

## McCarthy Plumbing Group – Terms & Conditions of Trade

### 1. Definitions

1.1 “Seller” means McCarthy Plumbing Group Pty Ltd ATF David McCarthy Trust T/A McCarthy Plumbing Group, its successors and assigns or any person acting on behalf of and with the authority of McCarthy Plumbing Group Pty Ltd ATF David McCarthy Trust T/A McCarthy Plumbing Group.

1.2 “Client” means the person/s ordering the Works as specified in any invoice, document or order, and if there is more than one Client is a reference to each Client jointly and severally.

1.3 “Works” means all Works or Materials supplied by the Seller to the Client at the Client’s request from time to time (where the context so permits the terms ‘Works’ or ‘Materials’ shall be interchangeable for the other).

1.4 “Price” means the Price payable for the Works as agreed between the Seller and the Client in accordance with clause 6 below.

### 2. Acceptance

2.1 The Client is taken to have exclusively accepted and is immediately bound, jointly and severally, by these terms and conditions if the Client places an order for or accepts delivery of any Works.

2.2 These terms and

conditions may only be amended with the Seller’s consent in writing and shall prevail to the extent of any inconsistency with any other document or agreement between the Client and the Seller.

2.3 Materials are supplied by the Seller only on the terms and conditions of trade herein to the exclusion of anything to the contrary in the terms of the Client’s order notwithstanding that any such order is placed on terms that purport to override these terms and conditions of trade.

2.4 None of the Seller’s agents or representatives are authorised to make any representations, statements, conditions or agreements not expressed by the manager of the Seller in writing nor is the Seller bound by any such unauthorised statements.

2.5 Where the Seller gives advice, recommendations, information, assistance or service to the Client or the Client’s agent, regarding the Materials or Works then it is given in good faith and the Seller shall not be liable in any way whatsoever for any damages, losses or costs however arising resulting from the Client relying on the same.

2.6 Where the Client specifically instructs the Seller to clear a branch drain or section of drain only, then any warranty will

only apply to sections cleared and not to any other section of drain.

2.7 Where the plumbing or drainage Works specifically referred to in a quotation or on an invoice includes storm water or sewer drainage cleaning by devices such as an electric eel, the Client:

(a) acknowledges that they have been informed that the use of the device may damage or destroy the drainage pipes;

(b) agrees that if such damage or destruction of the pipes occurs then any repairs or rectification shall be at the Client’s cost and as such shall indemnify the Seller against all costs; and

(c) if during the course of drain clearing works, that the Seller’s equipment is caught, jammed, or broken off in the drain that any costs incurred by the Seller for the recovery of the equipment shall be the Client’s responsibility.

2.8 In the event that the Materials and/or Works provided by the Seller are the subject of an insurance claim that the Client has made, then the Client shall be responsible for the payment of any monies payable to the insurance company and agrees to honour their obligation for payment for such transactions invoiced by the Seller and shall ensure

payment is made by the due date irrespective of whether the insurance claim is successful.

2.9 The Client accepts that the Seller’s Price is based on the presumption that all existing installation complies with all relevant laws, regulations, codes, compliance and Australian Standards. Where additional Works are required to bring existing installations up to standard to meet relevant laws, regulations, codes, compliance and Australian Standards shall be treated as a variation as per clause 6.2 and charged accordingly.

2.10 The Client acknowledges and accepts that where the Seller strikes hard rock, the Seller retains the right to re-quote for the Works to be provided and/or has the right to subcontract additional services and/or equipment required to complete the Works requested. Any additional charge incurred that is not re-quoted for shall be treated as a variation to the Price as per clause 6.2.

### 3. Electronic Transactions (Victoria) Act 2000

3.1 Electronic signatures shall be deemed to be accepted by either party providing that the parties have complied with Section 9 of the Electronic Transactions (Victoria) Act 2000 or any

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other applicable provisions of that Act or any Regulations referred to in that Act.

or  
(c) the removal by mechanical means or blasting of rock which may be encountered in the course of excavation; or

(d) the removal of spoil, roots, rock or other debris that has been excavated.

### 4. Change in Control

4.1 The Client shall give the Seller not less than fourteen (14) days prior written notice of any proposed change of ownership of the Client and/or any other change in the Client's details (including but not limited to, changes in the Client's name, address, contact phone or fax number/s, or business practice). The Client shall be liable for any loss incurred by the Seller as a result of the Client's failure to comply with this clause.

### 5. Exclusions from Quotations

5.1 Unless expressly stated otherwise, the Seller's Price does not cover:

- (a) concreting or other special treatment of drains on account of proximity of trees, made up ground or other causes. If concreting or the use of cast iron is ordered by any Competent Authority, Local Authority Inspector or person authorised by an Authority, then such additional Works shall be treated as a variation and invoiced on the basis of the Seller's quotation; or
- (b) the removal of tree roots;

### 6. Price and Payment

6.1 At the Seller's sole discretion the Price shall be either:

- (a) as indicated on invoices provided by the Seller to the Client in respect of Works performed or Materials supplied; or
- (b) the Seller's quoted Price (subject to clause 6.2) which shall be binding upon the Seller provided that the Client shall accept the Seller's quotation in writing within thirty (30) days.

6.2 The Seller reserves the right to change the Price:

- (a) if a variation to the Materials which are to be supplied is requested; or
- (b) if a variation to the Works originally scheduled (including any applicable plans or specifications) is requested; or
- (c) where additional Works are required due to the discovery of hidden or unidentifiable difficulties (including, but not limited to, hard rock or other obscured barriers or foreign materials below the surface, latent soil conditions, iron reinforcing rods in concrete, poor weather conditions, limitations to accessing the site, availability of machinery, safety considerations

including the discovery of asbestos, prerequisite work by a third party not being completed, removing the old hot water system prior to commencing the Works, change of design, or hidden pipes and wiring in walls, etc.) which are only discovered on commencement of the Works; or

(d) in the event of increases to the Seller in the cost of labour or materials which are beyond the Seller's control.

6.3 At the Seller's sole discretion a deposit may be required.

6.4 Time for payment for the Works being of the essence, the Price will be payable by the Client on the date/s determined by the Seller, which may be:

- (a) on completion of the Works; or
- (b) by way of progress payments in accordance with the Seller's specified progress payment schedule. Such progress payment claims may include the reasonable value of authorised variations and the value of any Materials delivered to the site but not yet installed; or
- (c) the date specified on any invoice or other form as being the date for payment; or
- (d) failing any notice to the contrary, the date which is seven (7) days following the date of any invoice

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given to the Client by the Seller.

6.5 Payment may be made by cash, cheque, bank cheque, electronic/on-line banking, credit card (plus a surcharge of up to four percent (4%) of the Price), or by any other method as agreed to between the Client and the Seller.

6.6 Unless otherwise stated the Price does not include GST. In addition to the Price the Client must pay to the Seller an amount equal to any GST the Seller must pay for any supply by the Seller under this or any other agreement for the sale of the Materials. The Client must pay GST, without deduction or set off of any other amounts, at the same time and on the same basis as the Client pays the Price. In addition the Client must pay any other taxes and duties that may be applicable in addition to the Price except where they are expressly included in the Price.

6.7 No allowance has been made in the Price for the deduction of retentions. In the event that retentions are made, the Seller reserves the right to treat retentions as placing the Client's account into default.

### 7. Delivery of the Works

7.1 Subject to clause 7.2 it is the Seller's responsibility to ensure that the Works

start as soon as it is reasonably possible.

7.2 The Works' commencement date will be put back and/or the completion date extended by whatever time is reasonable in the event that the Seller claims an extension of time (by giving the Client written notice) where completion is delayed by an event beyond the Seller's control, including but not limited to any failure by the Client to:

- (a) make a selection; or
- (b) have the site ready for the Works; or
- (c) notify the Seller that the site is ready.

7.3 At the Seller's sole discretion the cost of delivery is included in the Price.

7.4 The Client must take delivery by receipt of the Works whenever they are tendered for delivery. In the event that the Client is unable to take delivery of the Works as arranged then the Seller shall be entitled to charge a reasonable fee for redelivery and/or storage of Materials.

7.5 The Client shall take delivery of the Materials tendered notwithstanding that the quantity so delivered shall be either greater or lesser than the quantity purchased provided that:

- (a) such discrepancy in quantity shall not exceed five percent (5%); and

(b) the Price shall be adjusted pro rata to the discrepancy.

7.6 Any time or date given by the Seller to the Client is an estimate only. The Seller shall not be liable for any loss or damage whatsoever due to failure by the Seller to deliver the Works (or any part of them) promptly or at all, where due to circumstances beyond the reasonable control of the Seller.

### 8. Risk

8.1 If the Seller retains ownership of the Materials under clause 16 then:

(a) where the Seller is supplying Materials only, all risk for the Materials shall immediately pass to the Client on delivery and the Client must insure the Materials on or before delivery. Delivery of the Materials shall be deemed to have taken place immediately at the time that either;

- (i) the Client or the Client's nominated carrier takes possession of the Materials at the Seller's address; or
- (ii) the Materials are delivered by the Seller or the Seller's nominated carrier to the Client's nominated delivery address (even if the Client is not present at the address).

(b) where the Seller is to

both supply and install Materials then the Seller shall maintain a contract

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works insurance policy until the Works are completed. Upon completion of the Works all risk for the Works shall immediately pass to the Client.

8.2 Notwithstanding the provisions of clause 8.1 if the Client specifically requests the Seller to leave Materials outside the Seller's premises for collection or to deliver the Materials to an unattended location then such materials shall always be left at sole risk of the Client and it shall be the Client's responsibility to ensure the Materials are insured adequately or at all. In the event that such Materials are lost, damaged or destroyed then replacement of the Materials shall be at the Client's expense.

8.3 The Client acknowledges that the presence of plant or tree root growth and/or other blockages may indicate damaged pipe work and therefore where the Seller is requested to merely clear such blockages, the Seller can offer no guarantee against reoccurrence or further damage. In the event of collapse during the pipe clearing process, the Seller will immediately advise the Client of the same and shall provide the Client with an estimate for the full repair of the damaged pipe work.

8.4 The Client acknowledges

and agree that where the Seller has performed temporary repairs that:

(a) the Seller offers no guarantee against the reoccurrence of the initial fault, or any further damage caused; and

(b) the Seller will immediately advise the Client of the fault and shall provide the Client with an estimate for the full repair required.

8.5 The Client acknowledges that the Seller is only responsible for parts that are replaced by the Seller and does not at any stage accept any liability in respect of previous services and/or goods supplied by any other third party that subsequently fail and found to be the source of the failure, the Client agrees to indemnify the Seller against any loss or damage to the Materials, or caused by the Materials, or any part thereof howsoever arising.

8.6 Where the Client has supplied goods for the Seller to complete the Works, the Client acknowledges that he accepts responsibility for the suitability of purpose, quality and any faults inherent in the goods. The Seller shall not be responsible for any defects in the goods, any loss or damage to the Materials (or any part thereof), howsoever arising from the use of goods supplied by the Client.

8.7 The Client warrants that any structures to which the Materials are to be affixed are able to withstand the installation of the Materials and that any plumbing connections (including, but not limited to, meter boxes, pipes, couplings and valves) are of suitable capacity to handle the Materials once installed. If for any reason (including the discovery of asbestos, defective or unsafe plumbing or dangerous access to crawl spaces or the roof) that the Seller, or employees of the Seller, reasonably form the opinion that the Client's premises is not safe for the installation of Materials to proceed then the Seller shall be entitled to delay installation of the Materials **(in accordance with the provisions of clause 7.2 above)** until the Seller is satisfied that it is safe for the installation to proceed. The Seller may at its sole discretion agree to bring the premises up to a standard suitable for installation to proceed but all such Works undertaken and any additional Materials supplied shall be treated as a variation and be charged for in addition to the Price.

8.8 The Client acknowledges that the Seller's quotation for repairs to existing roofs shall be based only on the replacement of damaged areas and shall not include the replacement of tiles

with slight imperfections (where applicable) unless authorised by the Client prior to the commencement of the Works. If the Client requests the replacement of tiles that have slight imperfections but which the Seller does not deem to be defective or that will affect the integrity of the roof, then this shall be a variation to the original quotation and clause 6.2 will apply.

8.9 The Client acknowledges and agrees that no persons other than those authorised or employed by the Seller are to walk on the treated roof surface for a period of twenty-one (21) days after completion of the job and at no time are any persons permitted to be in the areas of the work. The Seller shall not be liable for any loss, damages, injuries, or costs however arising resulting from the Client's failure to comply with this clause.

8.10 The Client accepts and acknowledges that the Seller accepts no liability for any subsequent loss or damage (including, but not limited to, internal water damage) to the Client's property which may occur during the cleaning process where such loss or damage is due to pre-existing faults or leaks.

8.11 The Client acknowledges that where an anodised surface finish has been selected, slight colour variation may occur between the main unit frame and any installation

trims used due to the difference in metal alloys available and manufacturing standards and tolerances shall not be deemed to be a defect in the Materials.

8.12 The Seller gives no guarantee (expressed or implied) that colour samples will match the Materials supplied where applicable. The Seller will make every effort to match colour samples to the Materials supplied but will not be liable in any way whatsoever for colour samples differing from the Materials supplied.

8.13 The Client acknowledges that Materials supplied may:

- (a) fade or change colour over time; and
- (b) expand, contract or distort as a result of exposure to heat, cold, weather; and
- (c) mark or stain if exposed to certain substances; and
- (d) be damaged or disfigured by impact or scratching; and
- (e) create undesirable smells caused by a system as a result of its normal operation.

8.14 Should the Seller, in the course of any Works, discover any defect in any part of the premises or the existing installation therein or connection thereto which makes it impracticable or inexpedient for the Seller to continue with the Works

without repairing or replacing the defect, then the Seller shall be entitled to suspend work on the job and shall immediately notify the Client thereof and submit the price of such additional work in a variation. If the Client does not approve the variation, then the Seller may cancel under clause 22.1 and shall be entitled to

payment for all work done and Materials supplied to the date of suspension of the Works.

8.15 The Seller shall not be liable for any loss or damage resulting from insufficient or defective foundations, walls or other structure not erected by the Seller.

## 9. Specifications

9.1 The Client acknowledges that:

- (a) all descriptive specifications, illustrations, drawings, data, dimensions and weights stated in the Seller's or the manufacturer's fact sheets, price lists or advertising material, are approximate only and are given by way of identification only. The Client shall not be entitled to rely on such information, and any use of such does not constitute a sale by description, and does not form part of the contract, unless expressly stated as such in writing by the Seller;

(b) while the Seller may have provided information or figures to the Client regarding the performance of the Materials, the Client acknowledges that the Seller has given these in good faith, and are estimates based on Clean Energy Council

(CEC), Water Efficiency Labelling and Standards (WELS) scheme and/or industry prescribed estimates. The water efficiency may be less than estimates due to factors out of the Seller's control (including, but not limited to, water pressure, water source, the mineral content of water based on geographical location, etc.).

9.2 The Client shall be responsible for ensuring that the Materials ordered are suitable for their intended use.

9.3 The Seller reserves the right to substitute comparable Materials (or components of the Materials), and in all such cases the Seller will notify the Client in advance of any such substitution.

## 10. Client Acknowledgments

10.1 The Client acknowledges that the Materials or Works are bought solely upon the Client's skill and judgement.

10.2 If the Seller notifies the Client that it intends to store onsite Materials, plant, equipment or tools to be used in performance of the Works, then the Client shall designate an area for storage and shall take all reasonable precautions to protect such items against destruction, damage, or theft. In the event that such

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items are destroyed, damaged or stolen then the cost of replacement shall be added to the contract Price and will be shown as a variation as per clause 6.2.

10.3 All quotations for Works in respect of other tradesmen will be treated strictly between the tradesmen and the Client. The Client agrees to indemnify the Seller from any damage caused by any other tradesmen during and after the completion of the Works.

10.4 It is the intention of the Seller and agreed by the Client that it is the responsibility of the Client to provide and have erected scaffolding to enable the Works to be undertaken (where in the Seller's opinion it is deemed necessary). It is also agreed that all scaffolding erected will comply with industry safety standards and that any person erecting the scaffolding shall be suitably qualified to ensure its safe and proper erection and where necessary shall hold a current certificate of competency and/or be fully licensed.

10.5 The Client agrees to remove any furniture, furnishings or personal goods from the vicinity of the Works and agrees that the Seller shall not be liable for any damage caused to those items

through the Client's failure to comply with this clause.

### 11. Compliance with Laws

11.1 Both the Client and the Seller agree that they will at all times ensure that they comply with the provisions of all statutes, regulations and bylaws of government, local and other public authorities that may be applicable to the Works, including occupational health and safety laws relating to building/construction sites, and any other relevant safety standards or legislation, particularly those in relation to Asbestos/Hazardous Materials and the safe removal and disposal of the same.

11.2 The Seller shall only supply and connect to Australian approved equipment. All plumbing Materials must be "Watermark" approved and all gas pipework must be compliance tested prior to commencing any work on the gas system.

11.3 The Client shall obtain (at the expense of the Client) all licenses and approvals (including local Government approvals) that may be required for the Works, unless otherwise agreed. In the event that the Seller is instructed to arrange said licences and/or permits on behalf of the Client,

then all associated such charges will be invoiced in accordance with clause 6.2.

### 12. Access

12.1 The Client shall ensure that the Seller has clear and free access to the work site at all times to enable them to undertake the Works. The Seller shall not be liable for any loss or damage to the site (including, without limitation, damage to pathways, driveways and concreted or paved or grassed areas) unless due to the negligence of the Seller.

12.2 The Seller reserves the right to refuse to enter the site to undertake the Works in the event that the Seller believes the site to be unsafe. In this event, the Client agrees that it is their responsibility to ensure the site is made safe before the Seller will enter the site, the Seller shall not be liable for any delays caused, loss, damages, or costs however resulting from an unsafe site.

### 13. Underground Locations

13.1 Prior to the Seller commencing any work where the Seller has not been contracted to locate services, the Client must advise the Seller of the precise location of all underground services on the site and clearly mark

the same. The underground mains & services the Client must identify include, but are not limited to, electrical services, gas services, sewer services, pumping services, sewer connections, sewer sludge mains, water mains, irrigation pipes, telephone cables, fibre optic cables, oil pumping mains, and any other services that may be on site.

13.2 Whilst the Seller will take all care to avoid damage to any underground services the Client agrees to indemnify the Seller in respect of all and any liability claims, loss, damage, costs and fines as a result of damage to

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services not precisely located and notified as per clause 13.1.

### 14. Surplus Materials

14.1 Unless otherwise stated elsewhere in this contract:

- (a) demolished Materials remain the Client's property; and
- (b) Materials which the Seller brings to the site which are surplus remain the property of the Seller.

### 15. Insurance

15.1 The Seller shall have public liability insurance of at least twenty million dollars (\$20m). It is the Client's responsibility to ensure that they are similarly insured.

### 16. Title

16.1 The Seller and the Client agree that ownership of the Materials shall not pass until:

- (a) the Client has paid the Seller all amounts owing to the Seller; and
- (b) the Client has met all of its other obligations to the Seller.

16.2 Receipt by the Seller of any form of payment other than cash shall not be deemed to be payment until that form of payment has been honoured, cleared or recognised.

16.3 It is further agreed that:

- (a) until ownership of the Materials passes to the Client in accordance

with clause 16.1 that the Client is only a bailee of the Materials and unless the Materials have become fixtures must return the Materials to the Seller on request.

(b) the Client holds the benefit of the Client's insurance of the Materials on trust for the Seller and must pay to the Seller the proceeds of any insurance in the event of the Materials being lost, damaged or destroyed.

(c) the production of these terms and conditions by the Seller shall be sufficient evidence of the Seller's rights to receive the insurance proceeds direct from the insurer without the need for any person dealing with the Seller to make further enquiries.

(d) the Client must not sell, dispose, or otherwise part with possession of the Materials other than in the ordinary course of business and for market value. If the Client sells, disposes or parts with possession of the Materials then the Client must hold the proceeds of any such act on trust for the Seller and must pay or deliver the proceeds to the Seller on demand.

(e) the Client should not convert or process the Materials 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 Seller and must sell, dispose of or return the resulting product to the Seller as it so directs.

(f) unless the Materials have become fixtures the Client irrevocably authorises the Seller to enter any premises where the Seller believes the Materials are kept and recover possession of the Materials.

(g) the Seller may recover possession of any Materials in transit whether or not delivery has occurred.

(h) the Client shall not charge or grant an encumbrance over the Materials nor grant nor otherwise give away any interest in the Materials while they remain the property of the Seller.

(i) the Seller may commence proceedings to recover the Price of the Materials sold notwithstanding that ownership of the Materials has not passed to the Client.

### 17. Personal Property Securities Act 2009 ("PPSA")

17.1 In this clause financing statement, financing change statement, security agreement, and security interest has the meaning given to it by the PPSA.

17.2 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 Materials and/or collateral (account) – being a monetary obligation of the Client to the Seller for Works – that have previously been supplied and that will be supplied in the future by the Seller to the Client.

17.3 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 Seller may reasonably require to:

(i) register a financing statement or financing change statement in relation to a security interest on the Personal Property Securities Register;

(ii) register any other document required to be registered by the PPSA; or

(iii) correct a defect in a statement referred to in clause 17.3(a)(i) or 17.3(a)(ii);

(b) indemnify, and upon demand reimburse, the Seller for all expenses incurred in registering a financing statement or financing change

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- statement on the Personal Property Securities Register established by the PPSA or releasing any Materials charged thereby;
- (c) not register a financing change statement in respect of a security interest without the prior written consent of the Seller;
- (d) not register, or permit to be registered, a financing statement or a financing change statement in relation to the Materials and/or collateral (account) in favour of a third party without the prior written consent of the Seller;
- (e) immediately advise the Seller of any material change in its business practices of selling the Materials which would result in a change in the nature of proceeds derived from such sales.
- 17.4 The Seller 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.
- 17.5 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.
- 17.6 The Client waives its rights as a grantor and/or a debtor under sections 142 and 143 of the PPSA.
- 17.7 Unless otherwise agreed to in writing by the Seller,
- the Client waives its right to receive a verification statement in accordance with section 157 of the PPSA.
- 17.8 The Client shall unconditionally ratify any actions taken by the Seller under clauses 17.3 to 17.5.
- 17.9 Subject to any express provisions to the contrary nothing in these terms and conditions is intended to have the effect of contracting out of any of the provisions of the PPSA.
18. **Security and Charge**
- 18.1 In consideration of the Seller agreeing to supply the Materials, 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).
- 18.2 The Client indemnifies the Seller from and against all the Seller's costs and disbursements including legal costs on a solicitor and own client basis incurred in exercising the Seller's rights under this clause.
- 18.3 The Client irrevocably appoints the Seller and each director of the Seller as the Client's true and lawful attorney/s to perform all necessary acts to give effect to the provisions of this clause 18 including, but not limited
- to, signing any document on the Client's behalf.
19. **Defects, Warranties and Returns, Competition and Consumer Act 2010 (CCA)**
- 19.1 The Client must inspect all Materials on delivery (or the Works on completion) and must within forty-eight (48) hours of delivery notify the Seller in writing of any evident defect/damage, shortage in quantity, or failure to comply with the description or quote. The Client must notify any other alleged defect in the Materials/Works as soon as reasonably possible after any such defect becomes evident. Upon such notification the Client must allow the Seller to inspect the Materials or to review the Works provided.
- 19.2 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**).
- 19.3 The Seller acknowledges that nothing in these terms and conditions purports to modify or exclude the Non-Excluded Guarantees.
- 19.4 Except as expressly set out in these terms and conditions or in respect of the Non-Excluded Guarantees, the Seller



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makes no warranties or other representations under these terms and conditions including but not limited to the quality or suitability of the Materials/Works. The Seller's liability in respect of these warranties is limited to the fullest extent permitted by law.

19.5 If the Client is a consumer within the meaning of the CCA, the Seller's liability is limited to the extent permitted by section 64A of Schedule 2.

19.6 If the Seller is required to replace any Materials under this clause or the CCA, but is unable to do so, the Seller may refund any money the Client has paid for the Materials.

19.7 If the Seller is required to rectify, re-supply, or pay the cost of re-supplying the Works under this clause or the CCA, but is unable to do so, then the Seller may refund any money the Client has paid for the Works but only to the extent that such refund shall take into account the value of Works and Materials which have been provided to the Client which were not defective.

19.8 If the Client is not a consumer within the meaning of the CCA, the Seller's liability for any defect or damage in the Materials is:

(a) limited to the value of any express warranty or warranty card provided to the Client by the Seller

at the Seller's sole discretion;

(b) limited to any warranty to which the Seller is entitled, if the Seller did not manufacture the Materials;

(c) otherwise negated absolutely.

19.9 Subject to this clause 19, returns will only be accepted provided that:

(a) the Client has complied with the provisions of clause 19.1; and

(b) the Seller has agreed that the Materials are defective; and

(c) the Materials are returned within a reasonable time at the Client's cost (if that cost is not significant); and

(d) the Materials are returned in as close a condition to that in which they were delivered as is possible.

19.10 Notwithstanding clauses 19.1 to 19.9 but subject to the CCA, the Seller shall not be liable for any defect or damage which may be caused or partly caused by or arise as a result of:

(a) the Client failing to properly maintain or store any Materials;

(b) the Client using the Materials for any purpose other than that for which they were designed;

(c) the Client continuing to use any Materials after any defect became apparent or should have become apparent to a reasonably prudent

operator or user;

(d) interference with the Works by the Client or any third party without the Seller's prior approval;

(e) the Client failing to follow any instructions or guidelines provided by the Seller;

(f) fair wear and tear, any accident, or act of God.

19.11 The Seller may in its absolute discretion accept non-defective Materials for return in which case the Seller may require the Client to pay handling fees of up to thirty percent (30%) of the value of the returned Materials plus any freight costs.

19.12 Notwithstanding anything contained in this clause if the Seller is required by a law to accept a return then the Seller will only accept a return on the conditions imposed by that law.

### 20. Intellectual Property

20.1 Where the Seller has designed, drawn, written plans or a schedule of Works, or created any products for the Client, then the copyright in all such designs, drawings, documents, plans, schedules and products shall remain vested in the Seller, and shall only be used by the Client at the Seller's discretion.

20.2 The Client warrants that all designs, specifications or instructions given to the Seller will not cause the Seller to infringe any

patent, registered design or trademark in the

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execution of the Client's order and the Client agrees to indemnify the Seller against any action taken by a third party against the Seller in respect of any such infringement.

20.3 The Client agrees that the Seller may (at no cost) use for the purposes of marketing or entry into any competition, any documents, designs, drawings, plans or products which the Seller has created for the Client.

### 21. Default and Consequences of Default

21.1 Interest on overdue invoices shall accrue daily from the date when payment becomes due, until the date of payment, at a rate of two and a half percent (2.5%) per calendar month (and at the Seller's sole discretion such interest shall compound monthly at such a rate) after as well as before any judgment.

21.2 If the Client owes the Seller any money the Client shall indemnify the Seller from and against all costs and disbursements incurred by the Seller in recovering the debt (including but not limited to internal administration fees, legal costs on a solicitor and own client basis, the Seller's contract default fee, and bank dishonour fees).

21.3 Further to any other rights or remedies the Seller may

have under this contract, if a Client has made payment to the Seller by credit card and/or cheque, and the transaction is subsequently reversed, the Client shall be liable for the amount of the reversed transaction, in addition to any further costs incurred by the Seller under this clause 21 where it can be proven that such reversal is found to be illegal, fraudulent or in contravention to the Client's obligations under this agreement.

21.4 Without prejudice to any other remedies the Seller 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 Seller may suspend or terminate the supply of Works to the Client. The Seller will not be liable to the Client for any loss or damage the Client suffers because the Seller has exercised its rights under this clause.

21.5 Without prejudice to the Seller's other remedies at law the Seller shall be entitled to cancel all or any part of any order of the Client which remains unfulfilled and all amounts owing to the Seller shall, whether or not due for payment, become immediately payable if:

(a) any money payable to the Seller becomes overdue, or in the Seller's opinion the

Client will be unable to make a payment when it falls due;

(b) the Client becomes insolvent or bankrupt, 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.

### 22. Cancellation

22.1 The Seller may cancel any contract to which these terms and conditions apply or cancel delivery of Works at any time before the Works are commenced by giving written notice to the Client. On giving such notice the Seller shall repay to the Client any sums paid in respect of the Price, less any amounts owing by the Client to the Seller for Works already performed. The Seller shall not be liable for any loss or damage whatsoever arising from such cancellation.

22.2 In the event that the Client cancels the delivery of Works the Client shall be liable for any and all loss incurred (whether direct or indirect) by the Seller as a direct result of the cancellation (including, but not limited to, any loss of profits).

22.3 Cancellation of orders for products made to the Client's specifications, or for non-stocklist items, will definitely not be accepted once production has commenced, or an order has been placed.

### 23. Privacy Act 1988

23.1 The Client agrees for the Seller to obtain from a credit reporting body (CRB) a credit report containing personal credit information (e.g. name, address, D.O.B, occupation, previous credit applications, credit history) about the Client in relation to credit provided by the Seller.

23.2 The Client agrees that the Seller may exchange information about the Client with those credit providers and with related body corporates for the following purposes:

(a) to assess an application by the Client; and/or

(b) to notify other credit providers of a default by the Client; and/or

(c) to exchange information with other credit providers as to the status of this credit account, where the Client is in default with other credit providers; and/or

(d) to assess the creditworthiness of the Client including the Client's repayment history in the preceding two years.

23.3 The Client consents to the Seller being given a consumer credit report to

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collect overdue payment on commercial credit.

23.4 The Client agrees that personal credit information provided may be used and retained by the Seller for the following purposes (and for other agreed purposes or required by):

- (a) the provision of Works; and/or
- (b) analysing, verifying and/or checking the Client's credit, payment and/or status in relation to the provision of Works; and/or
- (c) processing of any payment instructions, direct debit facilities and/or credit facilities requested by the Client; and/or
- (d) enabling the collection of amounts outstanding in relation to the Works.

23.5 The Seller may give information about the Client to a CRB for the following purposes:

- (a) to obtain a consumer credit report;
- (b) allow the CRB to create or maintain a credit information file about the Client including credit history.

23.6 The information given to the CRB may include:

- (a) personal information as outlined in 23.1 above;
- (b) name of the credit provider and that the Seller is a current credit provider to the Client;
- (c) whether the credit provider is a licensee;

- (d) type of consumer credit;
- (e) details concerning the Client's application for credit or commercial credit (e.g. date of commencement/termination of the credit account and the amount requested);

- (f) advice of consumer credit defaults, overdue accounts, loan repayments or outstanding monies which are overdue by more than sixty (60) days and for which written notice for request of payment has been made and debt recovery action commenced or alternatively that the Client no longer has any overdue accounts and the Seller has been paid or otherwise discharged and all details surrounding that discharge (e.g. dates of payments);

- (g) information that, in the opinion of the Seller, the Client has committed a serious credit infringement;
- (h) advice that the amount of the Client's overdue payment is equal to or more than one hundred and fifty dollars (\$150).

23.7 The Client shall have the right to request (by e-mail) from the Seller:

- (a) a copy of the information about the Client retained by the Seller and the right to request that the Seller

correct any incorrect information; and

- (b) that the Seller does not disclose any personal information about the Client for the purpose of direct marketing.

23.8 The Seller will destroy personal information upon the Client's request (by e-mail) or if it is no longer required unless it is required in order to fulfil the obligations of this agreement or is required to be maintained and/or stored in accordance with the law.

23.9 The Client can make a privacy complaint by contacting the Seller via e-mail. The Seller will respond to that complaint within seven (7) days of receipt and will take all reasonable steps to make a decision as to the complaint within thirty (30) days of receipt of the complaint. In the event that the Client is not satisfied with the resolution provided, the Client can make a complaint to the Information Commissioner at [www.oaic.gov.au](http://www.oaic.gov.au).

### 24. **Dispute Resolution**

24.1 If a dispute arises between the parties to this contract then either party shall send to the other party a notice of dispute in writing adequately identifying and providing details of the dispute. Within

fourteen (14) days after service of a notice of dispute, the parties shall confer at least once, to attempt to resolve the dispute. At any such conference each party shall be represented by a person having authority to agree to a resolution of the dispute. In the event that the dispute cannot be so resolved either party may by further notice in writing delivered by hand or sent by certified mail to the other party refer such dispute to arbitration. Any arbitration shall be:

- (a) referred to a single arbitrator to be nominated by the President of the Institute of Arbitrators Australia; and
- (b) conducted in accordance with the Institute of Arbitrators Australia Rules for the Conduct of Commercial Arbitration.

### 25. **Building and Construction Industry Security of Payment Act 2002**

25.1 At the Seller's sole discretion, if there are any disputes or claims for unpaid Materials and/or Works then the provisions of the Building and Construction Industry Security of Payment Act 2002 may apply.

25.2 Nothing in this agreement is intended to have the effect of contracting out of any applicable provisions

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of the Building and Construction Industry Security of Payment Act 2002 of Victoria, except to the extent permitted by the Act where applicable.

### 26. General

26.1 The failure by the Seller to enforce any provision of these terms and conditions shall not be treated as a waiver of that provision, nor shall it affect the Seller's right to subsequently enforce that provision. If any provision of these terms and conditions shall be invalid, void, illegal or unenforceable the validity, existence, legality and enforceability of the remaining provisions shall not be affected, prejudiced or impaired.

26.2 These terms and conditions and any contract to which they apply shall be governed by the laws of Victoria in which the Seller has its principal place of business, and are subject to the jurisdiction of the courts of Victoria.

26.3 Subject to clause 19, the Seller shall be under no liability whatsoever to the Client for any indirect and/or consequential loss and/or expense (including loss of profit) suffered by the Client arising out of a breach by the Seller of these terms and conditions (alternatively the Seller's

liability shall be limited to damages which under no circumstances shall exceed the Price of the Works).

26.4 The Client shall not be entitled to set off against, or deduct from the Price, any sums owed or claimed to be owed to the Client by the Seller nor to withhold payment of any invoice because part of that invoice is in dispute.

26.5 The Seller may license or sub-contract all or any part of its rights and obligations without the Client's consent.

26.6 The Client agrees that the Seller may amend these terms and conditions at any time. If the Seller makes a change to these terms and conditions, then that change will take effect from the date on which the Seller notifies the Client of such change. The Client will be taken to have accepted such changes if the Client makes a further request for the Seller to provide any Works to the Client.

26.7 Neither party shall be liable for any default due to any act of God, war, terrorism, strike, lock-out, industrial action, fire, flood, storm or other event beyond the reasonable control of either party.

26.8 The Client warrants that it has the power to enter into this agreement and has obtained all necessary authorisations

to allow it to do so, it is not insolvent and that this agreement creates binding and valid legal obligations on it.