

AND

EXECUTIVE EMPLOYMENT AGREEMENT

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THIS AGREEMENT dated day of 2019

BETWEEN of (**Employer**)

AND of (**Executive**)

RECITALS

- A.** The employer has decided to offer the executive employment in the position of [senior executive position].
- B.** The executive has agreed to accept the position with the employer.
- C.** The employment of the executive will be on the terms and conditions contained in this agreement.

OPERATIVE PART

1. Definitions and interpretation

This agreement is governed by the law of New South Wales, and the parties, submit to the non-exclusive jurisdiction of the courts of that state.

In the interpretation of this agreement:

- (a) References to legislation or provisions of legislation include changes or re-enactments of the legislation and statutory instruments and regulations issued under the legislation;
- (b) Words denoting the singular include the plural and vice versa, words denoting individuals or persons include bodies corporate and vice versa, references to documents or agreements also mean those documents or agreements as changed, novated or replaced, and words denoting one gender include all genders;
- (c) Grammatical forms of defined words or phrases have corresponding meanings;
- (d) Parties must perform their obligations on the dates and times fixed by reference to the capital city of New South Wales;
- (e) Reference to an amount of money is a reference to the amount in the lawful currency of the Commonwealth of Australia;
- (f) If the day on or by which anything is to be done is a Saturday, a Sunday or a public holiday in the place in which it is to be done, then it must be done on the next business day;

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- (g) References to a party are intended to bind their executors, administrators and permitted transferees;
- (h) Obligations under this agreement affecting more than one party bind them jointly and each of them severally;
- (i) **Act** means the Fair Work Act 2009 (Cth);
- (j) **Competing business** means any person or other entity that competes with the employer's business or the business of any related body corporate of the employer;
- (k) **Confidential information** means all information in whatever form be it oral in writing or electronic concerning the business of the employer or any related entity likely to damage the business of the employer or related entity if disclosed to a third party but does not include information which is in the public domain or was known to the third party;
- (l) **Duties** means the duties set out herein, any other duties that the employer may delegate from time to time, those otherwise implied at law or in equity and statutory duties. Examples of the executive's duty to provide faithful service and to act in good faith include:
- (i) The executive must not use their position to derive secret profits or benefits during the term of the employment;
 - (ii) The executive must account to the employer for all moneys and property received in the course of their employment;
 - (iii) The executive must not solicit the employer's customers or clients or potential customers or clients while they are employed; and
 - (iv) The executive must not divulge or abuse trade secrets or the intellectual property of the employer.
- (m) **Employment** means the employment of the executive with the employer;
- (n) **Intellectual property** means all forms of intellectual property rights throughout the world – letters patent, trade marks, designs, copyrights, inventions, drawings, computer programs, confidential information, trade secrets, know-how and rights of a similar nature existing anywhere in the world, whether registered or unregistered;
- (o) **Month** means calendar month;
- (p) **Moral rights** means the right of integrity of authorship, the right of attribution of authorship and the right not to have authorship falsely attributed, as defined in the Copyright Act 1968 (Cth);
- (q) **National Employment Standards** means those matters set out in Chapter 2 Part 2-2 of the Act;

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- (r) **Performance objectives** means those targets and goals developed by the employer having reference to the employer's mission and annual business plan that further delineate the executive's duties that must be specific, measurable, attainable, realistic and timely and agreed upon by both parties. These goals can identify any changes the employer requires to the attitude, knowledge or behaviour of the executive and address the necessary personal development that may be required particularly if the business undergoes any major changes;
- (s) **Person** includes a corporation;
- (t) **Prospective client or customer** means a person, entity or company with whom the employer had engaged in negotiations to do business during the:
- (i) 24 months preceding the date of termination of the employment, unless that period is in the circumstances found to be unreasonable to be enforceable at law or in equity, in which case;
 - (ii) 18 months preceding the date of termination of the employment, unless that period is in the circumstances found to be unreasonable to be enforceable at law or in equity, in which case;
 - (iii) 12 months preceding the date of termination of the employment, unless that period is in the circumstances found to be unreasonable to be enforceable at law or in equity, in which case;
 - (iv) Six months preceding the date of termination of the employment.
- (u) **Restraint area** means:
- (i) Within a km radius of the business premises, unless that area is in the circumstances found to be unreasonable to be enforceable at law or in equity, in which case;
 - (ii) Within a km radius of the business premises, unless that area is in the circumstances found to be unreasonable to be enforceable at law or in equity, in which case;
 - (iii) The area in which the employer is located and conducts its business and from which it receives the majority of its custom.
- (v) **Restraint period** means the period during employment and from the date of termination of employment for:
- (i) 24 months, unless that period is in the circumstances found to be unreasonable to be enforceable at law or in equity, in which case;

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- (ii) 18 months, unless that period is in the circumstances found to be unreasonable to be enforceable at law or in equity, in which case;
 - (iii) 12 months, unless that period is in the circumstances found to be unreasonable to be enforceable at law or in equity, in which case;
 - (iv) Nine months, unless that period is in the circumstances found to be unreasonable to be enforceable at law or in equity, in which case;
 - (v) Six months, unless that period is in the circumstances found to be unreasonable to be enforceable at law or in equity, in which case;
 - (vi) Three months.
- (w) **Restricted way** means that the executive must not act, participate, assist, work or in any way be directly or indirectly involved in a competing business in any of the capacities of executive, contractor, director, employer, consultant, adviser (formal or informal), principal, agent, manager, equity holder, partner, associate, franchisee, franchisor, unit holder, member, shareholder, beneficial owner, beneficiary, trustee, joint venturer or financier, such that would entitle them or any of their respective associates or nominees to receive any benefit or reward because of their association with the competing business or would confer any benefit or reward upon the competing business itself;
- (x) The terms and conditions herein replace any other terms and conditions of employment that may have applied prior to the date of this agreement; and
- (y) Nothing in this agreement shall prevent the parties agreeing in writing to vary any or all of the provisions contained in this agreement, provided however, existing employees cannot be required to complete a probationary period. Additionally, the parties cannot agree to conditions of employment that are less than the minimum prescribed by any relevant law or award.

2. **Employment**

- (a) There being no restriction upon the executive's ability to commence employment with the employer under the terms of this agreement, the executive warrants that:
- (i) There are no limitations on the executive's ability to fully perform all of their duties and responsibilities, including, but not limited to physical or psychological limitations;
 - (ii) The executive will not breach continuing obligations arising from any prior employment in the performance of their duties and responsibilities for the employer including confidentiality obligations.

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- (b) The executive's employment will commence on [insert date] (commencement date) and will continue until terminated in accordance with the provisions of this agreement.
 - (c) The executive's employment will be subject to an initial six month probationary period. During this period, except in the case of summary dismissal, either party may terminate the executive's employment with one week's notice in writing. The employer may provide payment in lieu of notice. In the case of summary dismissal by the employer, no notice or payment in lieu will be provided.

3. Location

- (a) The executive will be predominantly based at the employer's office at [insert location].
- (b) The executive may be required to work at other locations as required or advised by the employer from time to time.

4. Duties

- (a) **Title**
 - (i) The executive is appointed to the position of [insert position].
 - (ii) A position description is attached at schedule A.
 - (iii) The executive's responsibilities will be to achieve the objectives of the employer which are enunciated in operational and business plans that are the subject of constant change and review. In particular the executive will devote the whole of their time honestly and loyally in fulfilment of the tasks:
 - (1) Necessary or incidental to the position of [insert position];
 - (2) Delegated to them by the board; and
 - (3) Set out in this agreement.
 - (iv) From time to time performance criteria will be agreed and the executive must achieve the targets established by them and in doing so must expand and enhance the business seeking new opportunities and markets for the employer's products and services.
 - (v) The executive will have the overall responsibility for the implementation of the various management and financial systems of the employer and must immediately on commencement fully acquaint themselves with these systems and with the duties and responsibilities of other executives and thereafter ensure the successful operation

and running of the integrated whole of the employer's business.

(b) **Compliance with policy and procedures**

- (i) The executive is required to read and comply with employer's policies and procedures, as varied from time to time. Such policies and procedures do not form part of this agreement.
- (ii) A breach of the employer's policies and procedures may result in disciplinary action, including termination of employment.
- (iii) The executive must comply with all reasonable and lawful directions or instructions given from time to time by the employer.

5. Reporting

- (a) The executive will report to [name e.g. John Smith or other description; e.g. the Board], [insert title if relevant; e.g. General Manager] or otherwise as directed from time to time.
- (b) The employer may change the executive's reporting arrangements in accordance with the needs of its organisation.

6. Hours of work

- (a) The executive will be expected to attend for work during the employer's ordinary business hours unless otherwise agreed. These hours are normally between the hours of [insert hours e.g. 9.00 am to 5.30 pm Monday to Friday].
- (b) The executive's maximum ordinary hours of work will be 38 hours per week plus reasonable additional hours necessary to perform the responsibilities of this position.
- (c) The executive must devote all their time and effort during business hours in performing their duties but acknowledge that from time to time working reasonable additional hours outside of normal business hours, for which no further payment will be made, will be required.
- (d) The executive's weekly ordinary hours may be averaged over a period of up to 26 weeks.
- (e) The executive acknowledges that due to the requirements and seniority of their position, there may be a requirement to work such reasonable additional hours (including on weekends and public holidays) without additional remuneration. The executive's remuneration is set at a level to compensate the executive for any additional hours worked and reflects the need to work reasonable additional hours if required.

7. **Travel** [Delete clause if not applicable]

- (a) The executive acknowledges that intrastate, interstate and overseas travel may be required by the employer.
- (b) The executive will make any such travel journeys as reasonably required by the employer, using such transport and accommodation as the employer determines.

8. **Remuneration**

(a) **Salary**

- (i) The executive will receive a gross wage of \$ per week payable into a nominated bank account after retention of applicable tax. The executive's salary is set at a level that takes into account any additional hours the executive may be required to work and is in full satisfaction of any entitlements the executive may otherwise have under legislation, or any industrial award or agreement.
- (ii) The executive's salary will be paid [insert weekly OR fortnightly OR monthly] and will be deposited by electronic funds transfer into a nominated bank or financial institution account;
- (i) This executive's salary will be reviewed on each anniversary of the employment or at other times as agreed. Reviews are based on the executive's position, the executive's performance and their contribution to the effective functioning of employer's business, and the market generally. In no event will the employer be obliged to increase the remuneration as a result of such review.
- (ii) The executive will receive a vehicle allowance of \$ per week. [OR ALTERNATIVELY] A motor vehicle will be allocated to the executive in accordance with the employer's motor vehicle policy for business and reasonable private use.

(b) **Bonuses**

[Alternative 1 – delete OR amend to suit]

The executive may be eligible to participate in bonus and incentive schemes offered by employer. The terms of any such scheme will be separately advised to the executive.

[Alternative 2 – delete OR amend to suit]

The executive will be eligible to participate in a bonus and incentive scheme offered by employer. The executive's entitlement to a bonus will be calculated as follows. A gross turnover target will be agreed each year between the employer and the executive and the employer

will pay to the executive by way of bonus an amount equivalent to % of the gross profit of the business being gross turnover less cost of sales.

(c) **Superannuation contributions**

- (i) The employer will make superannuation contributions for the executive into a superannuation fund nominated by the executive, or in the event of the executive failing to nominate a fund, a complying fund under superannuation guarantee legislation.
- (ii) These superannuation contributions shall be equal to the minimum level of superannuation contributions required under superannuation guarantee legislation.
- (iii) The executive may increase the superannuation contribution beyond the minimum amount, by agreement with the employer.

(d) **Expenses**

The employer agrees to reimburse the executive for all expenses reasonably and necessarily incurred by the executive, with the prior written consent of the employer, in the performance of the duties. The employer requires claims for such expenses to be supported by receipts.

9. Leave entitlements

(a) **Annual leave**

The executive will be entitled to four weeks paid annual leave for each year of service, which accrues progressively, in accordance with the National Employment Standards. The executive agrees that annual leave will be taken at times mutually convenient and, in the absence of agreement, as reasonably directed by the employer.

(b) **Long service leave**

The executive will be entitled to take long service leave in accordance with the relevant long service leave legislation of New South Wales.

(c) **Personal/Carer's leave (including sick leave)**

- (i) The executive will be entitled to 10 days paid personal/carers' leave per year of service in accordance with the National Employment Standards.
- (ii) Untaken paid personal/carers' leave accumulates from year to year but will not be paid out on termination of employment.
- (iii) If required by the employer, the executive must produce a medical certificate from a qualified medical practitioner evidencing the incapacity of the executive to carry out the duties.

(iv) The executive may be required to be examined by a medical practitioner nominated by the employer, in order to provide a report to the employer about the executive's capacity to perform their duties and role.

(d) **Other leave**

The executive will be entitled to parental leave and compassionate leave in accordance with the National Employment Standards.

10. Refund of tuition expenses by employee

Where:

- (a) The employer has, during the employment period, assisted the employee in a study or training course undertaken by the employee; and
- (b) This agreement is terminated either by the employer under clause [insert number] or for any reason by the employee or the study or training course is still running within six months following the end of such course,

the employee shall immediately on demand by the employer refund to the employer:

- (c) All fees and expenses relating to such calls or reasonably incidental to such cause are paid by the employer:
 - (i) Where the employee was granted study leave or leave from employment to attend a study or training course, an amount equal to the wage payable to the employee the number of days of such leave; and
 - (ii) Where the employee was granted use of the employer's facilities in relation to such course, including but not restricted to library, word processing, secretarial services and stationery, an amount which the employer considers reasonable, having regard to the nature and extent of facilities used by the employee.

11. Training courses [optional]

- (a) During their employment, the employee may be required to attend training courses. The cost of these courses shall be paid by the employer.
- (b) Employees who are required to attend courses during working hours will be paid at their usual rate of pay.
- (c) Employees who are required to attend courses outside of their usual working hours will not be paid.

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- (d) In the event that an employee terminates their employment with the employer within a period of three months of completing a training course, they will be required to reimburse the employer the full costs of such training course.

12. Training, tuition or accreditation courses [optional]

During employment, the employee may be requested to attend training, tuition or accreditation courses. The cost of these courses will be paid by the employer. Attendance at a course during working hours will be paid at the employee's usual rate of pay. Attendance at a training course outside of usual working hours will not be paid.

Period from the end of the employment	Percentage of training, tuition or accreditation expenses to be repaid to the employer
Up to and including 6 months	100%
More than 6 months and up to and including 12 months	75%
More than 12 months and up to and including 18 months	50%
More than 18 months and up to and including 24 months	25%

The employee authorises and permits the employer to deduct from the employee's termination pay, including remuneration or accrued entitlements, the value of any debt owed for attendance at a training course.

13. Confidential information

- (a) The executive acknowledges that by virtue of the employment the executive will have access to confidential information the disclosure of which could materially harm the employer.
- (b) During the course of employment or after termination of employment, the executive shall not for their own benefit or for the benefit of a third party use, make a record of or disclose to any person any confidential information relating to information, or trade secrets of the employer for any reason except so far as may be reasonably necessary to enable the executive to fulfil their obligations under this agreement. The executive hereby indemnifies the employer and any related entity against any loss or damage they may suffer as a result of the breach of confidentiality.

14. Intellectual property

- (a) The executive acknowledges that the intellectual property in all works of the executive in the course of the fulfilment of the executive's

obligations hereunder automatically vests in the employer, and the executive shall do all things and sign all documents that may be necessary to vest and secure ownership, registration or other protection of such intellectual property for the employer.

- (b) The executive irrevocably appoints the employer to be the executive's attorney to do all things and sign all documents that may be necessary to vest such intellectual property in the employer.

15. Moral rights

The executive consents to all uses, acts or omissions by or on behalf of the employer, its assignees, licensees or successors in title or any of its authorised persons of, or in relation to, any copyright work or subject matter that they create or with others create or develop in the course of the employment, including any uses, acts or omissions which would otherwise be in breach of any of their moral rights.

16. Conflict of interest

- (a) The executive will not, without the prior written consent of the employer, do anything which conflicts with, or is likely to conflict with, their obligations to the employer, or is likely to lead to a conflict of interest with the employer, or a prospective client or customer of the employer.
- (b) If a situation arises where the executive believes he has, or has the potential to have a conflict of interest or duty:
- (i) The executive must immediately advise their immediate superior, as nominated in the clause 5 of the situation; and
 - (ii) The executive must take all reasonable steps to avoid the conflict or potential conflict and will follow reasonable directions in that regard.
- (c) The executive agrees to comply with all reasonable directions given to him by the employer to resolve any actual or potential conflict of interest. Prospective client or customer.

17. Termination

- (a) **Termination by employer without notice – summary dismissal**
- The employer may terminate this agreement, at any time without prior notice, if the executive:
- (i) Engages in serious misconduct; or
 - (ii) Commits any serious or persistent breach of the executive's obligations under this agreement; or

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- (iii) Is subject to a finding of guilt for an indictable criminal offence; or
 - (iv) Engages in conduct which, in the opinion of the employer, brings or is likely to bring the executive or the employer into disrepute; or
 - (v) Engages in wilful or deliberate behaviour that is inconsistent with the continuation of the contract of employment; or
 - (vi) Engages in conduct that causes imminent, and serious, risk to the health, or safety, of a person or the reputation, viability or profitability of the employer's business; or
 - (vii) Engages in theft, fraud or assault; or
 - (viii) Is intoxicated at work; or
 - (ix) Fails to carry out a lawful and reasonable instruction; or
 - (x) Becomes bankrupt or commits an act of bankruptcy.

If this agreement is terminated under this clause no further payments of any kind will be made by the employer to the executive other than payments for the executive's accrued but unpaid salary and leave entitlements.

(b) **Termination by the employer or the executive**

Subject to the employer's rights dismiss the executive without notice, the employer or the executive terminate this agreement without reason:

- (i) During the probationary period, on one week's written notice to the other; or
- (ii) Following the completion of the probationary period but during the first year of employment on four weeks written notice to the other; or
- (iii) During the second year on six weeks written notice to the other; or
- (iv) After two years of employment on eight weeks written notice to the other.

(c) **Pay in lieu of notice**

At its discretion, the employer may elect to pay to the executive an amount in lieu of part or all of any notice period.

(d) **Consequences of termination**

The executive must:

- (i) Immediately deliver to the employer any hardware, software, plant or equipment owned by the employer in the possession

of the executive and all documents, plans, lists, inventions, and intellectual property arising out of the work undertaken by the executive for the employer; and

(ii) Disclaim any association with the business of the employer.

(e) **Not to prejudice rights**

Termination of the agreement will not prejudice any rights or remedies already accrued to any party under, or in respect of any breach of this agreement including but not limited to any post-employment restraint.

18. Restraint of trade

(a) Nothing in this agreement will be construed to limit the duty or duties owed by the executive to the employer, including the duty of loyalty and fidelity to the employer.

(b) During the restraint period the executive must not within the restraint area:

(i) Prepare to be, or be, involved in any competing business; or

(ii) Canvass, solicit, induce or encourage any person who was an employee or contractor of the employer to leave the employer and join the competing business; or

(iii) Canvass, solicit, approach or accept any approach from any person who was at any time an existing or prospective client or customer of the employer or a prospective client or customer of the employer; or any person who refers business to the employer on a regular or ongoing basis, with a view to obtaining custom or any business introduction from that person in a competing business; or

(iv) Interfere in any way with the relationship between the employer and its employees, clients and customers (including prospective clients and customers), contractors, or suppliers; or

(v) Act in any restricted way as defined above.

(c) The executive acknowledges that:

(i) Each agreed restraint specified above is, in the circumstances, reasonable and necessary to protect the genuine business interests of the employer;

(ii) Damages are not necessarily an adequate remedy if the executive breaches this restraint clause; and

(iii) The employer may apply for injunctive relief if:

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- (1) The executive breaches or threatens to breach this restraint clause; or
 - (2) The employer believes the executive is likely to breach this restraint clause.
- (d) Each party agrees that if:
- (i) A court of competent jurisdiction finds that any provision of this restraint clause is an unenforceable provision not enforceable at law or in equity; and
 - (ii) The unenforceable provision would be enforceable if:
 - (1) One or more restricted ways included in the definition of restricted way were deleted; or
 - (2) One or more of the alternate periods referred to in the definition of restraint period were deleted; or
 - (3) One or more of the alternate areas referred to in the definition of restraint area were deleted,
- then the unenforceable provision must be made enforceable by making those deletions.

19. **Dispute resolution**

(a) **No proceedings**

If a dispute arises out of or relates to this agreement, neither party may commence any court or arbitration proceedings relating to the dispute unless they have complied with this clause, except where they seek urgent interlocutory relief or the Act otherwise provides.

(b) **Notice**

The party to this agreement claiming that a dispute has arisen under or in relation to this agreement must give written notice to the other party to this agreement specifying the nature of the dispute.

- (i) On receipt of the notice by that other party, both parties must endeavour to resolve the dispute expeditiously using informal dispute resolution techniques such as mediation, expert evaluation or determination or similar techniques agreed by them.

(c) **Mediation**

If the executive and the employer do not agree within seven days of receipt of the notice as to the:

- (i) Dispute resolution technique and procedures to be adopted;
- (ii) Timetable for all steps in those procedures; and

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- (iii) Selection and compensation of the independent person required for such technique,

then either party may refer the matter to the Fair Work Commission for assistance in resolving the dispute by mediation.

- (d) **Proceedings**

If the mediation referred to is not completed within four weeks of reference to a mediator, either party may commence a court or arbitration proceedings relating to the dispute as they see fit.

- (e) **Costs**

The costs associated with the agreed dispute resolution process will be borne equally by the parties.

20. **General**

- (a) **Notices**

A notice or other communication to a party must be in writing and delivered to that party or that party's practitioner in one of the following ways:

- (i) Delivered personally; or
- (ii) Posted to their address when it will be treated as having been received on the second business day after posting; or
- (iii) Faxed to their facsimile number when it will be treated as received when it is transmitted; or
- (iv) Sent by email to their email address, when it will be treated as received when it enters the recipient's information system.

- (b) **Relationship of the parties**

The parties acknowledge that this agreement is intended as a contract of service and to create the relationship of employer and employee and not any other relationship and, in particular, not the relationship of principal and contractor or the relationship of partnership.

- (c) **Legal advice**

Each party acknowledges that it has had the opportunity to seek legal advice about this agreement.

SCHEDULE A

Position description:

Position title:

Position summary:

Key responsibilities:

Competencies and
experience required:

Qualifications required:

Execution page

SIGNED AS AN AGREEMENT

SIGNED BY in the presence of:)
)
..... Signature of witness Signature
..... Print name of witness	

SIGNED BY in the presence of:)
)
..... Signature of witness Signature
..... Print name of witness	