

**1. Definitions**

- 1.1 **“Contract”** means the terms and conditions contained herein, together with any quotation, order, invoice or other document or amendments expressed to be supplemental to this Contract.
- 1.2 **“WPM”** means Waterproofing Melbourne Pty Ltd ATF The Ron Noonan Family Trust T/A Waterproofing Melbourne Pty Ltd, its successors and assigns or any person acting on behalf of and with the authority of WPM.
- 1.3 **“Client”** means the person/s, entities or any person acting on behalf of and with the authority of the Client requesting WPM to provide the Works as specified in any proposal, quotation, order, invoice or other documentation, and:
- (a) if there is more than one Client, is a reference to each Client jointly and severally; and
  - (b) if the Client is a partnership, it shall bind each partner jointly and severally; and
  - (c) if the Client is a part of a Trust, shall be bound in their capacity as a trustee; and
  - (d) includes the Client’s executors, administrators, successors and permitted assigns.
- 1.4 **“Works”** means all services (including consultation, manufacturing and/or installation services) or Materials supplied by WPM 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).
- 1.5 **“Worksite”** means the address nominated by the Client to which the Materials are to be supplied by WPM.
- 1.6 **“Intended Use”** means a building product and the use thereof, for which the building product is intended to be, or is reasonably likely to be, associated with a building.
- 1.7 **“Non-Conforming Building Product”** means building products that are regarded as Non-Conforming for an Intended Use if, when associated with a building:
- (a) the product is not, or will not be, safe; or
  - (b) does not, or will not, comply with the relevant regulatory provisions; or
  - (c) the product does not perform, or is not capable of performing, for the use to the standard it is represented to conform by or for a person in the chain of responsibility for the product.
- 1.8 **“Confidential Information”** means information of a confidential nature whether oral, written or in electronic form including, but not limited to, this Contract, either party’s intellectual property, operational information, know-how, trade secrets, financial and commercial affairs, contracts, client information (including but not limited to, **“Personal Information”** such as: name, address, D.O.B, occupation, driver’s license details, electronic contact (email, Facebook or Twitter details), medical insurance details or next of kin and other contact information (where applicable), previous credit applications, credit history) and pricing details.
- 1.9 **“Cookies”** means small files which are stored on a user’s computer. They are designed to hold a modest amount of data (including Personal Information) specific to a particular client and website, and can be accessed either by the web server or the client’s computer. **If the Client does not wish to allow Cookies to operate in the background when using WPM’s website, then the Client shall have the right to enable / disable the Cookies first by selecting the option to enable / disable provided on the website, prior to making enquiries via the website.**
- 1.10 **“Price”** means the Price payable (plus any GST where applicable) for the Works as agreed between WPM and the Client in accordance with clause 6 below.
- 1.11 **“GST”** means Goods and Services Tax as defined within the “A New Tax System (Goods and Services Tax) Act 1999” (Cth).
- 1.12 **“Materials”** means any goods, products and merchandise supplied by WPM to the Client pursuant to any quote or and/or these terms and conditions.
- 1.13 **“PPSA”** means
- (a) the Personal Property Security Act 2009 (Cth) (PPS Act) and any regulation made at any time under the PPS Act (each as amended from time to time); and
  - (b) any amendment made at any time to any other legislation as a consequence of the PPS Act.

**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. The Client accepts these terms and conditions by various methods and conduct, including by signing and returning a copy of them to WPM, oral acceptance, placing an order with WPM (including in writing or by telephone or by text message), or by instructing WPM to supply Materials or to commence/ continue Works.
- 2.2 The Client warrants that the Client has obtained all the necessary authorisations to enter into and perform the contract created by these terms and conditions. The Client warrants that any person signing these terms and conditions, placing orders for Materials and/or Works, or instructing WPM as to the Materials and Works has the Client’s full authority and power to do so. The Client agrees that any such person is jointly and severally liable for the Client’s obligations under these terms and conditions, including payment of the Materials and/or Works.
- 2.3 In the event of any inconsistency between the terms and conditions of this Contract and any other prior document or schedule that the parties have entered into, the terms of this Contract shall prevail.
- 2.4 Any amendment to the terms and conditions contained in this Contract may only be amended in writing by the consent of both parties.
- 2.5 The Client acknowledges that the supply of Works on credit shall not take effect until the Client has completed a credit application with WPM and it has been approved with a credit limit established for the account.
- 2.6 In the event that the supply of Works requested exceeds the Client’s credit limit and/or the account exceeds the payment terms, WPM reserves the right to refuse delivery.
- 2.7 Where WPM gives any advice, recommendation, information, assistance or service provided by WPM in relation to Materials or Works supplied is given in good faith to the Client or the Client’s agent and is based on WPM’s own knowledge and experience and shall be accepted without liability on the part of WPM. Where such advice or recommendations are not acted upon then WPM shall require the Client or their agent to authorise commencement of the Works in writing. WPM shall not be liable in any way whatsoever for any damages or losses that occur after any subsequent commencement of the Works.
- 2.8 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 other applicable provisions of that Act or any Regulations referred to in that Act.

**3. Authorised Representatives**

- 3.1 Unless otherwise limited as per clause 3.2, the Client agrees that should the Client introduce any third party to WPM as the Client's duly authorised representative, that once introduced that person shall have the full authority to act on behalf of the Client under this Contract; such authority shall continue until the time that the Client notifies WPM otherwise that the said person is no longer the Client's duly authorised representative.
- 3.2 In the event that the Client's duly authorised representative, as per clause 3.1, is to have only limited authority to act on the Client's behalf, then the Client must specifically and clearly advise WPM in writing of the parameters of the limited authority granted to that authorised representative.
- 3.3 The Client specifically acknowledges and accepts that they will be solely liable to WPM for all additional costs incurred by WPM (including WPM's profit margin) in providing Works and/or Materials requested by the Client's duly authorised representative (subject always to the limitations imposed under clause 3.2 (if any)).

**4. Errors and Omissions**

- 4.1 The Client acknowledges and accepts that WPM shall, without prejudice, accept no liability in respect of any alleged or actual error(s) and/or omission(s):
- (a) resulting from an inadvertent mistake made by WPM in the formation and/or administration of this Contract; and/or
  - (b) contained in/omitted from any literature (hard copy and/or electronic) supplied by WPM in respect of the Works.
- 4.2 In the event such an error and/or omission occurs in accordance with clause 4.1, and is not attributable to the negligence and/or wilful misconduct of WPM; the Client shall not be entitled to treat this Contract as repudiated nor render it invalid.

**5. Change in Control**

- 5.1 The Client shall give WPM 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, change of trustees, or business practice). The Client shall be liable for any loss incurred by WPM as a result of the Client's failure to comply with this clause.

**6. Price and Payment**

- 6.1 At WPM's sole discretion the Price shall be either:
- (a) as indicated on invoices provided by WPM to the Client in respect of Works performed or Materials supplied; or
  - (b) WPM's quoted Price (subject to clause 6.2) which shall be binding upon WPM provided that the Client shall accept WPM's quotation in writing within thirty (30) days.
- 6.2 WPM 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, poor weather, limitations to accessing the Worksite, obscured building/Worksite defects, incorrect measurements, plans and/or specifications provided by the Client, safety considerations (discovery of asbestos, etc.), prerequisite work by any third party not being completed, lack of required utilities, remedial work required due to existing workmanship being of a poor quality or non-compliant to the building code, hard rock barriers below the surface, iron reinforcing rods in concrete 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 WPM in the cost of labour or Materials which are beyond WPM's control.
- 6.3 Variations will be charged for on the basis of WPM's quotation, and will be detailed in writing, and shown as variations on WPM's invoice. The Client shall be required to respond to any variation submitted by WPM within ten (10) working days. Failure to do so will entitle WPM to add the cost of the variation to the Price. Payment for all variations must be made in full at the time of their completion.
- 6.4 At WPM's sole discretion a non-refundable deposit may be required.
- 6.5 Time for payment for the Works being of the essence, the Price will be payable by the Client on the date/s determined by WPM, which may be:
- (a) on completion of the Works; or
  - (b) on or before delivery of the Materials; or
  - (c) by way of progress payments in accordance with WPM'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 Worksite but not yet installed; or
  - (d) for approved credit account holders fourteen (14) days following the date of any invoice; or
  - (e) the date specified on any invoice or other form as being the date for payment; or
  - (f) failing any notice to the contrary, the date which is seven (7) days following the date of any invoice given to the Client by WPM.
- 6.6 Payment may be made by cash, cheque, bank cheque, electronic/on-line banking, credit card (a surcharge may apply per transaction), or by any other method as agreed to between the Client and WPM.
- 6.7 WPM may in its discretion allocate any payment received from the Client towards any invoice that WPM determines and may do so at the time of receipt or at any time afterwards. On any default by the Client WPM may re-allocate any payments previously received and allocated. In the absence of any payment allocation by WPM, payment will be deemed to be allocated in such manner as preserves the maximum value of WPM's Purchase Money Security Interest (as defined in the PPSA) in the Materials.
- 6.8 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 WPM nor to withhold payment of any invoice because part of that invoice is in dispute.
- 6.9 Unless otherwise stated the Price does not include GST. In addition to the Price, the Client must pay to WPM an amount equal to any GST WPM must pay for any supply by WPM under this or any other contract 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.

**7. Provision of the Works**

- 7.1 Subject to clause 7.2 it is WPM'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 WPM claims an extension of time (by giving the Client written notice) where completion is delayed by an event beyond WPM's control, including but not limited to any failure by the Client to:
- (a) make a selection; or
  - (b) have the Worksite ready for the Works; or
  - (c) notify WPM that the Worksite is ready.
- 7.3 At WPM's sole discretion, the cost of delivery is either included in the Price or is in addition to the Price.
- 7.4 WPM may deliver the Works by separate instalments. Each separate instalment shall be invoiced and paid in accordance with the provisions in these terms and conditions.
- 7.5 Any time specified by WPM for delivery of the Works is an estimate only and WPM will not be liable for any loss or damage incurred by the Client as a result of delivery being late. However both parties agree that they shall make every endeavour to enable the Works to be supplied at the time and place as was arranged between both parties. In the event that WPM is unable to supply the Works as agreed solely due to any action or inaction of the Client, then WPM shall be entitled to charge a reasonable fee for re-supplying the Works at a later time and date, and/or for storage of the Materials.

**8. Risk**

- 8.1 If WPM retains ownership of the Materials under clause 14 then:
- (a) where WPM 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 WPM's address; or
    - (ii) the Materials are delivered by WPM or WPM's nominated carrier to the Client's nominated delivery address (even if the Client is not present at the address).
  - (b) where WPM is to both supply and install Materials then WPM shall maintain a contract 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 WPM to leave Materials outside WPM'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 Where WPM is required to install the Materials the Client warrants that the structure of the premises or equipment in or upon which these Materials are to be installed or erected is sound and will sustain the installation and work incidental thereto and WPM shall not be liable for any claims, demands, losses, damages, costs and expenses however caused or arising in connection with the installation and work incidental thereto.
- 8.4 All potential waterproofing surfaces are subject to an inspection by WPM prior to the commencement of the Works. In the event that the surface is deemed unsuitable, then WPM reserves the right to halt the Works until such time as it is agreed between the Client and WPM as to the additional cost in further preparation of the surface in order to make it fit for waterproofing. The additional cost shall be charged as a variation to the quotation as per clause 6.2.
- 8.5 WPM is only responsible for Materials that are replaced by WPM, and in the event that other components, subsequently fail, the Client agrees to indemnify WPM against any loss or damage to the Works, or caused by the components, or any part thereof howsoever arising.
- 8.6 WPM shall not be liable whatsoever for:
- (a) any loss or damage to the Works that is caused by any other tradesmen during and after the completion of the Works; or
  - (b) delays caused by any other third party suppliers that impacts on the provision of the Works by WPM; or
  - (c) materials and/or works supplied by the Client and/or any other third party; or
  - (d) any defect or damage resulting from incorrect or faulty installation carried out by any other third party and/or any damage or defects in any Materials caused by movement and/or interference of the said Materials; or
  - (e) if the Client instructs WPM to rectify any damage caused by any other tradesmen, this will become a variation to the original quotation and will be charged at WPM's normal hourly rate; or
  - (f) painting, re-decorating, re-sealing, carpentry or any other Works required for the restoration or making good of any surface/area where any Works have been carried out.
- 8.7 In the event asbestos or any other toxic substances are discovered at the Worksite, that it is the Client's responsibility to ensure the safe removal of the same. The Client further agrees to indemnify WPM against any costs incurred by WPM as a consequence of such discovery. Under no circumstances will WPM handle removal of asbestos product.
- 8.8 The Client acknowledges and accepts that:
- (a) WPM shall apply the Materials to the manufacturer's specification and in compliance with all relevant industry standards; and
  - (b) WPM may not be able to ascertain the depth of, or if a void or cavity is present under or inside the foundations without closer inspection. Any additional costs incurred by WPM for carrying out such investigation prior to repairing such a defect shall be invoiced as an extra. The Client also accepts that Works methods may alter as a result of any such investigation; and
  - (c) WPM gives no guarantee (expressed or implied) as to the length of time the curing process of repair Works will take due to factors or conditions outside WPM's control (including, but not limited to, the surfaces and the existing condition of the defect, atmospheric conditions including humidity and temperature, the nature of the Works) and that cracking of concrete that may occur naturally in the Works such as:
    - (i) hairline cracking of paving and grout; or
    - (ii) damage caused by contact with chemicals, solvents, oils or any other substances; or

(iii) the affects by elements such as heat exposure or wet weather conditions that prolong the curing process.

(d) Materials supplied may:

- (i) exhibit variations in shade, colour, texture, surface, finish, markings and may contain natural fissures, occlusions, lines, indentations and may fade or change colour over time; and
- (ii) expand, contract or distort as a result of exposure to heat, cold, weather; and
- (iii) mark or stain if exposed to certain substances; and
- (iv) be damaged or disfigured by impact or scratching.

8.9 WPM shall not be liable should any such variations occur.

8.10 It shall be WPMs responsibility to ensure flood testing is conducted on any waterproofing works undertaken by WPM no less than seven (7) days (and no more than thirty (30) days) from the date of completion. WPM may conduct this testing at the request of the Client, the cost of which shall be quoted and treated as a separate agreement. Where the testing is being undertaken by another party, it shall be the Clients responsibility to ensure WPM is supplied with the results within forty-eight (48) hours of them being obtained by the Client.

#### **9. Dimensions, Plans and Specifications**

9.1 All customary building industry tolerances shall apply to the dimensions and measurements of the Materials unless WPM and the Client agree otherwise in writing.

9.2 WPM shall be entitled to rely on the accuracy of any plans, specifications and other information provided by the Client

9.3 If the giving of an estimate or quotation for the supply of Materials involves WPM estimating measurements and quantities, it shall be the responsibility of the Client to verify the accuracy of WPM's estimated measurements and quantities, before the Client places an order based on such estimate or accepts such quotation.

9.4 Should the Client require any changes to WPM's estimated measurements and quantities, the Client shall request such changes in writing, in the case of an estimate before placing an order based on that estimate and in the case of a quotation before acceptance of that quotation.

#### **10. Insurance**

10.1 WPM shall have public liability insurance of at least five million dollars (\$5m). It is the Client's responsibility to ensure that they are similarly insured.

10.2 The Client shall ensure that all subcontractors engaged by the Client hold contract works insurance and/or public liability insurance to a value approved by WPM and shall provide evidence of this insurance to WPM upon request.

#### **11. Access**

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

#### **12. Underground Locations**

12.1 Prior to WPM commencing any work the Client must advise WPM of the precise location of all underground services on the Worksite and clearly mark the same. The underground mains and 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 the Worksite.

12.2 Whilst WPM will take all care to avoid damage to any underground services the Client agrees to indemnify WPM in respect of all and any liability claims, loss, damage, costs and fines as a result of damage to services not precisely located and notified as per clause 12.1.

#### **13. Compliance with Laws**

13.1 The Client and WPM shall 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 any occupational health and safety laws (WHS) relating or any other relevant safety standards or legislation pertaining to the Works.

13.2 Both parties acknowledge and agree:

- (a) to comply with the National Construction Code of Australia (NCC) and the Building Act 1993, in respect of all workmanship and building products to be supplied during the course of the Works; and
- (b) that Works will be provided in accordance with any current relevant Australian/New Zealand Standards applicable.

13.3 The Client shall obtain (at the expense of the Client) all licenses and approvals that may be required for the Works.

13.4 WPM shall comply with the terms and conditions of all such consents and approvals in so far as such consents and approvals relate to the carrying out of the Works.

#### **14. Title**

14.1 WPM and the Client agree that ownership of the Materials shall not pass until:

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

14.2 Receipt by WPM 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.

14.3 It is further agreed that until ownership of the Materials passes to the Client in accordance with clause 14.1:

- (a) the Client is only a bailee of the Materials and unless the Materials have become fixtures must return the Materials to WPM on request;
- (b) the Client holds the benefit of the Client's insurance of the Materials on trust for WPM and must pay to WPM 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 WPM shall be sufficient evidence of WPM's rights to receive the insurance proceeds direct from the insurer without the need for any person dealing with WPM 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 WPM and must pay or deliver the proceeds to WPM 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 WPM and must sell, dispose of or return the resulting product to WPM as it so directs;
- (f) unless the Materials have become fixtures the Client irrevocably authorises WPM to enter any premises where WPM believes the Materials are kept and recover possession of the Materials;
- (g) WPM 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 WPM;
- (i) WPM may commence proceedings to recover the Price of the Materials sold notwithstanding that ownership of the Materials has not passed to the Client.

**15. Personal Property Securities Act 2009 (“PPSA”)**

*Security for Goods Supplied*

- 15.1 The Client acknowledges and agrees that these terms and conditions constitute a security agreement for the purposes of the PPSA (“**Security Agreement**”) and create a security interest in the Materials supplied by WPM from time to time and any proceeds of the sale of the Materials to secure payment for the Materials supplied (“**Security Interest**”).
- 15.2 Each sale or supply of Materials by WPM under these terms and conditions is subject to the Security Agreement for the purposes of the PPSA.
- 15.3 WPM may lodge a financing statement on the Personal Property Securities Register (“**PPSR**”) in respect of the Security Interest in the Materials and the proceeds of the sale of the Materials, including as a purchase money security interest (as that term is defined in the PPSA) (“**PMSI**”), pursuant to these terms and conditions.

*General Security Agreement for Services Supplied*

- 15.4 For the purpose of any general security agreement (“**General Security Agreement**”), “**Collateral**” means all the Client’s present and after-acquired personal property, including circulating and non-circulating assets. Collateral includes any personal property in respect of which the Client has at any time, or may in the future have at any time, a sufficient legal or equitable right, title, interest or power to grant a security interest either in the Client’s own right or as trustee of a trust.
- 15.5 The Client acknowledges and agrees that:
  - (a) In addition to any other Security Interest created by these terms and conditions, these terms and conditions also constitute a General Security Agreement for the purposes of the PPSA and create a security interest in the Client’s Collateral to secure payment for the Works supplied (“**Security Interest**”);
  - (b) Each supply of Works by WPM under these terms and conditions is subject to the General Security Agreement for the purposes of the PPSA; and
  - (c) WPM may lodge a financing statement on the PPSR in respect of the Security Interest in the Collateral pursuant to these terms and conditions.

*Assurances*

- 15.6 The Client must do all things, provide all information and sign all documents that are necessary and reasonably required to enable WPM to acquire a perfected Security Interest in the Materials and/or Works, including for the purposes of:
  - (a) Ensuring that any Security Interest created under, or provided for, by these terms and conditions:
    - (i) Attaches to the Materials that is intended to be covered by that Security Interest; and
    - (ii) Is enforceable, perfected and otherwise effective; and
    - (iii) Has the priority required by WPM.
  - (b) Enabling WPM to prepare and register a financing statement or financing change statement;
  - (c) Enabling WPM to register a PMSI pursuant to the PPSA;
  - (d) Enabling WPM to register an ALLPAAP pursuant to the PPSA; and
  - (e) Enabling WPM to exercise and maintain any of WPM’s rights or powers in connection with any such Security Interest.
- 15.7 If the Client disposes of the Materials or the Collateral, the Client must:
  - (a) Immediately pay any proceeds to WPM in reduction of all amounts owing by the Client to WPM, which WPM may apply towards amounts owing by the Client to WPM in such order as specified by subsection 14(6)(c) of the PPSA, unless otherwise specified by WPM in writing; and
  - (b) Not allow any other charge or security interest to exist over those proceeds without WPM’s written consent if that security interest could rank ahead of WPM’s Security Interest.
- 15.8 If a higher-priority security interest does arise in the Materials and/or Collateral despite the Client’s obligations under this section, the Client must:
  - (a) Ensure that the Client receives cash proceeds for the Materials and/or Collateral of at least equal to the market value of the Materials and/or Collateral; and
  - (b) Immediately pay those proceeds to WPM in reduction of all amounts owing by the Client to WPM, which WPM may apply towards amounts owing by the Client to WPM in such order as WPM sees fit.
- 15.9 The Client must not change the Client’s name, structure, status or partnership, or assign or sell the Client’s business to another party, or initiate any change to any registered documentation, or act in any other manner which would impact on WPM’s registered Security Interest without WPM’s prior written consent. The Client agrees that the Client’s liability under these terms and conditions is not affected by such an event until a new application for credit in the Client’s new entity name as restructured or changed is made and approved by WPM in writing.

*Exclusion of Notices and Other Obligations*

- 15.10 To the extent permitted by law and for the purposes of sections 115(1) and 115(7) of the PPSA:
  - (a) WPM need not comply with sections 95, 118, 121(4), 125, 129(2), 129(3), 130, 132(3)(d) or 132(4); and

- (b) Sections 142 and 143 are excluded;
- (c) For the purposes of section 115(7) of the PPSA, WPM need not comply with sections 132 and 137(3).
- 15.11 To the extent permitted by law, the Client agrees to waive:
  - (a) The Client's rights to receive any notice that is required by any provision of the PPSA (including a notice of a verification statement) or any other law before a secured party or a receiver exercises a right, power or remedy; and
  - (b) Any time period that must otherwise lapse under any law before a secured party or a receiver exercises a right, power or remedy.
- 15.12 If the law that requires a period of notice or a lapse of time cannot be excluded, but the law provides that the period of notice or lapse of time may be agreed, that period or lapse is one day or the minimum period the law allows to be agreed (whichever is the longer).

*Provision of Information*

- 15.13 The Client agrees not to exercise the Client's rights to make any request of WPM under section 275(6) of the PPSA, to authorise the disclosure of any information under that section or to waive any duty of confidence that would otherwise permit non-disclosure under that section.
- 15.14 The parties must not disclose information of the kind mentioned in section 275(1) of the PPSA, except in the circumstances where:
  - (a) Disclosure is required by sections 275(7)(b) to (e) of the PPSA; and/or
  - (b) WPM discloses information of a kind mentioned in section 275(1) of the PPSA to the extent that WPM is not doing so in response to a request made by an "interested person" (as defined in section 275(9) of the PPSA) pursuant to section 275(1) of the PPSA.
- 15.15 Notwithstanding the obligations of this section, the Client shall only authorise the disclosure of information for the purposes of section 275(7)(c) of the PPSA, or request information under section 275(7)(d) of the PPSA, if WPM approves such disclosure or request for information in writing.
- 15.16 Nothing in this part prevents any disclosure of information by WPM that WPM believes is reasonably necessary to comply with any other obligations that WPM may have under the PPSA.

*Other*

- 15.17 If the Client defaults in the timely performance of any obligation owed to WPM, WPM may enforce the Security Interest by exercising all or any of WPM's rights under these terms and conditions, the general law and the PPSA.
- 15.18 Nothing in this part limits or is limited by any other provision of these terms and conditions or any other agreement between the parties.

**16. Security and Charge**

- 16.1 In consideration of WPM 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).
- 16.2 The Client indemnifies WPM from and against all WPM's costs and disbursements including legal costs on a solicitor and own client basis incurred in exercising WPM's rights under this clause.
- 16.3 The Client irrevocably appoints WPM and each director of WPM as the Client's true and lawful attorney/s to perform all necessary acts to give effect to the provisions of this clause 16 including, but not limited to, signing any document on the Client's behalf.

**17. Defects, Warranties and Returns, Competition and Consumer Act 2010 ("CCA")**

- 17.1 The Client must inspect all Materials on delivery (or the Works on completion) and must within seven (7) days of delivery notify WPM 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 WPM to inspect the Materials or to review the Works provided.
- 17.2 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**).
- 17.3 WPM acknowledges that nothing in these terms and conditions purports to modify or exclude the Non-Excluded Guarantees.
- 17.4 Except as expressly set out in these terms and conditions or in respect of the Non-Excluded Guarantees, WPM makes no warranties or other representations under these terms and conditions including but not limited to the quality or suitability of the Materials/Works. WPM's liability in respect of these warranties is limited to the fullest extent permitted by law.
- 17.5 If the Client is a consumer within the meaning of the CCA, WPM's liability is limited to the extent permitted by section 64A of Schedule 2.
- 17.6 If WPM is required to replace any Materials under this clause or the CCA, but is unable to do so, WPM may refund any money the Client has paid for the Materials.
- 17.7 If WPM 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 WPM 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.
- 17.8 If the Client is not a consumer within the meaning of the CCA, WPM'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 WPM at WPM's sole discretion;
  - (b) limited to any warranty to which WPM is entitled, if WPM did not manufacture the Materials;
  - (c) otherwise negated absolutely.
- 17.9 Subject to this clause 17, returns will only be accepted provided that:
  - (a) the Client has complied with the provisions of clause 17.1; and
  - (b) WPM 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.
- 17.10 Notwithstanding clauses 17.1 to 17.9 but subject to the CCA, WPM 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 WPM's prior approval;
  - (e) the Client failing to follow any instructions or guidelines provided by WPM;
  - (f) fair wear and tear, any accident, or act of God.
- 17.11 Notwithstanding anything contained in this clause if WPM is required by a law to accept a return then WPM will only accept a return on the conditions imposed by that law.

**18. Limitation of Liability**

- 18.1 WPM is not liable whatsoever for any indirect and/or consequential loss and/or expense (including loss of profit) suffered by the Client arising out of these terms and conditions (including loss of profits, loss of sales, loss of market, loss of goodwill or reputation, third party claims, incidental or special damages, or other indirect or consequential loss of any kind).
- 18.2 If WPM is lawfully allowed to limit its liability to the Client in respect of the Materials and Works supplied pursuant to these terms and conditions (including but not limited to WPM's breach of these terms, tort law or negligence), then WPM's liability to the Client is limited to WPM's choice of:
- (a) re-supply of the Materials and/or Works; or
  - (b) the cost to replace the Materials and/or Works with equivalent Materials and/or Works; or
  - (c) reimbursement of some or all of the price paid by the Client for the Materials and/or Works.
- 18.3 In any situation and to the extent permitted by law, WPM's liability to the Client in respect of Materials and Works supplied pursuant to these terms and conditions will not exceed the price of the Materials and/or Works supplied by WPM.

**19. Intellectual Property**

- 19.1 Where WPM 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 WPM, and shall only be used by the Client at WPM's discretion. Under no circumstances may such designs, drawings and documents be used without the express written approval of WPM.
- 19.2 The Client warrants that all designs, specifications or instructions given to WPM will not cause WPM to infringe any patent, registered design or trademark in the execution of the Client's order and the Client agrees to indemnify WPM against any action taken by a third party against WPM in respect of any such infringement.
- 19.3 The Client agrees that WPM may (at no cost) use for the purposes of marketing or entry into any competition, any documents, designs, drawings, plans or products which WPM has created for the Client.

**20. Default and Consequences of Default**

- 20.1 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 WPM's sole discretion such interest shall compound monthly at such a rate) after as well as before any judgment.
- 20.2 If the Client owes WPM any money the Client shall indemnify WPM from and against all costs and disbursements incurred by WPM in recovering the debt (including but not limited to internal administration fees, legal costs on a solicitor and own client basis, WPM's contract default fee, and bank dishonour fees).
- 20.3 Further to any other rights or remedies WPM may have under this Contract, if a Client has made payment to WPM, 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 WPM under this clause 19 where it can be proven that such reversal is found to be illegal, fraudulent or in contravention to the Client's obligations under this Contract.
- 20.4 Without prejudice to WPM's other remedies at law WPM shall be entitled to cancel all or any part of any order of the Client which remains unfulfilled and all amounts owing to WPM shall, whether or not due for payment, become immediately payable if:
- (a) any money payable to WPM becomes overdue, or in WPM's opinion the Client will be unable to make a payment when it falls due;
  - (b) the Client has exceeded any applicable credit limit provided by WPM;
  - (c) 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
  - (d) a receiver, manager, liquidator (provisional or otherwise) or similar person is appointed in respect of the Client or any asset of the Client.

**21. Cancellation**

- 21.1 Without prejudice to any other remedies WPM may have, if at any time the Client is in breach of any obligation (including those relating to payment) under these terms and conditions WPM may suspend or terminate the supply of Works to the Client. WPM will not be liable to the Client for any loss or damage the Client suffers because WPM has exercised its rights under this clause.
- 21.2 WPM 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 WPM shall repay to the Client any sums paid in respect of the Price, less any amounts owing by the Client to WPM for Works already performed. WPM shall not be liable for any loss or damage whatsoever arising from such cancellation.
- 21.3 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 WPM as a direct result of the cancellation (including, but not limited to, any loss of profits).
- 21.4 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.

**22. Privacy Policy**

- 22.1 All emails, documents, images or other recorded information held or used by WPM is Personal Information, as defined and referred to in clause 21.3, and therefore considered Confidential Information. WPM acknowledges its obligation in relation to the handling, use, disclosure

and processing of Personal Information pursuant to the Privacy Act 1988 (“the Act”) including the Part IIIC of the Act being Privacy Amendment (Notifiable Data Breaches) Act 2017 (NDB) and any statutory requirements, where relevant in a European Economic Area (“EEA”), under the EU Data Privacy Laws (including the General Data Protection Regulation “GDPR”) (collectively, “EU Data Privacy Laws”). WPM acknowledges that in the event it becomes aware of any data breaches and/or disclosure of the Client’s Personal Information, held by WPM that may result in serious harm to the Client, WPM will notify the Client in accordance with the Act and/or the GDPR. Any release of such Personal Information must be in accordance with the Act and the GDPR (where relevant) and must be approved by the Client by written consent, unless subject to an operation of law.

- 22.2 Notwithstanding clause 21.1, privacy limitations will extend to WPM in respect of Cookies where the Client utilises WPM’s website to make enquiries. WPM agrees to display reference to such Cookies and/or similar tracking technologies, such as pixels and web beacons (if applicable), such technology allows the collection of Personal Information such as the Client’s:
- (a) IP address, browser, email client type and other similar details;
  - (b) tracking website usage and traffic; and
  - (c) reports are available to WPM when WPM sends an email to the Client, so WPM may collect and review that information (“collectively Personal Information”)

If the Client consents to WPM’s use of Cookies on WPM’s website and later wishes to withdraw that consent, the Client may manage and control WPM’s privacy controls via the Client’s web browser, including removing Cookies by deleting them from the browser history when exiting the site.

- 22.3 The Client agrees for WPM to obtain from a credit reporting body (CRB) a credit report containing personal credit information (e.g. name, address, D.O.B, occupation, driver’s license details, electronic contact (email, Facebook or Twitter details), medical insurance details or next of kin and other contact information (where applicable), previous credit applications, credit history) about the Client in relation to credit provided by WPM.

- 22.4 The Client agrees that WPM 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 (2) years.

- 22.5 The Client consents to WPM being given a consumer credit report to collect overdue payment on commercial credit.

- 22.6 The Client agrees that personal credit information provided may be used and retained by WPM 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.

- 22.7 WPM 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.

- 22.8 The information given to the CRB may include:

- (a) Personal Information as outlined in 21.3 above;
- (b) name of the credit provider and that WPM 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 WPM has been paid or otherwise discharged and all details surrounding that discharge (e.g. dates of payments);
- (g) information that, in the opinion of WPM, 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).

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

- (a) a copy of the Personal Information about the Client retained by WPM and the right to request that WPM correct any incorrect Personal Information; and
- (b) that WPM does not disclose any Personal Information about the Client for the purpose of direct marketing.

- 22.10 WPM 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 Contract or is required to be maintained and/or stored in accordance with the law.

- 22.11 The Client can make a privacy complaint by contacting WPM via e-mail. WPM 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).

### **23. Service of Notices**

- 23.1 Any written notice given under this Contract shall be deemed to have been given and received:

- (a) by handing the notice to the other party, in person;
- (b) by leaving it at the address of the other party as stated in this Contract;
- (c) by sending it by registered post to the address of the other party as stated in this Contract;



- (d) if sent by facsimile transmission to the fax number of the other party as stated in this Contract (if any), on receipt of confirmation of the transmission;
  - (e) if sent by email to the other party's last known email address.
- 23.2 Any notice that is posted shall be deemed to have been served, unless the contrary is shown, at the time when by the ordinary course of post, the notice would have been delivered.
- 24. Trusts**
- 24.1 If the Client at any time upon or subsequent to entering in to the Contract is acting in the capacity of trustee of any trust ("Trust") then whether or not WPM may have notice of the Trust, the Client covenants with WPM as follows:
- (a) the Contract extends to all rights of indemnity which the Client now or subsequently may have against the Trust and the trust fund;
  - (b) the Client has full and complete power and authority under the Trust to enter into the Contract and the provisions of the Trust do not purport to exclude or take away the right of indemnity of the Client against the Trust or the trust fund. The Client will not release the right of indemnity or commit any breach of trust or be a party to any other action which might prejudice that right of indemnity;
  - (c) the Client will not without consent in writing of WPM (WPM will not unreasonably withhold consent), cause, permit, or suffer to happen any of the following events:
    - (i) the removal, replacement or retirement of the Client as trustee of the Trust;
    - (ii) any alteration to or variation of the terms of the Trust;
    - (iii) any advancement or distribution of capital of the Trust; or
    - (iv) any resettlement of the trust property.
- 25. Building and Construction Industry Security of Payment Act 2002**
- 25.1 At WPM's sole discretion, if there are any disputes or claims for unpaid Works and/or Materials then the provisions of the Building and Construction Industry Security of Payment Act 2002 may apply.
- 25.2 Nothing in this Contract is intended to have the affect of contracting out of any applicable provisions 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 either party to enforce any provision of these terms and conditions shall not be treated as a waiver of that provision, nor shall it affect that party'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, the state in which WPM has its principal place of business, and are subject to the jurisdiction of the courts in Melbourne, Victoria.
- 26.3 WPM may licence and/or assign all or any part of its rights and/or obligations under this Contract without the Client's consent.
- 26.4 The Client cannot licence or assign without the written approval of WPM.
- 26.5 WPM may elect to subcontract out any part of the Works but shall not be relieved from any liability or obligation under this Contract by so doing. Furthermore, the Client agrees and understands that they have no authority to give any instruction to any of WPM's sub-contractors without the authority of WPM.
- 26.6 The Client agrees that WPM may amend their general terms and conditions for subsequent future contracts with the Client by disclosing such to the Client in writing. These changes shall be deemed to take effect from the date on which the Client accepts such changes, or otherwise at such time as the Client makes a further request for WPM to provide 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 Both parties warrant that they have the power to enter into this Contract and have obtained all necessary authorisations to allow them to do so, they are not insolvent and that this Contract creates binding and valid legal obligations on them.