.6. Force majeure - Neither of us will be liable to the other for any delay or failure to fulfil their obligations (excluding payment obligations) under this Contract to the extent that any such delay or failure rises from causes beyond their control, including but not limited to fire, floods, acts of God, acts or regulations of any governmental or supranational authority, war, riot, terrorist activities, strikes, lockouts and industrial disputes.
- 15.7. No assignment - Neither of us may transfer, charge or otherwise seek to deal with our rights or obligations under this Contract without prior written consent of the other party, except that we may each transfer our respective rights and obligations to any partnership or legal entity authorised to take over all or part of our business.
- 15.8. Entire agreement - This Contract forms the entire agreement between us relating to the Services. It replaces and supersedes any previous proposals, correspondence, understandings or other communications (written or oral).
- 15.9. Validity of contract terms and severance - If any provision of this Contract is held to be invalid, in whole or in part, such provision shall be deemed not to form part of, and will be severed from, the Contract. The enforceability of the remainder of the Contract will not be affected.
- 15.10. Conflicting terms - In the event of any conflict between our Engagement Letter and:
- these Terms of Business; or
 - our proposal,
- the Engagement Letter will take precedence.
- 15.11. Guarantee - In the event of the Client being a corporate entity, then the authorised representative of that corporate entity hereby personally guarantees the performance by the Client of all its obligations in terms of this agreement.
- 16. Disputes**
- 16.1. Dispute Resolution - A party will not start arbitration or court proceedings (except proceedings seeking injunctive, declaratory or interlocutory relief) in respect of a dispute arising out of these terms or the work in relation to these terms (Dispute) unless it has complied with this clause.
- 16.2. Notification of Dispute - A party claiming that a Dispute has arisen must notify the other party, giving details of the Dispute.
- 16.3. Resolution of Dispute - During the 30 day period after a notice is given under clause 16.2 (or longer period agreed in writing by the parties to the Dispute) (Initial Period) each party to the Dispute (Disputant) must use its best efforts to resolve the Dispute.
- 16.4. Mediation - If the Disputants are unable to resolve the Dispute within the initial period, each Disputant agrees that the dispute must be referred for mediation, at the request of any Disputant, to:
- a mediator agreed on by the Disputants; or
 - if the Disputants are unable to agree on a mediator within seven days (7) after the end of the initial period, a mediator nominated by the Resolution Institute.
- 16.5. Role of Mediator - The role of any mediator is to assist in negotiating a resolution of the Dispute. A mediator may not make a decision that is binding on a Disputant unless that Disputant has so agreed in writing.
- 16.6. Confidentiality - Any information or documents disclosed by a Disputant under this clause:
- must be kept confidential; and
 - may not be used except to attempt to resolve the Dispute.
- 16.7. Costs - Each Disputant must bear its own costs of complying with this clause and the Disputants must bear equally the costs of any mediator engaged.
- 16.8. Place and Rules of Mediation - Any Mediation will be held in Melbourne, Australia in accordance with the current Mediation Rules of the Resolution Institute.
- 16.9. Termination of Dispute Resolution - After the initial period, a Disputant that has complied with clauses 16.1, 16.2 and 16.3 may terminate the Dispute resolution process by giving notice to each other Disputant.
- 17. Definitions**
- 17.1. For the purposes of this Contract:
- "Contract" means the agreement between us as set out in these Terms of Business and our Engagement Letter, Agreement or proposal together with any changes to the Contract that are agreed in writing between us.
- "Engagement Letter" or "Agreement" means the document or confirmation letter to which these terms of business are attached.