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# Terms of Business

for services provided by

**Eco Building Supplies Pty Ltd**  
Trading as **Eco Building Supplies**  
**(ABN 90 124 035 810)**

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## Operative provisions

### 1. Definitions and interpretation

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#### Definitions

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

**Agreement** means these terms of business, terms and conditions, any Quote or any Quotation, Variation, Website Terms of Use, Privacy Policy, and any ancillary document relating to the supply of Services or Goods by the Provider to the Client.

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

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

**Charges** means Fees and Expenses.

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

**Client** means the party that will receive the Services as named in the Agreement including their executors, representatives, administrators, and or assigns and any person purporting to be the Client.

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

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

- (d) any note, calculation, conclusion, summary or other material derived or produced partly or wholly from any such information.

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

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

**Default Rate** means a rate of interest of 15.00% per annum.

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

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

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

**Engagement** has the meaning given in clause 3.1, being each individual engagement for the Provider to provide specific Services to the Client pursuant to a Quote.

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

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

**Expenses** mean the expenses of the Provider for which the Provider is entitled to be reimbursed by the Client pursuant to clause 4.6.

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

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

**Goods** include any products as advertised for sale from time to time on the Provider's website (<https://ecobuildingsupplies.com.au>) ancillary parts, components, and equipment referred to in an Agreement and or Quote provided by the Provider to the Client at the Client's request.

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

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

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

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

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

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

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

**In-Scope Work** means work that has been expressly and specifically designated as being within the scope of the Services.

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

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

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

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

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

**Non-Solicitation Period** means each period of time specified in Schedule 1.

**Out-of-Scope Work** means any work that is not In-Scope Work, including the work specifically described as being out of scope in the Quote (if any).

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

**Provider** means Eco Building Supplies Pty Ltd trading as Eco Building Supplies (ABN 90 124 035 810)

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

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

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

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

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

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

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

**Start Date** means the date of this agreement or such other date as the parties may agree in writing.

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

**Tax or Taxation** means:

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

- (c) any interest, penalty, charge, fine or fee or other amount of any kind assessed, charged or imposed on or in respect of the above.

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

## Interpretation

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

- (a) headings in this agreement are for convenience only and do not affect its interpretation or construction;
- (b) no rule of construction applies to the disadvantage of a party because this agreement is prepared by (or on behalf of) that party;
- (c) where any word or phrase is defined, any other part of speech or other grammatical form of that word or phrase has a cognate meaning;
- (d) a reference to a document (including this agreement) is a reference to that document (including any schedules and annexures) as amended, consolidated, supplemented, novated or replaced;
- (e) references to recitals, clauses, subclauses, paragraphs, annexures or schedules are references to recitals, clauses, subclauses, paragraphs, annexures and schedules of or to this agreement;
- (f) in each schedule to this agreement, a reference to a paragraph is a reference to a paragraph in that schedule;
- (g) a reference to any statute, proclamation, rule, code, regulation or ordinance includes any amendment, consolidation, modification, re-enactment or reprint of it or any statute, proclamation, rule, code, regulation or ordinance replacing it;
- (h) an expression importing a natural person includes any individual, corporation or other body corporate, partnership, trust or association and any Governmental Agency and that person's personal representatives, successors, permitted assigns, substitutes, executors and administrators;
- (i) a reference to writing includes any communication sent by post, facsimile or email;
- (j) a reference to time refers to time in Adelaide, South Australia and time is of the essence;
- (k) all monetary amounts are in Australian currency;
- (l) a reference to a "**liability**" includes a present, prospective, future or contingent liability;
- (m) the word "**month**" means calendar month and the word "**year**" means 12 calendar months;
- (n) the meaning of general words is not limited by specific examples introduced by "**include**", "**includes**", "**including**", "**for example**", "**in particular**", "**such as**" or similar expressions;

- (o) a reference to a “**party**” is a reference to a party to this agreement and a reference to a “**third party**” is a reference to a person that is not a party to this agreement;
- (p) a reference to any thing is a reference to the whole and each part of it;
- (q) a reference to a group of persons is a reference to all of them collectively and to each of them individually;
- (r) words in the singular include the plural and vice versa; and
- (s) a reference to one gender includes a reference to the other genders.

## **2. Engagement as Provider**

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

### **Commencement and duration**

2.2 The Provider’s engagement with the Client will:

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

### **Nature of relationship**

2.3 The Provider is an independent contractor of the Client and nothing in this agreement constitutes a relationship of employer and employee, principal and agent, partnership or joint venture between the parties.

## **3. Provision of the Services**

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### **Quote**

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

- (a) The Client has notified the Provider of the Client's acceptance of the relevant Quote; and
- (b) The Client has paid all moneys required under the Quote to the Client.

## **4. Pricing and invoicing**

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### **Pricing**

4.1 Subject to clause 3.1, in respect of each Engagement, the parties have agreed that the total price for the relevant Services (exclusive of GST and Expenses, and including a Deposit where relevant) (the **Fees**) will be, if as designated in the relevant Quote:



- (a) **(Fixed Price)** a Fixed Price applies – that Fixed Price (which, for the avoidance of doubt, includes the Deposit if applicable) payable in arrears (subject to clause 4.1(c)) upon completion of the Services to the reasonable satisfaction of the Client; and
- (b) **(Hourly Rate)** the Hourly Rate applies – calculated on the basis of the time spent by the Provider in exclusively providing those Services on an hourly rate basis at the Hourly Rate in accordance with clause 4.3 and payable in arrears (subject to clause 4.1(c)) upon completion of the Services to the reasonable satisfaction of the Client,

and the Provider will invoice the Client by way of a single invoice for all relevant Charges following completion of all relevant work to the reasonable satisfaction of the Client, provided that if, as designated in the relevant Quote, a deposit is specified (the **Deposit**):

- (c) the Deposit will be payable upon commencement of the Services. The Provider will invoice the Client for the Deposit at any time, but not less than 15 Business Days, prior to commencement of the Services and the Client must pay the Deposit prior to the commencement of the Services; and
- (d) the balance of all relevant Charges will be payable 15 business days in arrears or as otherwise agreed between the parties upon completion of the Services to the reasonable satisfaction of the Client. The Provider will invoice the Client for that balance following completion of all relevant work to the reasonable satisfaction of the Client.

#### **Deposit (if any) non-refundable**

- 4.2 In the absence of any material breach by the Provider constituting a repudiation or deemed repudiation of this agreement, the Deposit (if applicable) is non-refundable.

#### **Hourly Rates**

- 4.3 Hourly Rates shall be proportionately charged for work involving periods of less than one hour and structured in 15-minute units, with 4 units per hour – eg, the time charged for an attendance of up to 15 minutes will be 1 unit and the time charged for an attendance between 15 and 30 minutes will be 2 units.
- 4.4 The Provider must keep and maintain accurate records of the number of hours of Services in respect of which the Hourly Rate applies and provide the Client with a copy of such records upon reasonable notice as may be requested by the Client from time to time.
- 4.5 The Hourly Rate may only be changed by way of an amendment to this agreement pursuant to clause 14.7.

#### **Reimbursement of Expenses**

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

- (iii) complies with any applicable expenses policy of the Client in force from time to time, provided that a copy of the policy has been provided to the Provider by the Client prior to the relevant expense being incurred; and
- (b) the Client will not be required to reimburse the Provider for any amount of GST that the Provider has paid, or is liable to pay, in relation to any supply acquired by the Provider from any third party if the Provider has received, or is entitled to receive, an Input Tax Credit for that GST.

## **5. Payment**

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### **Timing of payments**

- 5.1 The Deposit (if any) is payable in accordance with the provisions of clause 4. The Client must pay to the Provider all other Charges properly invoiced pursuant to clause 4 in full on or before the date that is 15 Business Days after the Client's receipt of the relevant invoice.

### **Method of payment**

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

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

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

### **Default interest**

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

required to ensure that the total amount of interest that the other party receives in respect of that liability is equal to the Default Rate.

## **6. GST**

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### **Definitions regarding GST**

6.1 In this clause 6:

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

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

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

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

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

### **Fines, penalties and interest**

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

### **Reimbursement**

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

### **Adjustment events**

6.6 If, at any time, an adjustment event arises in respect of any supply made by a party under this agreement, a corresponding adjustment must be made between the parties in respect of any amount paid to the Providing Party by the Receiving Party pursuant

to clause 6.3 and payments to give effect to the adjustment must be made and the Providing Party must issue an adjustment note.

## **7. Confidentiality**

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- 7.1 Subject to clauses 7.3 and 7.4, a Disclosee must:
- (a) keep all Confidential Information confidential;
  - (b) not use or exploit any Confidential Information in any way except in the proper performance of the Services in accordance with this agreement;
  - (c) not disclose or make available any Confidential Information in whole or in part to any third party;
  - (d) not copy, reduce to writing or otherwise record any Confidential Information except in the proper performance of the Services in accordance with this agreement (and any such copies, reductions to writing and records will be the property of the Discloser); and
  - (e) ensure that any and all Authorised Third Party Disclosees:
    - (i) comply with the obligations in this agreement as if each of them was a party to this agreement in the place of the Disclosee; and
    - (ii) do not do, or omit to do, anything which, if done or omitted to be done by the Disclosee, would constitute a breach of this agreement by the Disclosee.
- 7.2 The Disclosee shall be responsible for, and liable to the Discloser in respect of, the actions or omissions of any and all of its Authorised Third Party Disclosees in relation to the Confidential Information as if they were the actions or omissions of the Disclosee.

### **Exceptions**

- 7.3 The Disclosee may disclose Confidential Information to those of its Representatives who have an actual need to know the Confidential Information but only in the proper provision of the Services and performance of its duties under this agreement and provided that it informs such Representatives of the confidential nature of the Confidential Information before such disclosure.
- 7.4 Subject to clause 7.5, the obligations in clause 7.1 will not apply to any Confidential Information which (as shown by appropriate documentation and other evidence in the relevant Disclosee's possession):
- (a) was already known to the Disclosee on a non-confidential basis prior to the time of its first disclosure by the Discloser to the Disclosee, unless it came to be so known as a direct or indirect result of having been:
    - (i) unlawfully obtained by the Disclosee, whether from a third party or otherwise; or
    - (ii) received by the Disclosee from a third party that owed a confidentiality obligation to the Discloser in respect of that information at the time of such receipt, in circumstances in which the Disclosee knew, or ought reasonably to have known after due enquiry, that the third party owed that confidentiality obligation to the Discloser;

- (b) is or becomes generally available to the public, unless it became so generally available as a direct or indirect result of having been disclosed by any person:
  - (i) in circumstances that constitute a breach of this agreement by the Disclosee (for the avoidance of doubt, including any breach by the Disclosee of its obligations under clause 7.1(e) to ensure that its Authorised Third Party Disclosees comply with the obligations in this agreement as if they were parties to this agreement in the place of the Disclosee); or
  - (ii) that owed a confidentiality obligation to the Discloser in respect of that information at the time of such disclosure, in circumstances in which the Disclosee knew, or ought reasonably to have known after due enquiry, that the person owed that confidentiality obligation to the Discloser;
- (c) is, after the time of its first disclosure by the Discloser to the Disclosee, lawfully received by the Disclosee from a third party and the Disclosee reasonably believed, after due enquiry, that the information was not so received as a direct or indirect result of a breach by any person of a confidentiality obligation owed to the Discloser;
- (d) is required by law or court order to be disclosed, provided that the Disclosee must:
  - (i) promptly notify the Discloser in writing in advance of any such disclosure, if reasonably practicable; and
  - (ii) reasonably assist the Discloser in obtaining confidential treatment for, or avoiding or minimising such disclosure of, the relevant Confidential Information to the extent reasonably requested by the Discloser;
- (e) is independently developed by the Disclosee without any direct or indirect use of, reference to, or reliance on any Confidential Information; or
- (f) is authorised for release or use by the written pre-approval of the Discloser but only to the extent of such written pre-approval.

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

## **8. Non-disparagement**

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- 8.1 Subject to clause 8.2, on and from the date of this agreement, each party must not:
- (a) make, express, transmit, speak, write, verbalise or otherwise communicate in any way (directly or indirectly, in any capacity or manner) any remark, comment, message, information, declaration, communication or other statement of any kind (whether verbal, in writing, electronically transferred or otherwise) that might reasonably be construed to be critical of, or derogatory or negative towards, any other party or any Representative of any other party; or
  - (b) cause, further, assist, solicit, encourage or knowingly permit any other person to do so, or support or participate in any other person doing so,

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

- 8.2 Clause 8.1 shall not prohibit any party from making any statement or disclosure as required by law or court order, provided that such party must:
- (a) promptly notify the other party in writing in advance of any such statement or disclosure, if reasonably practicable; and
  - (b) reasonably assist the other party in obtaining confidential treatment for, or avoiding or minimising the dissemination of, such statement or disclosure to the extent reasonably requested by any party.

## **9. Intellectual Property**

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

### **Assignment**

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

### **Client's duty to assist the Provider**

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

### **Permitted use**

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

### **Moral rights**

- 9.5 The Client consents to the doing of any acts, or making of any omissions, by the Provider or any of the Provider's employees, officers, contractors, agents, licensees or assigns that infringes its Moral Rights in any Works that constitute Relevant IP, including:
- (a) not naming the Client as the author of a Work; or
  - (b) amending or modifying (whether by changing, adding to or deleting/removing) any part of a Work but only if the Client is not named as the author of the amended or modified Work,

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

## 10. Liability and remedies

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### Indemnity

- 10.1 The Client shall have personal liability for, and hereby irrevocably indemnifies and covenants to hold the Provider harmless from and against, any and all Losses that may be suffered by the Provider and which arise, directly or indirectly, in connection with any breach of this agreement by the Client and/or any negligent or other tortious conduct in the provision of the Services.
- 10.2 The Client acknowledges that, in entering into this Agreement, it does not do so in reliance on any representation, warranty or other provision except as expressly provided in this Agreement, and any conditions, warranties or other terms implied by statute or common law are excluded from this agreement to the fullest extent permitted by law.

### Indemnities continuing

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

### Limitation of liability

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

- (iii) the refund of any amounts paid by the Client to the Provider under this agreement in respect to the Services,

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

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

### **Force majeure**

10.5 To the maximum extent permitted by law, the Provider and its Representatives expressly exclude liability for any damage and/or delay in the performance of any obligation of the Provider under this agreement where such damage or delay is caused by circumstances beyond the reasonable control of the Provider and the Provider shall be entitled to a reasonable extension of time for the performance of such obligations, and the Client acknowledges and agrees that the Provider holds the benefit of this clause 10.5 for itself and as agent and trustee for and on behalf of each of its Representatives. For the avoidance of doubt, the Provider has no liability under and is not deemed to be in breach of this agreement for any delays or failures in performance of this agreement which result from circumstances beyond the reasonable control of the Provider including:

- (a) 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;
- (b) 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;
- (c) Pressure waves caused by aircraft or other aerial devices travelling at sonic or supersonic speeds;
- (d) An act of God, pandemic, epidemic, earthquakes, tempest, cyclone, tornado, volcano, asteroid impact, flood, fire, lightning, storm, explosion, celestial events, solar flare, electromagnetic pulse, coronal mass ejection or other physical or natural disaster;
- (e) Strikes at national level or industrial disputes at a national level, or strike or industrial disputes by labour not employed by the Provider, its subcontractors or its suppliers and which affect an essential portion of the Service but excluding any industrial dispute which is specific to the performance of the works or this Agreement;
- (f) Strike, lockout or other interference with work, blockade, disturbance, , governmental or quasi-governmental restraint, expropriation prohibition intervention direct or embargo, unavailability or delay in availability of equipment or transport, inability; or
- (g) Delay in obtaining governmental or quasi-governmental approvals consents permits licenses authorities or allocations, and any other cause whether of the kind specifically enumerated above or otherwise which is not reasonably within the control of the Provider.



- (h) Where there is an event of force majeure, the party prevented from or delayed in performing its obligations under this contract must immediately notify the other party giving full particulars of the event of force majeure and the reasons for the event of force majeure preventing that party from, or delaying that party in performing its obligations under this contract and that party must use its reasonable efforts to mitigate the effect of the event of force majeure upon its or their performance of the contract and to fulfil its or their obligations under the contract.
- (i) Upon completion of the event of force majeure the party affected must as soon as reasonably practicable recommence the performance of its obligations under this agreement. Where the party affected is the Client, the Client must provide a revised programme rescheduling the Service to minimise the effects of the prevention or delay caused by the event of force majeure.
- (j) An event of force majeure does not relieve the Client from liability for an obligation which arose before the occurrence of that event, nor does that event affect the obligation to pay money in a timely manner which matured prior to the occurrence of that event.
- (k) If such circumstances continue for a continuous period of more than 6 months, either Party may terminate this agreement by written notice to the other Party.

### **Remedies for breach**

10.6 Each party acknowledges and agrees that, in the event of any breach by the other party of the provisions of clause 7 (Confidentiality), clause 8 (Non-disparagement) or clause 12 (Non-solicitation), damages may not be an adequate remedy and the first-mentioned party may, in addition to any other remedies, obtain an injunction restraining any further violation by the other party and other equitable relief, without the necessity of showing actual damage and without any security being required, together with recovery of costs. Any Claims asserted by such other party against the first-mentioned party shall not constitute a defence in any such injunction action, application or motion.

## **11. Termination**

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### **Termination for breach**

- 11.1 The Provider may terminate this agreement immediately by notice to the Client if an Event of Default occurs in respect of the Client.
- 11.2 If the Provider commits any material or persistent breach of this agreement, the Client may (but is not obliged to) provide the Provider with a notice of breach in writing. If the Provider fails to remedy the breach within 10 Business Days after the date of its receipt of such notice, the Client may terminate this agreement with immediate effect upon providing the Provider with a further notice of termination in writing.

### **Termination with notice**

- 11.3 The Client may, without limitation to its rights under clause 11.2, terminate this agreement at any time by giving at least 10 Business Days' notice to the Provider.
- 11.4 The Provider may, without limitation to its rights under clause 11.1, terminate this agreement at any time by giving at least 10 Business Days' notice to the Client. The Client may waive all or part of such notice period.

### **Effect of termination**

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

### **During notice period**

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

### **Partially completed deliverables**

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

### **Ipsa facto legislation**

- 11.8 If any provision of this agreement is otherwise unenforceable by virtue of the operation of the *Treasury Laws Amendment (2017 Enterprise Incentives No. 2) Act 2017* (Cth), upon the occurrence of an Insolvency Event in respect of a particular party, notwithstanding any other provision of this agreement, to the maximum extent permitted by law:

- (a) time is of the essence in respect of all obligations of that party under this agreement (whether falling due for performance before, upon or after the occurrence of that Insolvency Event); and
- (b) any breach of this agreement by that party (whether occurring before, upon or after the occurrence of that Insolvency Event), however minor, will (alone or, severally, in combination with the occurrence of that Insolvency Event) be deemed to be a material breach of this agreement,

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

### **Accrued rights**

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

## Survival

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

## 12. Non-solicitation

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

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

12.2 The Client acknowledges and agrees that:

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

12.3 The parties intend the covenants and restraints under clauses 12.1 to operate to the maximum extent. If any of those separate covenants and restraints would, in the absence of this clause 12.3, be void as unreasonable for the protection of the interests of the Provider but would not be so void if any part of the wording in this clause 12 or Schedule 1 was deleted or amended, the separate covenants and restraints will apply with the minimum modifications necessary to make them effective.

## 13. Notices

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

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

- (c) delivered/sent either:
  - (i) personally;
  - (ii) by commercial courier;
  - (iii) by pre-paid post;
  - (iv) if the notice is to be served by post outside the country from which it is sent, by airmail;
  - (v) by fax; or
  - (vi) by e-mail.

13.2 A notice is deemed to have been received:

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

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

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

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

## **14. General**

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### **Further assurances**

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

### **Third parties**

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

### **Costs**

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

### **Entire agreement**

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

### **Severability**

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

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

### **No waiver**

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

### **Amendment**

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

### **Assignment**

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

### **Counterparts**

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

### **Electronic exchange**

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

14.11 If a party delivers an executed counterpart of this agreement under clause 14.1010:

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

### **Consequences of Default**

- 14.12 Where an invoice, has remained unpaid for five (5) Business Days, a reminder will be sent to the Client, in writing, and an administration fee of \$250.00 will be charged to the Client.
- 14.13 If the invoice remains unpaid after the reminder has been provided, solicitors or collection agents will be engaged, and the Client agrees to indemnify the Provider for any legal and/or collection costs.
- 14.14 For the avoidance of doubt, if the Client owes the Provider any money, the Client shall in addition to indemnifying the Provider from and against all costs and disbursements incurred by the Provider in recovering the debt including but not limited to collection fees, legal costs on a solicitor and own client basis, also indemnify the Provider for the Provider's contract Default fee in the amount of \$250.00, Court, arbitration, or any other institution filing fees and bank dishonour fees.
- 14.15 Without prejudice to any other remedies the Provider may have, if at any time the Client is in breach of any obligation (including those relating to payment) under these terms and conditions, the Provider may suspend or terminate the supply of Service to the Client.
- 14.16 Without prejudice to the Provider other remedies at law the Provider shall be entitled to cancel all or any part of any order of the Client which remains unfulfilled and all amounts owing to the Provider shall, whether or not due for payment, become immediately payable if:
  - (a) any money payable to the Provider becomes overdue, or in the Provider's opinion the Client will be unable to make a payment when it falls due;
  - (b) the Client becomes insolvent, convenes a meeting with its creditors or proposes or enters into an arrangement with creditors, or makes an assignment for the benefit of its creditors; or
  - (c) a receiver, manager, liquidator (provisional or otherwise) or similar person is appointed in respect of the Client or any asset of the Client.

### **Work Health and Safety**

- 14.17 The Client shall comply with the provisions of all statutes, regulations and bylaws of government, local and other public authorities that may be applicable, including any work health and safety (WHS) laws relating to the relevant industry and any other relevant standards or legislation.
- 14.18 The Client shall obtain (at the expense of the Client) all licenses and approvals that may be required for the Service.
- 14.19 The Client is solely responsible for any fines, penalties, or other notices incurred by them, relating to the Services performed in connection with this Agreement.

## **Insurance**

- 14.20 The Client must take out all insurance required by law including workers' compensation and public liability insurance for a minimum of an amount to be agreed for each occurrence. The Client accordingly does not limit its liability, whether in contract, tort, negligence, breach of statutory duty or otherwise to that amount.
- 14.21 It is the Client's responsibility to obtain any and all proper and appropriate insurances (such as public and property liability insurance and insurance coverage for the full replacement value of the Goods) in respect of and in connection with the purchase of any goods from the Provider.
- 14.22 The Client acknowledges that the Provider may at their discretion refuse the sale, delivery or collection of Goods unless the Client has taken out appropriate insurance policies (as determined by the Provider in its absolute discretion) and provides the Provider with certificates of currency of such insurance policies.
- 14.23 The Client holds the benefit of the Client's insurance of the Goods on trust for the Provider and must pay to the Provider the proceeds of any insurance in the event of the Goods being lost, damaged or destroyed.
- 14.24 The production of these terms and conditions by the Provider shall be sufficient evidence of the Provider's rights to receive the insurance proceeds direct from the insurer without the need for any person dealing with the Provider to make further enquiries.
- 14.25 If any Goods are damaged or destroyed before all money owing to the Provider is paid by the Client, the Provider will be entitled to receive all insurance proceeds payable for the Goods. The production of these terms and conditions by the Provider is sufficient evidence of the Provider's rights to receive the insurance proceeds without the need for any person dealing with the Client to make further enquiries.

## **Dispute Resolution**

- 14.26 The parties shall endeavour to settle any dispute arising out of or relating to this agreement, including with regard to its existence, validity or termination, by mediation administered by the Australian Disputes Centre (ADC) before having recourse to arbitration or litigation.
- 14.27 The mediation shall be conducted in accordance with the ADC Guidelines for Commercial Mediation operating at the time the matter is referred to ADC (the Guidelines).
- 14.28 The terms of the Guidelines are hereby deemed incorporated into this agreement.
- 14.29 This clause shall survive termination of this agreement.

## **Change of Control**

- 14.30 Where the Client is a business or Provider, the Client shall give the Provider not less than twenty (20) business days' prior written notice of any proposed change of Providership of the Provider and/or any other change in the Provider's details (including but not limited to, changes in the Provider's name, address, contact phone numbers, email addresses, ABN, ACN or business practice).

## **Cancellation**

- 14.31 The Provider may cancel any contract to which these terms and conditions apply or cancel the Service at any time before the Service is provided or delivered by giving notice to the Client. The Client shall have no claim against the Provider for such cancellation.
- 14.32 Upon cancellation, the Provider is entitled to immediately take possession of the Goods.
- 14.33 The Provider reserves the right not to refund any deposit where the Provider cancelled the contract.
- 14.34 If the Client cancels this agreement, the Provider reserves the right to charge an administrative fee of up to \$250.00 to the Client.
- 14.35 On giving such notice the Provider shall invoice the Client for any work completed up to that point and any materials purchased.
- 14.36 The following cancellation fees apply:
- (a) Within 10 days of acceptance of the quote– 50% of the total cost of the Service; or
  - (b) Within 5 days of acceptance of the quote – Full cost of the service, and any additional, reasonable fees incurred by the Provider.
- 14.37 Refunds will be refunded to the same card that was used to make payment. Whilst the Provider will endeavour to process payments and refunds immediately, transactions may take up to 5 working days to appear on a bank statement. If payment was made in cash, refunds will also be made in cash.
- 14.38 Cancellation shall only be accepted by the Provider if provided in writing. The Client shall be liable for any and all loss incurred (whether direct or indirect) by the Provider as a direct result of the cancellation (including, but not limited to, any loss of profits).
- 14.39 Cancellation of orders for Service made to the Client's specifications, or for non-stock list items, will not be accepted once production of any made-to-order goods or goods has commenced, or an order has been placed and any deposit will be forfeited at the sole discretion of the Provider.

### **Title & Risk**

- 14.40 The Client agrees and acknowledges that the Provider remains the legal owner of the Goods until all moneys owed by the Client are paid to the Provider and until then all property in and title to the goods sold to the Client remains, at all times, with the Provider.
- 14.41 It is further agreed that until the Client pays all moneys owing to the Provider, that:
- (a) the Client is only a bailee of the Goods and must, return the Goods to the Provider on request;
  - (b) the Client must not sell, grant, create or allow to be created any encumbrance or security interest by any party over the equipment, mortgage, assign, caveat, sub-let, dispose of, or otherwise part with possession of the Goods;
  - (c) if the Client sells, disposes or parts with possession of the Goods then the Client must hold the proceeds of any such act on trust for the Provider and must pay or deliver the proceeds to the Provider on demand;



- (d) the Client should not convert or process the Goods or goods or intermix them with other goods but if the Client does so then the Client holds the resulting product on trust for the benefit of the Provider and must sell, dispose of or return the resulting product to the Provider as it so directs;
- (e) the Provider may commence proceedings to recover the Price of the Goods sold notwithstanding that ownership of the Goods has not passed to the Client;
- (f) the Client must not sub-hire or sub-lease the Goods without the prior written consent of the Provider (which consent may be withheld in the Provider's absolute discretion or given subject to such conditions as the Provider sees fit); and
- (g) if any Goods are damaged or destroyed, the Provider is entitled to receive all insurance proceeds payable for the Goods. The production of these terms and conditions by the Provider is sufficient evidence of the Provider's rights to receive the insurance proceeds without the need for any person dealing with the Provider to make further enquiries.

14.42 Risk of damage to or loss including theft or by act of god of Goods passes to the Client on delivery to an address nominated by the Client.

14.43 If the Client requests the Provider to leave Goods outside their own premises or venue, or outside the Client's premises for collection or to deliver the Goods to an unattended location then such Goods shall be left at the Client's sole risk.

### **Recovery & Right of Entry**

14.44 The Client agrees to be liable for all costs incurred by the Provider in the recovery of outstanding amounts, or withheld Goods.

14.45 This includes, but is not limited to, interest at the rate of 15% per annum pro rata, debt collection fees and commissions, legal expenses (including legal fees and disbursements on a solicitor/Client basis) and filing fees as may be appropriate.

14.46 Without prejudice to the rights of the Provider to recover any money owed by the Client, for payment of fees or for damages for breach of this agreement, The Client irrevocably authorises the Provider to enter any premises where the Provider believes the Goods are kept and recover possession of the Goods.

14.47 The Client agrees to indemnify the Provider in respect of any claims, damages, expenses or costs arising out of any action taken as a result of this clause.

### **Goods Delivery**

14.48 Delivery, collection and/or return of the Goods is at the Client's expense.

14.49 The Client must sign all delivery documentation requested to be signed by the Provider and/or the forwarding carrier.

14.50 If the Provider is required to deliver Goods, the Client must provide safe and proper access to the delivery site, including making sure that the site will be clear of all obstructions to allow the Provider to deliver, erect, install or place the Goods safely.

14.51 Delivery and collection does not include set up or pack down, unless stated on the invoice, which must be organized upon purchase. After the booking or upon delivery if

this is required then a cost for this service will be determined by the Provider and charged to the Client.

- 14.52 The Client is liable for and indemnifies the Provider on a full indemnity basis, its employees or agents against all injury, death, loss or damage suffered by the Provider while at the delivery site, unless such injury, loss or damage is caused by the negligence of the Provider, its employees or agents.
- 14.53 The Client also indemnifies the Provider on a full indemnity basis, its employees or agents against all injury, death, loss or damage suffered by the Client including their attendees at the delivery.
- 14.54 The Client agrees and acknowledges that it will pay the Provider additional delivery charges (as reasonably determined by the Provider) for delivery of any Goods above or below street level at the delivery site.
- 14.55 Delivery is taken to have occurred at the time that:
- (a) The Provider (or their nominated carrier) delivers the Goods to the Client's nominated address, even if the Client is not present at the address (as may be agreed between the parties);
  - (b) The Provider undertakes the Service at the Client's nominated address, either in full or in part over one or more days, even if the Client is not present at the address (as may be agreed between the parties); or
  - (c) Any other method of service occurring, as agreed in writing by the parties to this agreement.
- 14.56 At the Provider's sole discretion, the cost of Service is included in the Price and any delivery costs will be itemised in the Quote. Where delivery costs are not indicated the Service does not include delivery.
- 14.57 The time, date and location for Service is to be agreed between the parties.
- 14.58 In the event that the Client is unable to receive Service as arranged then the Provider shall be entitled to charge a reasonable fee for reattendance and/or storage of Goods.
- 14.59 Any time or date given by the Provider to the Client is subject to change. The Provider will not be liable for any loss or damage incurred by the Client as a result of Service being late.
- 14.60 If the Goods cannot be returned, the Provider reserves the right to claim the full costs of the Goods from the Client. If Goods can be returned, the Provider reserves the right to on-charge any restocking fee applied to such returns, and additionally any reasonable costs of time and travel incurred to undertake such returns.
- 14.61 The Client will upon delivery of the Goods, inspect and examine the Goods to confirm its condition and performance. In accepting the Goods upon delivery, the Client accepts that it is in satisfactory condition.
- 14.62 The Client will indemnify the Provider and hold them harmless from and against any and all damage to any person or property resulting from the use of the Goods, including through negligent or reckless behaviour on behalf of the Client.
- 14.63 The Client has rights conferred on it by consumer protection legislation, including guarantees of the quality of provided Goods. It is the Client's sole responsibility to be

aware of their rights. Beyond these statutory rights, the Provider provides no other guarantees or warranties regarding the Goods or service.

- 14.64 Any advice, recommendation, information, assistance or service provided by the Provider in relation to Goods or Services supplied is given in good faith, is based on the Provider's own knowledge and experience and shall be accepted without liability on the part of the Provider and it shall be the responsibility of the Client to confirm the accuracy and reliability of the same in light of the use to which the Client makes or intends to make of the Service.
- 14.65 Where the Provider gives advice or recommendations to the Client, or their agent, regarding the suitability of goods or equipment, and such advice or recommendations are not acted upon by the Client, the Provider shall not be liable in any way whatsoever for any damages or losses that occur and any warranties, resupply or defects clauses will be revoked.

### **Proper Use of Goods**

- 14.66 The Client may not use the Goods for any purpose other than that agreed to between the parties.
- 14.67 The Goods provided will not be used by the Client, or any other person, for any illegal purpose, or to convey, carry or load any illegal substances or materials.

### **PPSA Laws**

- 14.68 This clause applies to the extent that the Provider's interest in respect of Goods provided for in this Agreement is a 'security interest' for the purposes of the Personal Property Securities Act 2009 (Cth) ("PPS Law"). References to PPS Law in this Agreement include references to amended, replacement and successor provisions or legislation.
- 14.69 The Provider may register any actual impending or likely security interest. The Client may not make any Claim against the Provider in respect of any registration even if it is determined that The Provider should not have registered a security interest.
- 14.70 The Client must do anything (such as obtaining consents and signing documents) which the Provider requires for the purposes of:
- (a) Ensuring that the Provider's security interest is enforceable, perfected and otherwise effective under the PPS Law;
  - (b) Enabling the Provider to gain first priority (or any other priority agreed to by the Provider in writing) for its security interest; and
  - (c) Enabling the Provider to exercise rights in connection with the security interest.
- 14.71 The rights of the Provider under this Agreement are in addition to and not in substitution for the Provider's rights under other law (including the PPS Law) and the Provider may choose whether to exercise rights under this Agreement, and/or under such other law, as it sees fit. To avoid any doubt about it the Provider's security interest will attach to proceeds.
- 14.72 The Client must not dispose or purport to dispose of or create or purport to create or permit to be created any 'security interest' (as defined in PPS Law) in the Goods other than with the express written consent` of the Provider. The Client must not lease, hire, pledge, bail or give possession ('sub-hire') of the Goods to anyone else

unless the Provider (in its absolute discretion) first consents in writing. Any such sub-hire must be in writing in a form acceptable to the Provider and must be expressed to be subject to the rights of the Provider under this Agreement. The Client may not vary a sub-hire without the prior written consent of the Provider (which may be withheld in its absolute discretion).

- 14.73 The Client must take all steps including registration under PPS Law as may be required to:
- (a) Ensure that any security interest arising under or in respect of the sub-hire is enforceable, perfected and otherwise effective under the PPS Law;
  - (b) Enable the Client to gain (subject always to the rights of the Provider) first priority (or any other priority agreed to by the Provider in writing) for the security interest;
  - (c) Enable the Provider and the Client to exercise their respective rights in connection with the security interest; and
  - (d) To assure performance of its obligations under this Agreement, the Client hereby gives the Provider an irrevocable power of attorney to do anything the Provider considers the Client should do under this Agreement. The Provider may recover from the Client the cost of doing anything under this clause 14.68 – 14.73, including registration fees.
- 14.74 In this clause financing statement, financing change statement, security agreement, and security interest has the meaning given to it by the PPS.
- 14.75 Upon assenting to these terms and conditions in writing the Client acknowledges and agrees that these terms and conditions constitute a security agreement for the purposes of the PPSA and creates a security interest in all Goods and/or collateral (account) – being a monetary obligation of the Client to the Provider for Services – that have previously been supplied and that will be supplied in the future by the Provider to the Client.
- 14.76 The Client undertakes to:
- (a) promptly sign any further documents and/or provide any further information (such information to be complete, accurate and up-to-date in all respects) which the Provider may reasonably require to;
  - (b) register a financing statement or financing change statement in relation to a security interest on the Personal Property Securities Register;
  - (c) register any other document required to be registered by the PPSA; or
  - (d) correct a defect in a statement;
  - (e) indemnify, and upon demand reimburse, the Provider for all expenses incurred in registering a financing statement or financing change statement on the Personal Property Securities Register established by the PPSA or releasing any Goods charged thereby;
  - (f) not register a financing change statement in respect of a security interest without the prior written consent of the Provider;

- (g) not register, or permit to be registered, a financing statement or a financing change statement in relation to the Goods and/or collateral (account) in favour of a third party without the prior written consent of the Provider;
- (h) immediately advise the Provider of any material change in its business practices of selling the Goods which would result in a change in the nature of proceeds derived from such sales.

14.77 The Provider and the Client agree that sections 96, 115 and 125 of the PPSA do not apply to the security agreement created by these terms and conditions.

14.78 The Client hereby waives its rights to receive notices under sections 95, 118, 121(4), 130, 132(3)(d) and 132(4) of the PPSA.

14.79 The Client waives its rights as a grantor and/or a debtor under sections 142 and 143 of the PPSA.

14.80 Unless otherwise agreed to in writing by the Provider, the Client waives its right to receive a verification statement in accordance with section 157 of the PPSA.

14.81 The Client unconditionally ratify any actions taken by the Provider under clauses 14.68 to 14.80.

14.82 Subject to any express provisions to the contrary (including those contained in this clause 14.68 – 14.80 nothing in these terms and conditions is intended to have the effect of contracting out of any of the provisions of the PPSA.

### **Severance**

14.83 If a contract constituted by these Conditions is a 'consumer contract' or 'small business contract' (each as defined in the Australian Consumer Law in Schedule 2 to the Competition and Consumer Act 2010 (Cth) (ACL) and a term of that contract would, but for this clause be 'unfair' (as defined in section 24(1) of the ACL), the Provider may only apply or rely upon that term to the extent that doing so is reasonably necessary to protect the Provider's legitimate interests.

14.84 If any provision of these Conditions are not enforceable in accordance with its terms, other provisions which are self-sustaining are, and continue to be, enforceable in accordance with their terms.

14.85 If any part of these Conditions is invalid or unenforceable, that part is deleted and the remainder of the Conditions remains effective.

### **Security and Charge**

14.86 In consideration of the Provider agreeing to supply the Services or Goods under this Agreement, the Client charges all of its rights, title and interest (whether joint or several) in any land, realty or other assets capable of being charged, owned by the Client either now or in the future, to secure the performance by the Client of its obligations under these terms and conditions (including, but not limited to, the payment of any money) or otherwise arising from the carrying out of the works.

14.87 The Client acknowledges and agrees that the Provider has a caveatable interest in the land from upon execution of this Agreement and that the Provider is entitled to lodge and maintain a caveat on the title to the Land notifying the Provider's interested created by this Agreement.

- 14.88 The Client agrees that upon execution of this Agreement to deliver to the Provider, a caveat in registerable form with the consent to caveat signed by the Client to lodge and maintain a caveat on the title to the land notifying the Provider's interested by this Agreement together with a cheque in favour of the Lands Title Office for registration fee on the caveat.
- 14.89 The Client agrees that the Provider is entitled to register and a lodge a caveat on the Client's property in its favour and that the Provider will withdraw the caveat once all moneys owing to the Provider by the Client pursuant to this Agreement are paid in full to the Provider.
- 14.90 The Client indemnifies the Provider from and against all the Provider's costs and disbursements including legal costs on a solicitor and own client basis incurred in exercising the Provider's rights under this clause.
- 14.91 The Client irrevocably appoints the Provider and each partner of the Provider as the Client's true and lawful attorney/s to perform all necessary acts to give effect to the provisions of this clause 14.75 - 14.82 including, but not limited to, signing any document on the Client's behalf.
- 14.92 The Client acknowledges that the Provider is entitled to apply to a Court for the sale of the property for the purpose of recovering any debt that may be outstanding under this Agreement relating to building works.
- 14.93 The Client agrees it has sought and received independent legal advice in relation to this Clause 14.86 - 14.93.

#### **Guarantee**

- 14.94 As security for the due and punctual payment and performance of the Client's obligations under this Agreement, the Client may be required to (at the Provider's discretion), prior to the undertaking of Services and or supply of Goods by the Provider, provide to the Provider a Guarantor to enter into this Agreement and guarantee and indemnify the Provider on any or all of the following terms:
- (a) The Guarantor unconditionally guarantees full Payment of all money owed by the Client under this Agreement and any ancillary documents and the observance and performance of all of the Client's obligations as specified in or implied by this Agreement;
  - (b) The Guarantor indemnifies and must keep indemnified the Provider against any costs, expenses, claims, liabilities, losses and damages incurred by the Provider in respect of any default by the Client under this Agreement, or arising out of any claim by any third-party relating to the terms of this Agreement;
  - (c) This guarantee covers all Goods and Services undertaken by the Provider, including Variations;
  - (d) This guarantee is in favour of the Provider and its employees, successors, assigns and agents;
  - (e) This guarantee extends to claims by the Provider for breaches of material terms of this Agreement and repudiation of this Agreement and to the Provider's reasonable legal and other expenses of seeking to enforce those obligations;

- (f) the Provider may require the Guarantor under this guarantee to pay to the Provider any outstanding amounts, or any other amount to compensate the Provider for any loss or damage incurred under this Agreement, without the Provider being required to institute any proceedings against the Client in respect of such claims or breaches;

14.95 The Provider's rights against the Guarantor are not affected by:

- (a) the death, bankruptcy or winding up of the Client or Guarantor;
- (b) the Client's liability under this Agreement, any variation or any other ancillary documents, assignments or extensions of the Agreement between the Parties; or
- (c) any release of the Client or any Guarantor.

14.96 This Guarantee is to be a continuing Guarantee and will be irrevocable and will remain in full force and effect until the whole of the money payable or which may become payable pursuant to the provisions of this Agreement has been paid and until all obligations of the Client, pursuant to this Agreement, have been duly and properly observed and performed or satisfied.

#### **Defects, Warranties and Returns, Competition and Consumer Act 2010 (CCA)**

14.97 The Client must inspect all Goods on delivery (or Services on completion) and must within five (5) business days of delivery notify the Provider, in writing, of any evident defect/damage, shortage in quantity or failure to comply with the description or quote. The Client must notify the Provider of any other alleged defect in the Goods/Services as soon as reasonably possible after any such defect becomes evident. Upon such notification the Client must allow the Provider to inspect the relevant Goods or Services.

14.98 Under applicable State, Territory and Commonwealth Law (including, without limitation the CCA), certain statutory implied guarantees and warranties (including, without limitation the statutory guarantees under the CCA) may be implied into these terms and conditions ("Non- Excluded Guarantees").

14.99 The Provider acknowledges that nothing in these terms and conditions purports to modify or exclude the Non-Excluded Guarantees.

14.100 The Provider will not accept liability, nor will any warranty provided by the Provider apply where repairs or installation occurs by a third-party Contractor without the Provider's written consent.

14.101 The Provider's liability in respect of these warranties is limited to the fullest extent permitted by law.

14.102 If the Client is a consumer within the meaning of the CCA, the Provider liability is limited to the extent permitted by this Act.

14.103 The Provider shall not be liable for any defect or damage which may be caused or partly caused by or arise as a Force Majeure event and as a result of:

- (a) The Client failing to properly maintain the Serviced area or store the Goods;
- (b) The Client using the Serviced area or Goods for any purpose other than that for which they were designed;

- (c) The Client continuing use or attempting to repair after any defect became apparent or should have become apparent to a reasonably prudent operator or user;
- (d) The Client failing to follow any instructions or guidelines provided by the Provider or manufacturer; or
- (e) Fair wear and tear, any accident, or act of God.
- (f) Notwithstanding anything contained in this clause if the Provider is required by a law to accept a return then the Provider will only accept a return on the conditions imposed by that same law.

### **Building and Construction Industry Security of Payment Act 2009**

14.104 The Client's obligation to pay the Provider pursuant to the Building and Construction Industry Security of Payment Act 2009 (SA) survive termination or cancellation of this Agreement.

14.105 The Provider is entitled to progress payments from the Client pursuant to the Act.

14.106 The Provider is entitled to issue Payment Claims to the Client pursuant to the Act.

14.107 Progress Payments are calculated according to the Provider's terms and conditions including but not limited to Quotes, Variations, proposals and or invoices.

14.108 The Reference Date for any Progress Payment and or Payment Claim issued by the Provider to the Client is according to the Provider's terms and or in any other case 15 business days.

14.109 If the Client does not pay a Progress Payment, and or Payment Claim, the Provider reserves the right to:

- (a) charge interest in accordance with these terms of service;
- (b) halt any further work until such time as the outstanding payment is forthcoming without incurring any penalty:
  - (i) exercise a lien over unfixed plant and materials supplied by the Provider;
  - (ii) recover the unpaid portion of a claimed amount as a debt due in Court;
  - (iii) make an adjudication application; or
  - (iv) serve notice on the Client of the Provider's intention to suspend carrying out construction works or supply Goods and Service.
- (c) The Client also agrees that the Provider is entitled to serve notice on the Client of the Provider's intention to suspend work under the Act where:
  - (i) the Client fails to provide a payment schedule to the Provider and fails to pay the claimed amount by the due date on any payment claim.
  - (ii) the Client provides a payment schedule to the Provider where the Scheduled Amount is less than the Claimed Amount; or



- (iii) the Client fails to pay an amount on the date determined by the Adjudicator.
- (d) The Client's obligation to pay the Provider pursuant to the *Building and Construction Industry Security of Payment Act 2009* (SA) survives termination or cancellation of this Agreement.
- (e) The Client accepts that email is a valid format to receive any documents under the Act, including but not limited to Payment Claims, Progress Payment claims, an application for adjudication, and mandatory notices (without limiting the preceding, taken to include a notice under section 17(2) of the Act
- (f) Where a progress claim is disputed, no payment schedule is provided, or payment is not made in accordance with a payment schedule by the relevant due date, the person who has served the payment claim can serve a notice of intention to apply for adjudication.

### **Governing law and jurisdiction**

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

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

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## Schedule 1 | Non-Solicitation Periods

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3 months; 6 months; 9 months; 12 months; 18 months; 24 months; 30 months; 36 months

Worldwide, the Commonwealth of Australia, the State of South Australia, the Greater Adelaide Metropolitan Area, within 20km of the Provider's Business, within 15km of the Provider's Business, within 10km of the Provider's Business.