

GENERAL TERMS AND CONDITIONS

MAGRYN & ASSOCIATES PTY LTD ACN 090 560 099

TERMS

The following conditions, provisions and terms (referred to below as the 'Agreement') govern the relationship between the Magryn & Associates Pty Ltd ACN 090 560 099 and the Customer in connection with the supply of Goods and Services.

1. Definitions and Interpretation

Additional Items means any Goods and/or Services supplied and provided by the Supplier to the Customer specifically referred to in the Purchase Order or variation to the Purchase Order.

Agreement means these General Terms and Conditions, the Purchase Order and all invoices.

Business Day means a day on which the banks are open for general banking business in South Australia except Saturday, Sundays and public or statutory holidays.

Customer means the customer identified on any quotation, work authorisation or other form as provided by the Supplier to the Customer, including any person acting as agent or purporting to act as agent of the Customer.

Contract means all contract(s) entered into between the Supplier and the Customer.

Contract Sum means the amount specified in this Agreement.

Collateral and/or Goods means goods and/or services supplied by the Supplier to the Customer or ordered by the Customer but not yet supplied and includes goods described in this Agreement and on any quotation, invoice, purchase order or any other document including any recommendations and advice and over which the Supplier may intend to register a security interest.

Delivery means:

- (a) for services, the time at which the relevant invoice is issued; and
- (b) for Goods, the time at which the Customer takes possession of the Goods at the Customer's nominated address.

Force Majeure Event includes act of God, war, civil disturbance, riot, lightning, cyclone, earthquake, fire, storm, flood, explosion, governmental action and any other cause, event or circumstance which is not reasonably within the control of either the Supplier or the Customer.

Goods means items and materials or equipment supplied by the Supplier to the Customer (and where the context so permits shall include any supply of Services as hereinafter defined).

IP Rights includes copyrights (including software), patents, utility models, trademarks, service marks, design rights (whether registered or unregistered), database rights, proprietary information rights and all other similar proprietary rights that may exist anywhere in the world.

Manufacture includes any individual, manufacturer, supplier, company or agent of the Goods and/or Services that provides such Goods and/or Services to the Supplier.

PPSA means the *Personal Property Securities Act 2009* (Cth) as amended.

Premises means the premises specified in the Purchase Order.

Price means either:

- (a) the cost of Goods and/or Services as specifically agreed between the Supplier and the Customer; or
- (b) in the absence of any prior agreement, as set by the Supplier and shall be subject to change from time to time without notice.

Purchase Order means all Goods and Services purchased by the Customer which form an integral part of any purchase order placed by the Customer with the Supplier which includes any quotation.

Services means all services supplied by the Supplier to the Customer and includes any advice or recommendations (and where the context so permits, shall include any supply of Goods as defined supra).

Supplier means the Magryn & Associates Pty Ltd ACN 090 560 099 or any other change of name of the Supplier.

Interpretation. Headings are for convenience and are used for the use of reference only and do not form part of this Agreement or affect the interpretation or construction of this Agreement. Reference to singular includes the plural and the plural includes the singular. Reference to any other document, agreement or instrument includes any variation or replacement of such other document. Reference to any gender includes all other genders and words importing the singular includes the plural and vice versa. All monetary amounts are in Australian dollars. The use of the words includes or including is not to be taken as limiting the meaning of the words preceding it. A provision of this agreement must not be construed to the disadvantage of a party merely because that party was responsible for the preparation of this Agreement or the inclusion of a provision in this Agreement.

2. Tax

- 2.1. If any supply by the Supplier is subject to Goods and Services Tax (GST), the Customer must, unless the price expressly states that GST is included, pay the relevant GST amount in addition to the specified price.
- 2.2. The Customer shall reimburse the Supplier for all taxes, excises, duties or other charges with the Supplier may be required to pay to any Government or Statutory authority (Local, State or Federal) upon Goods or Services or related to the sale, production, transportation or Delivery of Goods or Services.

3. Quotations

- 3.1. Any estimate or quotations do not constitute an offer by the Supplier and may be altered or withdrawn without notice.
- 3.2. the Supplier's obligation to supply the Goods and/or carrying out the Services is subject always to the availability of labour, supply/materials, plant, equipment and services making up, or necessary for, the supply of the Goods and Services.
- 3.3. Dates specified in any quotation for Delivery of the Goods and/or completion of the Services are estimates only. The Supplier will use all reasonable endeavours to deliver the Goods or Services by dates specified in the quotation but does not warrant that such Delivery date will be met.
- 3.4. The Customer may not reject the Goods and/or Services on account of the Supplier's inability to comply with dates specified in any quotation.
- 3.5. The Supplier need not supply or carry out provision of the Goods and/or Services until the Purchase Order and this Agreement has been accepted by the Customer.
- 3.6. The Customer shall accept the Purchase Order and this Agreement by instructing the Supplier in writing to commence the supply or carry out provision of the Goods and/or Services by signing and returning a true copy of the Purchase Order signed by the Customer.
- 3.7. Subject to the provisions specified below, the Purchase Order shall remain current for thirty (30) days from the date on which the Customer signs the Purchase Order and this Agreement. The Supplier shall be entitled to vary any quotation previously provided to the Customer if:
 - 3.7.1. the Customer provides incomplete or inaccurate information to the Seller preventing the Supplier from providing an accurate quotation;
 - 3.7.2. the Customer varies the order in any way, including but not limited to, the size of the order;
 - 3.7.3. the Supplier experiences delays in providing the Goods and/or Services by virtue of any action or inaction on the part of the Customer where such delay is in excess of fourteen (14) days from the commencement date specified in the quotation or if no such date is specified, then fourteen (14) days from the date on which the Customer accepts the quotation;
 - 3.7.4. any works previously carried out by other persons upon the Premises interferes with or prevents the Supplier from providing the Goods and/or Services in accordance with the timeframe as required by this Agreement;
 - 3.7.5. at the Customer's request, the Supplier agrees to provide additional Goods or Services at any time after acceptance of the quotation by the Customer;

3.7.6. the Supplier experiences price increases in acquiring any Goods required in respect of providing the Goods and/or Services to the Customer after the date on which the quotation is accepted by the Customer;

3.7.7. the Customer is in breach of its obligations as set out in this Agreement causing the Supplier to incur loss for any reason directly or indirectly; and

3.7.8. any cause beyond the Supplier's control causing the necessary variation.

4. Additional Items

- 4.1. If the Customer requests that the Supplier supply or carry out Additional Items and the Supplier agrees to such a request, the Additional Items will be deemed to form part of the Goods and/or Services (as the case may be) and the Customer must pay:
 - 4.1.1. if the Supplier has given a written quotation prior to performing or providing the Additional Items, the amount quoted; or
 - 4.1.2. in the absence of a written quotation, an amount calculated using the Supplier's standard supply and hourly labour rates.
- 4.2. The Customer acknowledges and agrees that any and all Goods and/or Services that are not specifically referred to in this Agreement shall constitute Additional Items.

5. Acceptance of Orders

- 5.1. All orders are accepted and goods supplied only upon and subject to this Agreement.
- 5.2. Any order placed by the Customer, whether orally or in writing, shall constitute an offer to contract upon this Agreement and no variation, whether contained in the Customer's order or otherwise shall apply unless the same is accepted and agreed in writing by an officer by the Supplier authorised to sign on its behalf.
- 5.3. No order shall be binding on the Supplier unless and until accepted or confirmed in writing by the Supplier.

6. Prices, Charges, Invoicing and Payment

- 6.1. **Prices and Charges.** Price Catalogues, price lists and other advertising literature or material used by the Supplier are intended to provide an indication only as to price and range of Goods and Services and no prices, descriptions or other particulars contained therein shall be binding on the Supplier.
 - 6.2. The firm and fixed fees and charges for the Delivery of Goods and/or Services shall be the price shown for each of such Goods and/or Services on the face of the Purchase Order or in a prices list attached to these conditions or as otherwise determined by the Supplier. Services will be at fixed fees or charged at the service provider's hourly rate which may vary due to the seniority of the service provider and as amended from time to time. The Supplier will notify the Customer of the hourly charged from time to time upon receiving a written request from the Customer. Apart from GST and taxes, the fees and charges shall include all costs and expenses, whether internal or external, direct or indirect, incurred by the Supplier in complying with the obligations set out in this Agreement or required by law. The Purchase Order prices are inclusive of all packing, protecting, lashing and anchoring materials and of all necessary documents, accessories, all out of pocket expenses, devices and/or appropriate tools in view of a complete and functional use and maintenance of the Goods and/or Services.
 - 6.3. Prices are subject to change without notice.
 - 6.4. **Invoicing.** Invoices shall include all necessary references to the specific Goods and/or Services provided and the Customer's references including buyer's name, contact person, Purchase Order number, place of Delivery, quantity and description of the Goods and/or Services (in the same sequence as in the Purchase Order). With regards to taxes each invoice shall show the GST rate applicable to the charges being invoiced.
 - 6.5. **Due payment and non-payment.** The Customer may be required to pay a deposit to the Supplier equal to one half of the GST inclusive cost as quoted to the Customer within five (5) Business Days following the Customer's written acceptance of the Purchase Order and this Agreement. The Customer acknowledges that the Supplier is under no obligation to supply or carry out provision of the Goods and/or Services as requested by the Customer, until the deposit specified in this Agreement is received by the Supplier in full and when all details pertaining to this Agreement are finalised. In the event of default as to payment owing to the Supplier on the part of the Customer, the Supplier shall be entitled to retain the deposit absolutely and claim for the balance owing in this Agreement and for any other loss and/or damages suffered by the Supplier by way of any remedy available to it as provided in this Agreement or at law or in equity generally.
 - 6.6. The Customer must pay the Supplier, within fourteen (14) Business Days of the date of the Supplier issuing an invoice for such payment to the Customer, the total amount set out in the invoice/s issued by the Supplier to the Customer whether for the whole or part of the Contract Sum and/or the value of any Additional Items. The Customer acknowledges that Delivery of Goods and the provision of Services under this Agreement shall not be made until payment in full pursuant to any invoice issued is made.
 - 6.7. Where Services are carried out over a period exceeding one (1) month, then pro-rata progress payments of the price in respect of the Services carried out shall be claimed and invoiced accordingly.
 - 6.8. If the Customer fails to make such payment within the time frame required by the Supplier, the Supplier shall be at liberty to withhold the provision of Goods and/or Services until such time as the Customer makes full payment and such action shall not constitute a breach of the Supplier's obligations under this Agreement.
 - 6.9. The Customer agrees to pay:
 - 6.9.1. any and all amounts by cheque or electronic funds transfer;
 - 6.9.2. a fee of 2% of the value of the payment for any and all payments made by credit card (VISA or Mastercard only).
 - 6.10. In the event the Customer has not received an invoice of the Goods and/or Services under a Purchase Order at the address stated in the Purchase Order one-hundred and eighty (180) days after the Delivery of the Goods or completion of the Services, such Goods or Services shall not qualify for invoicing and shall not be payable.
 - 6.11. If the Customer disputes the whole or any part of a tax invoice issued by the Supplier, it must pay all amounts due under this Agreement in full to the Supplier before pursuing any remedial or rectification claims.
- #### 7. Personal Property Securities Act 2009 (Cth) (PPSA)
- 7.1. The Customer agrees and acknowledges that:
 - 7.1.1. this Agreement constitute a security agreement for the purposes of the PPSA;
 - 7.1.2. this Agreement create a security interest in all any Goods supplied to the Customer including all present and after-acquired Goods;
 - 7.1.3. the Supplier may register, on the Personal Property Security Register (in any manner the Supplier considers appropriate), a Security Interest in all and any Goods supplied to the Customer including all present and after-acquired Goods.
 - 7.2. The Customer and the Supplier agree to contract-out of the PPSA in accordance with section 115 of the PPSA to the extent that the section applies for the benefit of, and does not impose a burden on, the Supplier. The Customer waives its right to receive a copy of any Financing Statement or any Financing Change Statement registered by the Supplier in respect of the Security Interest created by this Agreement.
 - 7.3. The Customer agrees, at no cost to the Supplier, to execute any documents, provide all relevant information and co-operate fully with the Supplier to ensure that the Supplier has a perfected Security Interest (including, if applicable, a 'Purchase Money Security Interest' as defined from time to time in the PPSA) in any relevant Goods.

- 7.4. The Customer agrees to notify the Supplier of any change in the Customer's structure or management including any sale or disposition of any part of the business of the Customer, any change in directorships, shareholders or management or change in partnership or trusteeship fourteen (14) days prior to any such change taking effect.
- 7.5. The Customer warrants that it shall:
- 7.5.1. not register a financing change statement in respect of a Security Interest without the prior written consent of the Supplier;
- 7.5.2. not register, or permit to be registered, a financing statement or a financing change statement in relation to the Goods in favour of a third party without the prior written consent of the Supplier; and
- 7.5.3. immediately advise the Supplier of any material change in the Customer's structure or management including any sale or disposition of any part of the business of the Customer fourteen (14) days prior to any such change taking effect.
- 7.6. The Customer agrees to indemnify, and on demand reimburse, the Supplier for all costs and/or expenses incurred by the Supplier in registering, maintaining or releasing any Security Interest or for any document costs in respect of any Security Interest.
- 7.7. Defined terms in this clause have the same meaning as given to them in the PPSA from time to time.
- 8. Payment Terms**
- 8.1. Save as herein expressly provided, unless otherwise specifically negotiated and agreed, all invoices to non-account holders are payable cash on Delivery or against a pro forma invoice.
- 8.2. Invoices rendered to account holders are payable net, not later than fourteen (14) days from the date that the Supplier issued the invoice to the Customer.
- 8.3. the Supplier reserves the right to fix minimum order values and/or charge a monthly credit account administration fee.
- 8.4. At the Supplier's sole discretion:
- 8.4.1. a non-refundable deposit may be required prior to any supply of Goods or Services;
- 8.4.2. payments by credit card (VISA or Mastercard only) may attract a fee of 2% of the value of the payment or as otherwise determined by the Supplier in its sole and absolute discretion.
- 8.5. The Supplier reserves the right to change the Price in the event of a variation from the plan of scheduled Services or specifications of the Goods (including but not limited to any variation as a result of additional work required due to unforeseeable circumstances or as a result of increases to the Supplier in the cost of materials and labour).
- 8.6. The Supplier reserves the right to submit payment claims at weekly, fortnightly or monthly intervals, or in accordance with the Supplier's specified payment schedule for work performance, including the cost of variations and the value of any Goods delivered to the Customer but not yet installed.
- 8.7. The Customer shall notify the Supplier in writing within seven (7) days of an invoice being rendered by the Supplier to the Customer if the Customer considers the invoice to be incorrect or invalid for any reason and the reasons for withholding payment, failing which the Customer shall raise no objection to any such invoice and shall make full payment of the said invoice.
- 8.8. The Supplier may, its absolute and sole discretion, seek and recover from the Customer and the Customer agrees to pay:
- 8.8.1. interest on all overdue invoices at a rate of interest six percent (6%) per cent per annum greater than the rate charged from time to time by the Commonwealth Banking Corporation on overdraft accounts.
- 8.8.2. any costs, fees or expenses incurred in collecting or attempting to collect any amounts that are not paid by the Customer by the due date and/or costs, fees or expenses incurred by the Supplier in exercising any other rights, powers or remedies, including but not limited to debt collection agency's expenses and solicitor's fees on a full indemnity basis.
- 8.9. Amounts received by the Supplier may be applied first against interest, charges and expenses.
- 8.10. The Customer shall be liable for, and expressly undertakes to pay, all fees (including an Administration Fee in an amount to be set from time to time by the Supplier) for all costs incurred as a result of any cheque or electronic banking transaction being dishonoured for whatever reason.
- 9. Delivery**
- 9.1. Unless otherwise specifically agreed in the Purchase Order, prices do not include Delivery charges to the Customer.
- 9.2. Unless otherwise quoted or listed in the Purchase Order, prices are calculated on the basis of one Delivery. Specific requests for more than one Delivery shall be subject to agreement in writing by the Supplier and the Supplier reserves the right to impose additional charges.
- 9.3. Where the Supplier agrees to make Delivery by instalments, every instalment shall be deemed to be the subject matter of a separate contract.
- 9.4. The Supplier shall not be liable for any loss or damage, including consequential loss or damage, arising from delay in Delivery or failure to deliver Goods, either whole or in part, due to circumstances beyond its control.
- 9.5. The Customer shall indemnify the Supplier for any costs incurred should access to the Premises not be available and interfering with or preventing the Supplier from delivering the Goods or providing the Services.
- 9.6. The Customer shall make all arrangements necessary to take Delivery of the Goods when they are tendered for Delivery.
- 9.7. The Customer warrants that it will insure the Goods against any loss or damage upon transfer of risk.
- 9.8. The Supplier's obligation to deliver shall be discharged on Delivery. If the Customer is unable or unwilling to take Delivery of the Goods when the Goods are ready for Delivery, then the Supplier shall be entitled to charge a fee for the storage and re-Delivery of the Goods.
- 9.9. Unless otherwise specifically agreed in writing, any times quoted for despatch are to be treated as estimates only. The Supplier will however endeavour to adhere to them.
- 9.10. All despatch dates are calculated from the date of acceptance of the Customer's written order or from the date all outstanding technical details have been resolved, whichever is the later.
- 9.11. Unless otherwise specifically negotiated, the risk in the Goods shall pass to the Customer when it is dispatched from the Supplier's premises and the Supplier has no liability for loss or damage of Goods in transit unless the carriage is affected by the Supplier vehicles and not by a third party carrier.
- 9.12. The failure of the Supplier to deliver shall not entitle either party to treat this Agreement as having been repudiated.
- 10. Buried or Unseen Services**
- 10.1. In the event that buried or unseen services are disturbed or damaged on site and/or the Premises whilst the Goods and/or Services are being supplied by the Supplier, the Supplier will not be liable for any repair work and any repair work required by the Customer to be undertaken by the Supplier will constitute Additional Items and will be paid at the Customer's expense.
- 10.2. The Customer acknowledges and agrees that it is the Customer's responsibility and obligation to provide scaled plans to the Supplier and mark out precisely the location of where the Goods are to be installed and the Supplier shall be held harmless and shall not be responsible or liable for any loss, damage or costs of alterations or repositioning of the Goods in the event that the Customer incurs losses in that regard if the Customer's instructions are incorrect and the Goods are installed in a position that does not comply with all relevant legislation, regulations, standards or guidelines.
- 10.3. The Customer shall ensure they or a representative remain on site or at the Premises during the performance of the Supplier's work and the Customer agrees to indemnify the Supplier for any claims or charges relating to the damage and/or loss of property from the site and/or the Premises if the Customer has not complied with this clause.
- 11. Defects**
- 11.1. The Customer acknowledges and agrees that:
- 11.1.1. if it fails to provide the Supplier with written notice of any non-complying aspect of, or defects in, the Goods or Services (as the case may be) within three (3) Business Days of Delivery, the Customer shall be deemed to have acknowledged and accepted that the Goods and/or Service are of the specified quantity and of a suitable quality, standard and condition, have been delivered without shortage in quantity and in a proper and suitable standard and condition in keeping with the Goods specified in this Agreement, then the Supplier will be deemed to have fully discharged its obligations under this Agreement. In the event, the Customer has property and in detail notified the Supplier in writing within the timeframe specified in this clause that the Goods and/or Service (as the case may be) are defective, the Customer shall afford the Supplier an opportunity to inspect the Goods within a reasonable time following Delivery. If the Customer fails to comply with this clause the Goods shall be conclusively deemed to be in accordance with this Agreement and free from any damage;
- 11.1.2. the Supplier will, upon being deemed to have fully discharged its obligations under this Agreement, be released from any and all liability in respect of the Goods and Services supplied save for the continuing operation of any warranty expressly given under this Agreement;
- 11.1.3. the Supplier shall not be liable to compensate the Customer for any delay in either replacing or repairing the workmanship/Goods or in properly assessing the Customer's claim; and
- 11.1.4. the Supplier is not liable to compensate the Customer where the defect or damage is caused by or arises through:
- 11.1.4.1. a failure on the part of the Customer to properly maintain any Goods; or
- 11.1.4.2. a failure on the part of the Customer to follow any instructions or guidelines provided by the Supplier or a third party; or
- 11.1.4.3. any use of any Goods otherwise than for any application specified on a quote or order form; or
- 11.1.4.4. the continued use of any Goods after any defect becomes apparent or would have become apparent to a reasonably prudent operator or user; or
- 11.1.4.5. the purported repair, alteration or overhaul of the Goods by the Customer or a third party without the Supplier's prior written consent; or
- 11.1.4.6. fair wear and tear, any accident or Force Majeure Event.
- 11.2. The Customer may not assert any right of set off, counterclaim or abatement in respect of alleged defects concerning the Goods and Services and must pay all amounts due under this Agreement in full to the Supplier before pursuing any remedial or rectification claims.
- 12. Manufacturer's Specification and Configuration**
- 12.1. The Supplier will pass to the Customer (so far as possible) the benefit of any warranty given to the Supplier by any third party and will (on request) supply to the Customer details of this Agreement of such warranty and copies of any relevant product information sheets, technical data sheets or product leaflets issued by such third parties and the Customer shall be solely responsible to the entire exclusion of the Supplier for complying with these.
- 12.2. Save as mentioned the Supplier will not be liable for or in respect of any loss or damage caused by, or resulting from, any variation (for whatever reason) in the Manufacturer's specifications or technical data and will not be responsible for any loss or damage resulting from curtailment or cessation of supply following such variation.
- 12.3. Unless otherwise agreed in writing by the Supplier, Goods are supplied in accordance with the Manufacturer's standard specifications. The Supplier reserves the right to increase its quoted price or to charge accordingly in respect of any orders accepted for Goods of non-standard specifications or which require configuration to the Customer's specific requirements and in no circumstances will the Supplier accept cancellation of orders for or the return of Goods of non-standard specification or which have been specifically configured to the Customer's requirements.
- 13. Completion**
- 13.1. All Goods supplied may be subject to manufacturing tolerances. The Supplier does not warrant that all Goods supplied will comply exactly with any specification set by a manufacturer or the Supplier, and the Customer agrees to accept the Goods provided that any variance with an applicable specification does not exceed tolerances acceptable in the industry in which the Supplier carries on business.
- 13.2. The Customer may not assert any right of set off, counterclaim or abatement in respect of alleged defects concerning the Goods and/or Services and must pay all amounts due under this Agreement in full to the Supplier before pursuing any remedial or rectification claims.
- 13.3. The Customer acknowledges and agrees that:
- 13.3.1. if the Customer fails to give the Supplier notice of any non-complying aspect of, or defects in, the Goods or Services (as the case may be) within three (3) business days of the Supplier notifying the Customer that it has fully discharged its obligations under this Agreement, the Supplier will be deemed to have fully discharged its obligations under this Agreement;
- 13.3.2. the Supplier will, upon being deemed to have fully discharged its obligations under this Agreement, be released from any and all liability in respect of the Goods and Services supplied save for the continuing operation of any warranty expressly given under this Agreement;
- 13.3.3. the Supplier shall not be liable to compensate the Customer for any delay in either replacing or repairing the workmanship/Goods or in properly assessing the Customer's claim;
- 13.3.4. it shall be the Customer's responsibility to insure against any loss arising from the breakdown or failure of any Goods provided to the Customer by the Supplier;
- 13.3.5. it shall be the Customer's responsibility to insure against any loss caused by the workmanship or Service provided to the Customer by the Supplier.
- 14. Warranty & Limitation of Liability**
- 14.1. The Supplier warrants that Goods supplied will be of acceptable quality and that the Services shall be performed with due care and skill.
- 14.2. Any warranty as to the Goods on the part of the Customer shall be limited to the written warranty provided by the manufacturer to the Customer on or before installation of the Goods.
- 14.3. The Supplier reserves the right to revoke the warranty should the Goods be modified, altered, damaged or put to any undue stress other than in the way the Goods were designed to perform.
- 14.4. All other warranties, liabilities and obligations imposed under statute are expressly excluded but only to the extent that this exclusion does not contravene the *Australian Consumer Law* or cause any part of this Agreement to be void.
- 14.5. In the event of defects in the Goods or Services supplied being identified within the period specified in clauses 11.1.1 and 13.3.1 above, the Supplier's liability is limited to:
- 14.5.1. in respect of Goods, either:
- 14.5.1.1. the cost of having the Goods repaired; or
- 14.5.1.2. the cost of replacing the Goods whether it be the same or equivalent Goods.
- 14.5.2. in respect of Services:
- 14.5.2.1. supplying the Services again; or
- 14.5.2.2. the cost of having the Services supplied again,
- whichever the Supplier elects to do in its absolute discretion.

- 14.6. Any costs associated with the return of Goods for the purpose of a warranty claim shall be the responsibility of the Customer.
- 14.7. To the maximum extent permitted by law:
- 14.7.1. the Supplier will not be liable to the Customer or any other person or third party in respect of any consequential or other loss or damage (including loss of profit, loss of income, loss of rental, loss of production, loss of actual or potential business opportunity or loss of reputation) arising directly or indirectly from the performance or non-performance of the Goods, their use or misuse, or provision of Services under this Agreement;
- 14.7.2. the Supplier's liability arising out of or in connection with this Agreement whether under the law of contract, in tort, in equity under statute or otherwise shall be limited in aggregate to an amount equal to the Price of the Goods and/or Services payable by the Customer;
- 14.7.3. the Supplier shall not be liable to the Customer for any statements, representations, guarantees, conditions or warranties not expressly contained in this Agreement; and
- 14.7.4. the Supplier shall not be responsible for damage caused in the course of the installation including, but not limited to, cracking or damage to surrounding concrete and pavers or other ground surface area, and accidental or consequential damage the result of carrying out the installation and/or Delivery.
- 14.8. If the customer requests and requires additional insurance the Supplier will take reasonable steps to obtain it on the Customer's behalf and any premium payable and any other expenses incurred in obtaining such insurance shall be payable by the Customer to the Supplier.
- 14.9. The Customer warrants that all Goods ordered by, and / or supplied to the Customer are for commercial purposes only and, accordingly, the provisions of the National Credit Code will not apply.
- 15. Intellectual Property Rights (IP Rights)**
- 15.1. All materials, documentation, computer programs, inventions (whether or not patentable), pictures, audio, video, artistic works and all other works of authorship including all worldwide rights therein under patent, copyright, design right, trade secret or other property right created or developed by the Supplier in providing the Services ('the Work Product'), shall belong to and remain the property of the Supplier.
- 15.2. Save for any confidential information provided by the Customer, which the Customer shall identify in advance in writing to the Supplier, the Supplier shall not be obliged to return any artwork or other material supplied by the Customer to the Supplier for the provision of Services. The Supplier reserves the right to charge a fee proportionate to the time and costs they incur in having to return any information under this clause.
- 15.3. The Supplier grants an exclusive licence to the Customer in perpetuity for the use of an unlimited number of copies of the Work Product, on the basis that the Customer has met all of its contractual obligations to the Supplier.
- 15.4. The Customer shall retain title to and all IP Rights in any pre-existing intellectual property which are submitted by the Customer to the Supplier for the performance of Services.
- 16. Software Products**
- 16.1. The Manufacturer of computer software products or copies thereof shall retain the IP rights to any such software provided to the Customer (**the proprietary software**). The limit of the right or interest in the proprietary software which the Customer shall receive shall be such right or licence to use or enjoy such proprietary software as may be permitted or advised by the Supplier or by the owner of the IP rights therein and shall be subject to the Supplier's terms and conditions relating to such use, a copy of which will be provided to the Customer upon written request to the Supplier for such information.
- 16.2. The Supplier shall have no liability to the Customer in the event that any proprietary software supplied by the Supplier infringes the IP rights of a third party.
- 16.3. The Supplier's liability to the Customer in respect of any claim that software created by the Supplier (not being proprietary software) and supplied to the Customer infringes the IP rights of a third party shall be determined by provisions of the licence issued by the Supplier to the Customer in respect of such software and shall be conditional upon the Supplier having sole control of the legal proceedings and all negotiations for settlement or compromise of any such claim.
- 17. Retention of Title**
- 17.1. The Supplier and the Customer agree that title to the Goods, legal and beneficial ownership, remains vested in the Supplier and shall not pass to the Customer until the Customer has paid the Contract Sum in full and all amounts due for Additional Items to the Supplier by the Customer for the particular Goods and the cost of installation in addition to any interest, fees, collection, repossession and / or legal costs incurred.
- 17.2. The Supplier shall retain an equitable interest in the Goods, whether separate or co-mingled or accessioned, which shall be stored in such a manner as to be clearly identifiable as the property of the Supplier, until title has passed to the Customer and further, upon re-sale of the Goods by the Customer, the Supplier shall have the right to trace any proceeds of sale to the extent that they relate to its Goods.
- 17.3. Until such time as the Supplier receives payment of all costs due and payable by the Customer, the Customer holds the Goods (at no cost to the Supplier) as trustee for the Supplier, should Delivery of any Goods have been made.
- 17.4. If payment has not been received, the Customer will transfer to the Supplier all of its rights in respect of the sale price.
- 17.5. The Supplier may demand at any time until title has passed to the Customer that the Customer, at the Customer's cost, return the Goods or any part of them.
- 17.6. In addition to any lien to which the Supplier may by statute or otherwise be entitled, the Supplier shall, in the event of the Customer's insolvency, bankruptcy or winding up, be entitled to a general lien for the unpaid price of any Goods delivered and installed at the Premises.
- 17.7. In the event that the Customer defaults in the payment of any monies owing, the Supplier and its employees or agents shall have the right to enter with or without notice upon the Customer's Premises or any other premises where the Goods are known to be stored (and a licence to enter the Premises for that purpose should the Premises be private premises) to repossess the Goods and on the basis where the Customer releases and discharges the Supplier from any and all liability whatsoever in respect of exercising rights to possessing the Goods and for this purpose the Customer shall grant reasonable access rights and the Supplier, its employees or agents shall be entitled to do all things required to secure repossession.
- 17.8. Nothing in Clause 17.7 prevents the Supplier from exercising any legal rights and remedies to recover payment of all amounts due and payable under this Agreement and otherwise at law.
- 17.9. The Customer agrees and acknowledges that it is only a bailee of the Goods and until such time as the Supplier has received payment in full for the Goods then the Client shall hold any proceeds from the sale or disposal of the Goods, up to and including the amount owed to the Supplier for the Goods, on trust for the Supplier.
- 17.10. Until title passes to the Customer, the Customer acknowledges that these conditions create, in the Supplier's favour, a Purchase Money Security Interest in the Goods and any proceeds of their sale which the Supplier may register on the PPSR.
- 17.11. If the Customer rejects the Goods for any reason, then title and risk does not pass to the Customer.
- 18. Risk and Title**
- 18.1. Notwithstanding clause 17 above, the risk for the Goods supplied shall pass to the Customer upon Delivery.
- 18.2. If any of the Goods are damaged or destroyed prior to the title in them passing to the Customer, the Supplier is entitled, without affecting any other rights and remedies under any agreement, to any insurance proceeds payable for the Goods. The production of this Agreement by the Supplier will be sufficient evidence of the Supplier's rights to receive the insurance proceeds without the need for any insurer or other third party acting on behalf of the insurer to make further enquiries.
- 19. Cancellation and Customer's default**
- 19.1. The Supplier may cancel the Delivery of Goods at any time before Delivery by giving notice to the Customer by any means.
- 19.2. The Supplier shall not be liable for any loss or damage, including any consequential loss or damage, arising from such cancellation.
- 19.3. In the event that the Customer cancels delivery of Goods, the Customer shall be liable for any costs incurred by the Supplier up to the time of the cancellation including, but not limited to, any freight and labour costs incurred by the Supplier.
- 19.4. If the Customer breaches any of its obligations to the Supplier, the Supplier may without prejudice to any further or other claims or rights which the Supplier may have, immediately cancel any uncompleted order or to cancel or suspend Delivery, immediately demand payment for any deliveries already made and retain any payments made for incomplete deliveries.
- 19.5. The Supplier shall also have, without prejudice to any further or other claims or rights which the Supplier may have, immediately cancel any uncompleted order or to cancel or suspend Delivery, immediately demand payment for any deliveries already made and retain any payments made for incomplete Deliveries upon any of the following events taking place:
- 19.5.1. Where full payment of any invoice issue by the Supplier to the Customer whether for the whole or part of the Contract Sum and/or the value of any Additional Items has not been received by the Supplier in accordance with clauses 6.5, 6.6 and 6.7 above; or
- 19.5.2. where the Customer is in material breach of any of this Agreement:
- 19.5.2.1. the Supplier has given the Customer a written notice demanding the breach be remedied within fourteen (14) days and the Customer fails to comply with such notice; or
- 19.5.2.2. such breach cannot be remedied; or
- 19.5.2.3. such breach evinces an intention on the part of the Customer that it does not wish to be bound by the terms of this Agreement; or
- 19.5.3. If the Customer is an individual or a sole trader, the Customer commits an act of bankruptcy, insolvency, goes into administration, has a liquidator, manager or receiver appointed, or the Customer has judgment signed against them (**a default event**); or
- 19.5.4. A default event occurs in respect of any director of a Customer that is trading as a company or any resolution or petition to wind up the Customer is passed or presented, other than for the purposes of a scheme of reconstruction or amalgamation (previously approved in writing by the Supplier); or
- 19.5.5. A default event occurs in respect of any Customer who is incorporated body or any resolution or petition to wind up the Customer is passed or presented, other than for the purposes of a scheme of reconstruction or amalgamation (previously approved in writing by the Supplier); or
- 19.5.6. A default event occurs in respect of any partner of a Customer that is trading as a partnership
- 19.6. This Agreement may only be cancelled and/or varied by the Customer with the written consent of the Supplier.
- 19.7. To the extent permitted by law, the Supplier may require, as a condition of such consent, that the Customer pay reasonable charges for such cancellation/variation, which takes into account expenses incurred by the Supplier to the date of cancellation and/or variation.
- 20. Delays**
- 20.1. The Supplier's obligation to supply the Goods and/or carrying out the Services is subject always to the availability of labour, materials, plant, equipment and services making up, or necessary for, the supply of the Goods and Services.
- 20.2. Dates specified in this Agreement for Delivery and installation of the Goods and/or completion of the Services are estimates only. The Supplier will use all reasonable endeavours to deliver and install the Goods or Services by dates specified in this Agreement but does not warrant that such Delivery or installation date will be met.
- 20.3. The Customer may not reject the Goods and/or Services on account of the Supplier's inability to comply with dates specified in this Agreement.
- 20.4. When it becomes evident to any party that anything (including an act or omission of the Customer or an employee, other consultant, the Supplier or agent of the Customer) may delay The Supplier in carrying out completing the supply of Goods and Services that party must promptly notify the other party in writing with details of the possible delay and the cause.
- 20.5. If the Supplier is or will be delayed in supply of the Goods or completion of the Services (as the case may be) by any cause beyond the reasonable control of the Supplier, the dates for supply and installation specified in this Agreement shall be extended to address the extent of the delay. Alternatively, the Supplier may (in its absolute discretion) elect to reschedule the supply and installation of the Goods and Services to new dates that are to be agreed with the Customer.
- 21. Returns Procedure**
- 21.1. Where the Customer requests, at any time and for any reason, to return any Goods to the Supplier, and the Goods are capable of being returned and the Supplier accepts return of the Goods in its absolute discretion and subject to any law(s), the following procedure for return shall be complied with by the Customer (no return or alleged return of Goods to the Supplier by the Customer being effective for any purpose unless such procedure is complied with by the Customer).
- 21.1.1. The Customer shall prior to despatching or returning any Goods, notify the Supplier in writing of its desire to return the Goods concerned and the reason therefore;
- 21.1.2. Prior to any return of Goods, the Customer shall obtain from the Supplier a designated return label. The label will contain an identification number and shall be affixed by the Customer to the Goods (or the packaging) when returned to the Supplier.
- 21.2. The forgoing procedure being designated solely for administrative convenience, the issuance by the Supplier of any return label shall not be taken as an admission of fault and/or liability on any account whatsoever on the part of the Supplier in relation to any Goods the subject of such return and shall not in any way prejudice or impair any rights which the Supplier may have under the terms of any applicable contractual arrangements.
- 22. Privacy**
23. The Customer hereby authorises the Supplier to collect, retain, record, use and disclose consumer and/or commercial information about the Customer, in accordance with the *Privacy Act 1988* (Ch), to persons and/or legal entities who are a solicitor or any other professional consultant engaged by the Supplier, a Debt Collector, Credit Reference Organization and/or any other individual or organization which maintains credit references and/or default listings.
24. The Customer hereby authorises the Supplier to make enquiries with respect to the Customer's consumer and commercial credit worthiness, to exchange information with other Credit Providers in respect of previous consumer and commercial defaults of the Customer and to notify other Credit Providers of a consumer and/or commercial default by the Customer.

25. Security

- 25.1. The Customer hereby charges in favour of the Supplier all its estate and interest in any land and in any other assets, whether tangible or intangible, freehold or leasehold, in which it now has any legal or beneficial interest or in which it later acquires any such interest with payment of all monies owed by the Customer and consents to the lodging by the Supplier of a caveat or caveats which note its interest in or over such land or other caveatable property.
- 25.2. If the Supplier seeks to enforce the security granted by the Customer in accordance with clause 25.1, the Customer agrees to indemnify the Supplier from and against all of the Supplier's costs and disbursements including (but not limited to) solicitor's fees on a solicitor/client basis.

26. Dispute Resolution

- 26.1. Without prejudice to either party's rights under and relevant legislation in South Australia regulating the services, both parties agree that:
- 26.1.1. if a dispute arises between the Supplier and the Customer out of or in connection with this Agreement, either party must give the other written notice of the dispute.
- 26.1.2. the notice must give reasonable details about the nature of the dispute and the basis or any claim that party is making.
- 26.1.3. the Customer and the Supplier will initially use all reasonable endeavours to resolve any dispute arising under this Agreement within ten (10) Business Days of a party being advised by written notice of such a dispute;
- 26.1.4. in the event that the parties are unable to resolve the dispute within the timeframe specified at clause 26.1.3 above, the parties may either agree to refer the matter to mediation or some other form of alternative dispute resolution or commence legal proceedings.
- 26.2. Neither party will commence proceedings (other than for injunctive or other urgent relief) in respect of any such dispute before a notice and the procedures under clause 26.1 have been complied with.

27. Notices

- 27.1. A notice from one party to another shall be deemed to have been served upon the receiving party if:
- 27.1.1. the notice is delivered personally to the other party;
- 27.1.2. the notice is delivered by facsimile to the other party and the sending party receives a delivery confirmation upon transmission of the facsimile; or
- 27.1.3. the notice is delivered by electronic means to the other party and the sending party receives a delivery confirmation upon transmission of the electronic notice; or
- 27.1.4. the notice is posted to the other party to the address provided in the Details, whereby delivery will be deemed to have occurred on the third business day following the posting of the notice.

28. General

- 28.1. **Entire Agreement.** This Agreement contains the entire agreement between the Supplier and the Customer. In entering into this Agreement, the parties hereby acknowledge that they have not made any warranties or representations to each other except as incorporated in this Agreement. The Customer acknowledges and agrees that this Agreement take precedence over any terms or conditions which may be contained in any document provided by the Customer.
- 28.2. **Variation.** The Supplier may vary this Agreement, any credit limits, or suspend any credit facility from time to time by notice given to the Customer by any means. Unless or except specifically excluded herein, the Supplier retains any rights and remedies available in any prior or pre-existing agreement.
- 28.3. **Warranties.** The warranties, rights and remedies of the Customer as outlined in the *Competition & Consumer Act (Cth) 2010* are not intended to be compromised as a result of anything contained in this Agreement, except to the degree permitted by the Act. The Customer acknowledges that where the Customer consists of more than one party or entity, liability shall be joint and several.
- 28.4. **Error or Misdescription.** No error or misdescription shall invalidate this Agreement nor bind the Supplier in any way and the parties agree to correct such error or misdescription.
- 28.5. **Force Majeure.** The Supplier will have no liability to the Customer in relation to any loss, damage or expense caused by the Supplier's failure to supply the Goods and/or complete the Services as a result of fire, flood, tempest, earthquake, riot, civil disturbance, theft, vandalism, crime, strike, lockout, breakdown, war, the inability of the Supplier's normal suppliers to supply the necessary material or any other matter beyond the Supplier's control.
- 28.6. **Severance.** The invalidity or unenforceability of any provision of this Agreement shall not affect the validity or enforceability of the remaining provisions.
- 28.7. The Customer acknowledges that all orders placed with the Supplier by the Customer are made relying solely upon the Customer's own skill and judgment.
- 28.8. **No Waiver.** The failure by the Supplier to enforce any provision of this Agreement shall not be treated as a waiver of that provision, nor shall it affect the Supplier's right to subsequently enforce that provision.
- 28.9. **Assignment.** The Customer hereby authorises the Supplier to assign its obligations, rights and interest in this Agreement to any third party if it so desires without any further consent being required from the Customer.
- 28.9.1. The Customer is not entitled to transfer its obligations, rights and interest under this Agreement without first seeking the written consent of the Supplier.
- 28.9.2. Any consent that may be given by the Supplier may be granted or withheld in the Supplier's absolute discretion and shall not at any time constitute a waiver of the Supplier's rights and interests under this Agreement.
- 28.10. **Guarantee.** The person signing this Agreement on behalf of the Customer hereby guarantees the payment of all monies that become due and payable under this Agreement. This guarantee will continue following the termination of this Agreement until all monies owing to the Supplier are paid in full.
- 28.11. **Applicable Law.** Any dispute arising out of this Agreement or connected to them including the enforcement of rights shall be governed by the law applying in South Australia and the parties submit to the non-exclusive jurisdiction of the courts (federal or state) in South Australia.
- 28.12. **Instructions and Communications.** The Supplier shall receive instructions from the person signing this Agreement only. If the Customer authorises any other employee or agent to give the Supplier instructions in lieu of or in addition to the person signing this Agreement, the Customer must inform the Supplier of that person's details in writing. The Supplier shall not be liable in any way for any losses incurred by the Customer in accepting instructions from the persons contemplated by this clause. The Supplier may elect to communicate by electronic mail or such other form as is convenient and does not warrant that any such communication will be free from defect, virus or shall be otherwise secure. The Customer hereby acknowledges and agrees to accept such communications and releases the Supplier from all liability in respect of any losses that may be incurred by the Customer by virtue of such communications.

SIGNING PAGE

..... [INSERT NAME OF COMPANY] has read, understand and agree with the above Terms and Conditions under which the Supplier will provide the Customer the Goods and/or Services.

EXECUTED by [INSERT NAME OF COMPANY]
without affixing a common seal / *by affixing its
common seal pursuant to section 127 of the
Corporations Act 2001 (Cth)

Signature of
*Director / *Sole Director and Sole Secretary

Signature of
*Director / * Secretary

Name of
*Director / *Sole Director and Sole Secretary

Name of
*Director / * Secretary

(*Delete the inapplicable)

Date

I, [INSERT NAME OF INDIVIDUAL(S) CLIENT] have read, understand and agree with the above Terms and Conditions under which the Supplier will provide the Customer the Goods and/or Services.

SIGNED

by the said
[INSERT NAME OF INDIVIDUAL(S) CLIENT]

Signature of Individual Client

in the presence of:

Signature of Witness

Name of Witness

Address and Telephone Number of Witness

Date

SIGNED

by the said
[INSERT NAME OF INDIVIDUAL(S) CLIENT]

Signature of Individual Client

in the presence of:

Signature of Witness

Name of Witness

Address and Telephone Number of Witness

Date