

TERMS AND CONDITIONS

1. INTERPRETATION

1.1 In this document:

- 1.1.1 **'Australian Standards'** means any applicable Australian Standards and related documents as amended from time to time.
- 1.1.2 **'Attach'** has the same meaning as it is given in section 19 of the *Personal Property Securities Act 2009* (Cth).
- 1.1.3 **'Australian Consumer Law'** means the Australian Consumer Law set out in the *Competition and Consumer Act 2010* (Cth), and all other relevant legislation and regulations.
- 1.1.4 **'Company'** means Profile Aluminium Systems Pty Ltd (ABN 95 159 285 579), and each related entity as defined in the *Corporations Act 2001* (Cth) of Profile Aluminium Systems Pty Ltd (ABN 95 159 285 579) now or at any time Goods and/or Services are supplied to the Customer in the future.
- 1.1.5 **"Contract"** means any contract or agreement, whether formal or informal, written, oral or partly written and partly oral, formed between the Customer and the Company.
- 1.1.6 **'Customer'** refers to the individual, business, partnership or company entering into a Contract with the Company, and includes the Customer receiving the Goods and/or Services as proprietor (in whole or in part) or as agent of any entity.
- 1.1.7 **'Financing Statement'** has the same meaning as it is given in section 10 of the *Personal Property Securities Act 2009* (Cth).
- 1.1.8 **'Guarantors'** means the guarantors specified in the Deed of Guarantee annexed hereto, if any.
- 1.1.9 **'Goods'** refers to any goods supplied by the Company to the Customer pursuant to a Contract.
- 1.1.10 **'Goods and/or Services'** refers to any Goods and/or services supplied by the Company to the Customer pursuant to a Contract.
- 1.1.11 **'Notice'** refers to a notice in accordance with clause 33.
- 1.1.12 **'Party'** means each party to the Contract, including the Company and the Customer, and **'Parties'** has a corresponding meaning.
- 1.1.13 **'Payment Claim'** has the meaning stated in clause 6.4.
- 1.1.14 **'Price'** has the meaning stated in clause 6 and is subject to clause 21.
- 1.1.15 **'Security Interest'** has the same meaning as it is given in section 12 of the *Personal Property Securities Act 2009*.
- 1.1.16 **'Secured Party'** has the same meaning as it is given in section 10 of the *Personal Property Securities Act 2009*.
- 1.1.17 **'Service'** refers to the provision of any service by the Company to the Customer pursuant to a Contract.
- 1.1.18 **'Terms and Conditions'** means the terms and conditions set out herein from clause 1 to clause 34 inclusive subject to any amendments made by the Company pursuant to clause 21.4;

1.1.19 **'Verification statement'** has the same meaning as it is given in section 155 of the *Personal Property Securities Act 2009*.

1.1.20 **'Works'** refers to the Company's provision of Goods and/or Services.

1.2 In these Terms and Conditions, unless the context otherwise requires:

1.2.1 the singular includes the plural and vice versa;

1.2.2 a reference to an individual or person includes a corporation, partnership, joint venture, association, authority, trust, state or government and vice versa;

1.2.3 a reference to any gender includes all genders;

1.2.4 a reference to a recital, clause or schedule is to a recital, clause or schedule of or to these Terms and Conditions;

1.2.5 a reference to any agreement or document is to that agreement or document (and, where applicable, any of its provisions) as amended, novated, restated or replaced from time to time;

1.2.6 a reference to a statute, regulation, proclamation, ordinance or by-law includes all statutes, regulations, proclamations, ordinances or by-laws amending, consolidating or replacing it, and a reference to a statute includes all regulations, proclamations, ordinances and by-laws issued under that statute;

1.2.7 a reference to a body, other than a Party to the Contract (including, without limitation, an institute, association or authority), whether statutory or not:

1.2.7.1 which ceases to exist; or

1.2.7.2 whose powers or functions are transferred to another body,

is a reference to the body which replaces it or which substantially succeeds to its powers or functions.

1.2.8 If a party comprises two or more persons, the covenants and Contracts on their part bind and shall be observed and performed by them jointly and each of them severally and may be enforced against any one or any two or more of them;

1.2.9 reference to a party includes its executors, administrators, successors and permitted assigns;

1.2.10 no provision of these Terms and Conditions will be construed adversely to a Party solely on the ground that the Party was responsible for the preparation of these Terms and Conditions or that provision;

1.2.11 where an expression is defined, another part of speech or grammatical form of that expression has a corresponding meaning;

1.2.12 all references to A\$, \$, dollar, \$, or to currency are references to Australian dollars;

1.2.13 "including" and similar expressions are not and must not be treated as words of limitation; and

1.2.14 headings are for ease of reference only and do not affect the meaning of these Terms and Conditions.

2. APPLICATION

2.1. The Company agrees to provide the Customer with goods and/or services it orders subject to these Terms and Conditions. These Terms and Conditions apply in respect of all Contracts, offers

to sell, quotations and other commercial transactions for the supply of goods and/or services by the Company.

3. OPERATION

- 3.1. Any Contract between the Customer and the Company shall be upon these Terms and Conditions and shall be read in conjunction with these Terms and Conditions. These Terms and Conditions shall operate to the exclusion of any terms and conditions to the contrary effect expressed in any of the Company's quotations or other documentation and shall supersede all prior Contracts.
- 3.2. The continued operation of these Terms and Conditions shall not be affected by any repudiation of any Contract or transaction relating to the supply of Goods and/or Services between the Company and the Customer.
- 3.3. The Contract is accepted by the Company on the basis that the Contract constitutes the entire Contract between the Customer and the Company in connection with the supply of Goods and/or Services.

4. SUPPLY OF GOODS AND/OR SERVICES

- 4.1. Unless specifically agreed in writing with the Customer, the Company does not make any promises, assurances, guarantees or representations whatsoever that the Goods and/or Services comply with Australian Standards.
- 4.2. Acts and omissions (including, without limitation, in relation to the placement or alteration of the Contract) of the Customer's directors, employees, former directors and/or employees, contractors (except the Company), agents and any other person who purports to act on behalf of the Customer, shall be treated as the Customer's acts and omissions of its directors, employees, former directors and/or employees, contractors (except the Company), agents and any other person who purports to act on behalf of the Customer, even if they act outside their authority.
- 4.3. To the fullest extent permitted by law any prior representations, agreements and arrangements, including representations as to the suitability of the Goods and/or Services, and any descriptions, illustrations and material contained in any advertisement, website, catalogue, price list or brochure are excluded from, and do not form part of, the Contract unless specifically stated in the Contract to the contrary.
- 4.4. All descriptions, specifications, drawings, and particulars of weight and dimensions of the Goods and/or Services are approximate only. Unless the accuracy of such descriptions, specifications, drawings, and particulars of weight and dimensions of the Goods and/or Services has been confirmed in writing by the Company in respect of a particular Contract, the Customer cannot claim against the Company for any deviation in such descriptions, specifications, drawings, or particulars of weight or dimensions.

5. QUOTATIONS AND TENDERS

- 5.1. Any quotations given do not involve any obligations by the Company.
- 5.2. Tenders and quotes shall lapse without notice after 30 days from their date of dispatch by the Company, unless the Company and the Customer agree otherwise in writing.
- 5.3. Where a quote or tender has been based on critical dimensions supplied by the Customer, any variance established to those dimensions will mean a hold point and the Company will have the right to exercise the following:
 - 5.3.1. Estimate the difference and process as a variance; or
 - 5.3.2. Re-estimate the Price and Works for formal acceptance by the Customer prior to restarting the supply of Goods and/or Services.

5.4. If the Company has provided the Customer with a quotation, the Customer agrees that:

5.4.1. The Customer has checked that the quantity, sizes and other details are correct,

5.4.2. The Customer is solely responsible for checking that the details in the quotation are accurate in every aspect before acceptance.

6. PRICE AND PAYMENT

6.1. The Customer shall pay to the Company the Price specified on the Company's Quotation, order, or invoice dispatched plus all taxes, credit card fees, freight, handling, delivery and insurance charges by the Company in respect of the Goods and/or Services to be supplied ("**the Price**").

6.2. The Customer agrees to accept and pay the Company the Price for the Goods and/or Services in accordance with these Terms and Conditions and the Contract.

6.3. Time of payment is of the essence of the Contract.

6.4. At any time after the Company has performed any of its obligations under the Contract, the Company may, at its discretion, make a claim for a progress payment from the Customer ("**a Payment Claim**"). A Payment Claim shall:

- a. be in writing, addressed to the Customer, and state the Company's name;
- b. state the amount claimed by the Company and when that amount is due to be paid by the Customer;
- c. describe the Works that the Company has performed to which the claim relates;
- d. be given to the Customer.

6.5. Any Payment Claim does not prevent the Company from making any other claim for moneys payable to the Company under or in connection with the Contract.

6.6. Any progress payment or payment of a Payment Claim is on account only and the Customer has no right of set off.

6.7. As a condition precedent to future supplies under the Contract pursuant to which the payments are due or under any other Contract, the Customer agrees that it shall pay the Price to the Company without deduction in the following manner:

6.7.1. The Customer shall make payment on or before the due date(s) as stated on the Company's Quotation, Payment Claim, order or invoice;

6.7.2. Where there is no due date notified by the Company to the Customer or stated on a Company's Quotation, Payment Claim, order or invoice in any event, the Customer shall pay the Company within 7 days of the Company claiming a payment from the Customer;

6.7.3. The Customer shall pay the Company the unpaid balance of the Price immediately upon the Company notifying the Customer that the Works are completed.

6.8. The Customer's liability to pay any money under the Contract to the Company must not and is not contingent, whether directly or indirectly, on the Customer being paid money by any other person whatsoever.

6.9. Payments received by the Company from the Customer shall be applied, firstly in reduction of any interest payable pursuant to clause 7.2 herein and secondly, in reduction of all other monies owed by the Customer to the Company until such time as all monies owed to the Company have been paid in full.

- 6.10. If any payment made by, or on behalf of, the Customer to the Company shall subsequently be avoided by law or recovered by a liquidator or trustee in bankruptcy such payment shall be deemed not to have discharged the Customer's liability and in such event the Company and the Customer shall be restored to the position in which each would have been had the payment not been avoided. The Guarantors agree to be liable to the Company for the payment so avoided.

7. COSTS RECOVERABLE

- 7.1. Should the Customer default in the payment of any monies due under the Contract, then all monies due to the Company shall immediately become due and payable and shall be paid by the Customer within 7 days of the date of demand.
- 7.2. The Company shall be entitled to charge the Customer interest calculated at 12% per annum, on the balance of all overdue accounts and invoices from the date of due payment until the date of actual payment.
- 7.3. Any expenses, costs or disbursements, including debt collection agency fees, commission and any fees paid to the Company's solicitors (on an indemnity basis), incurred by the Company in recovering any outstanding monies shall be paid by the Customer on an indemnity basis.
- 7.4. Where the Customer is a company, the company's Directors personally guarantee the payment of all costs and expenses owing to the Company by the Customer.

8. DELIVERY

- 8.1. In consideration of payment of the Price by the Customer, the Company may arrange delivery of Goods and/or Services to the Customer's nominated location in accordance with the Contract.
- 8.2. Delivery times quoted by the Company are estimates only and the Company may extend delivery times.
- 8.3. The Company may make part delivery of any Goods and/or Services ordered by the Customer and any Goods and/or Services so delivered shall be deemed to have been delivered pursuant to a Contract for the quantity of Goods and/or Services so delivered.
- 8.4. Delivery is deemed to take place at the time the Customer or a carrier, whether engaged by the Company or the Customer, takes possession of the Goods and/or Services, or, within 7 days of notification by the Company to the Customer that the Goods and/or Services are available, whichever first occurs.
- 8.5. The Goods and/or Services supplied by the Company to, or at the request of, the Customer shall be at the Customer's risk immediately upon delivery to the Customer or into the Customer's custody, whichever is sooner. Upon risk in the goods supplied by the Company passing to the Customer, the Customer shall insure the Goods and/or Services for their full insurable value against loss or damage by fire, theft, accident and other such risks.

9. RETENTION OF TITLE

- 9.1. Prior to full payment of the Price and all other sums owing by the Customer to the Company in relation to the supply of Goods and/or Services, the Customer shall have no right to sell or dispose of any or all of the Goods and/or Services.
- 9.2. The parties agree that the title of any Goods and/or Services supplied by the Company shall not pass to the Customer until payment of the Price for those items and any associated labour has been received in full by the Company.
- 9.3. Where any part of the Price for Goods and/or Services supplied by the Company remains owing, the following provisions apply:

- 9.3.1. the Company shall retain legal title to all Goods and/or Services supplied and not yet used or resold in the ordinary course of business;
- 9.3.2. the Customer must store the Goods in such a manner as to show clearly that they are the property of the Company;
- 9.3.3. the Customer shall be at liberty to sell the Goods in the ordinary course of business, but only as a fiduciary agent for the Company and the Customer shall account to the Company for all proceeds from any sale;
- 9.3.4. If such Goods and/or Services are used in some manufacturing process, construction process, or other process by the Customer or some third party, even with loss of identity, the legal title to the resultant goods shall vest in the Company. The proceeds of the sale of the Goods and/or Services or resultant goods shall be received by the Customer as agent of the Company and such proceeds are to be kept in a separate account or are to be accounted for on demand;
- 9.3.5. The Customer appoints the Company as their attorney to collect payment from any third party for goods supplied, in whole or in part, by the Company.
- 9.4. Prior to payment being received in full by the Company for Goods and/or Services, the Customer will take custody of the Goods and/or Services and retain them as the fiduciary agent and bailee of the Company.
- 9.5. The Customer agrees to indemnify the Company against any claim, action, damage, loss, liability, cost, charge, expense, outgoing or payment which the Company suffers, incurs or is liable to pay in respect of the Company's exercise of its rights under this clause 9.
- 9.6. The Customer acknowledges and agrees that all rights in all copyright, designs, patents and trademarks existing in relation to the Goods and/or Services are reserved to the owner of those rights.

10. DATE OF WORKS

- 10.1. The Company will complete the Works by the date or dates specified by the Customer, but will not, unless agreed in writing, be held responsible for any loss or damage of any kind if Works are not completed by the agreed date or dates.
- 10.2. The Customer acknowledges that any variation to the Works or any delay in payment may affect the anticipated completion date.

11. DELAYS AND EXTENSION OF TIME

- 11.1. Should the progress of the Works be delayed by any of the following causes or conditions resulting therefrom:
 - 11.1.1. The Company not having uninhibited access to carry out the Works pursuant to clause 18.10;
 - 11.1.2. On account of variations or extras;
 - 11.1.3. By a suspension of the Works under clause 12;
 - 11.1.4. By inclement weather or conditions resulting from inclement weather;
 - 11.1.5. In consequence of proceedings taken or threatened by, or disputes with, adjoining or neighbouring owners or residents;
 - 11.1.6. By reason of any civil commotion, or combination of workmen or strikes or lockouts affecting the Works or affecting the manufacture or supply of materials for the Works;
 - 11.1.7. Any act, default or omission on the part of the Customer;

11.1.8.Delay on the part of any local or other authority in granting or issuing any necessary consent or approval;

11.1.9.By any other matter, cause or thing whatsoever beyond the control of the Company including unavailability of labour or materials;

then in any such case, the Company shall be entitled to a fair and reasonable extension of time in which to complete the Works without notice to the Customer.

11.2. When the Customer becomes aware of any matters that are likely to result in a delay to the Works, the Customer is to notify the Company in writing of the nature and estimated extent of the delay.

11.3. Upon receipt of the Customer's notice above, the Company will notify the Customer of the estimated impact of the delay on:

11.3.1.The time for completion of the Works; and

11.3.2.The estimated extra costs associated with the delay.

11.4. The Customer shall pay for the Company's extra costs necessarily incurred by reason of any delay or extension of time.

12. SUSPENSION OF WORKS

12.1. Should the Customer default by failing to pay the Price, pay any part of the Price, pay any money due and owing, or by committing any other breach of a Contract:

12.1.1. the Company may, without prejudice to the Company's right terminate the contract, give a notice to the Customer stating it intends to suspend the Works in 7 days unless the Customer remedies its default within 7 days ("**Notice of Intention to Suspend**");

12.1.2.If the Customer's default continues for 7 days after the Company gives its Notice of Intention to Suspend, then the Company may suspend the Works. If the Company suspends the Works it shall promptly give Notice of such suspension in writing to the Customer ("**Suspension Notice**");

12.1.3.The Company shall lift the suspension within 14 days of the Customer remedying the default specified in the Notice of Intention to Suspend, and the time in which to bring the Works to completion shall be extended by the period equivalent to the number of days which the Works were suspended and any consequential delays.

12.2. The Company shall be entitled to be paid reasonable costs arising from any suspension of the Works plus an administration fee.

13. FORCE MAJEURE

13.1.The Company will not be liable for any breach of the Contract due to any matter or thing beyond the Company's control. Furthermore, the Company is excused from performing any term, covenant or condition required by the Contract during the time and to the extent that performance is prevented when such performance is prevented wholly or in part by circumstances beyond the Company's control.

14. SECURITY

14.1.The Customer hereby charges and mortgages in favour of the Company to secure the repayment of any debt and any monies which may become owed by the Customer to the Company hereunder and under any Contract all of the Customer's present and future estate and interest in all real property and personal property.

- 14.2. The Customer hereby acknowledges that these Terms and Conditions constitute a security agreement for the purposes of section 20 of the Personal Property Securities Act 2009 ("**the PPSA**").
- 14.3. The Customer will not (except with the written consent of the Company) allow to be, or be liable to become, attached in favour of any person or Company a Security Interest or Transitional Security Interest in any goods owned by the Company.
- 14.4. The Company may register these Terms and Conditions together with the Contract as a Security Interest on the Personal Property Securities Register ("**the PPSR**") which will constitute a Security Interest in:
- 14.4.1. All goods previously supplied by the Company;
 - 14.4.2. All goods that will be supplied in the future by the Company.
- 14.5. The Customer agrees to grant a Purchase Money Security Interest in the goods which will continue to apply to any goods coming into existence or proceeds of sale of goods coming into existence.
- 14.6. The Company will continue to hold a Security Interest in the goods in accordance with and subject to the PPSA, notwithstanding that the goods may be processed, commingled or become an accession with other goods.
- 14.7. The Customer undertakes to:
- 14.7.1. Promptly sign any documents and/or provide all necessary information requested by the Company to lodge a Financing Statement with respect to the registration of any Security Interest or correct a defect in any Financing Statement or Verification Statement;
 - 14.7.2. Not register or permit to be registered a Financing Change Statement as defined in section 10 of the PPSA or make a demand to alter the Financing Change Statement pursuant to section 178 of the PPSA in respect of the goods without the prior written consent of the Company;
 - 14.7.3. Provide the Company with not less than 14 days prior written notice of any proposed change in the Customer's name, address, contact numbers, business practice or other such change in the Customer's details registered on the PPSR; and
 - 14.7.4. Indemnify and upon demand reimburse the Company for all expenses incurred in registering and maintaining a Financing Statement or Financing Change Statement on the PPSR or releasing any Security Interests and/or enforcing or attempting to enforce the Security Interest created by these Terms and Conditions and the Contract.
- 14.8. The Customer waives the right to receive a verification statement or financial change statement relating to any Security Interest registered by the Company.
- 14.9. The Parties agree that the Company and the Customer contract out of, and nothing in the provisions of, sections 95, 96, 117, 118, 121(4), 130, 132(3)(d), 132(4), 135, 142 and 143 of the PPSA shall apply to any Contract or these Terms and Conditions;
- 14.10. The Company may exercise any and all remedies afforded to it as a Secured Party under Chapter 4 of the PPSA including, without limitation, entry into any building or premises owned, occupied or used by the Customer, to search for and seize, dispose of or refrain those goods in respect to which the Customer has granted a Security Interest to the Company.
- 14.11. The Customer hereby agrees not to request the information referred to below or authorise the disclosure of such information without the prior written consent of the Company:
- 14.11.1. Copies of security agreements;
 - 14.11.2. Statements setting out details of amounts secured, obligations secured, terms of payment or performance of obligation;

14.11.3. Approvals or corrections of specified personal property indicating which items of personal property have security interests; and/or

14.11.4. Approvals or corrections of amounts secured, obligations secure, terms of payment or performance of obligation.

15. LIABILITY FOR ADVICE

15.1. The Company is only liable for expert advice which is:

15.1.1. Within the scope of the Contract;

15.1.2. In writing; and

15.1.3. Accompanied by a written confirmation stating that the Company is qualified to give the advice.

15.2. The Customer acknowledges that the Company is not able to provide expert advice outside the scope of a Contract.

15.3. The Company is not liable for any technical advice or assistance given in good faith, but which it is not contractually bound to provide and which does not fit the criteria set out in clause 15.1.

16. LIABILITY FOR GOODS MANUFACTURED BY THIRD PARTIES

16.1. The Customer acknowledges that the Company is not liable for any defects attributable to the manufacture of any Goods that are manufactured by third parties and supplied by the Company.

16.2. The Customer shall be entitled to any benefit of any manufacturer's warranty in respect of such Goods. Warranty of all Goods sold is strictly limited to the manufacturer's warranty.

16.3. The Company accepts no responsibility for any manufacturer's warranty or claim arising from the use of the Goods, whether singularly or in combination with other Goods.

16.4. This clause 16 survives the termination or natural expiration of any Contract.

17. NO LIABILITY FOR SERVICES PROVIDED BY THIRD PARTIES

17.1. The Customer acknowledges that the Company is not liable for any damage or defects attributable to the provision of Services by a third party.

17.2. The Company accepts no responsibility for any third party's warranty or claim.

17.3. This clause 17 survives the termination or natural expiration of any Contract.

18. DEFECTS AND WARRANTIES

18.1. Within 7 days of the Company's delivery of Goods or Services, the Customer must inspect the Goods or Services and provide notice of any alleged defects in the Goods and/or Services to the Company in writing.

18.2. The Company shall not be responsible or liable for any alleged defect in the Works unless it is reported in accordance with clause 18.1.

18.3. The Customer must allow a representative of the Company (including a third party engaged by the Company) the rights to inspect any alleged defect reported in accordance with clause 18.1.

- 18.4. If the inspection under clause 18.3 reveals that the alleged defect was not caused by any act or omission of the Company, then the Customer must pay all costs of the Company incurred in connection with the inspection.
- 18.5. Duration of life after installation is not covered by any guarantee or warranty.
- 18.6. This clause 18 survives the termination or natural expiration of any Contract.
- 18.7. Except as provided in these Terms and Conditions, all express and implied warranties, guaranties and conditions under statute or general law as to merchantability, description, quality, suitability or fitness of the Goods and/or Services for any purpose or as to design, assembly, installation, material or workmanship or otherwise are expressly excluded.
- 18.8. The Company is not liable for physical or financial injury, loss or damage or for consequential loss or damage of any kind arising out of:
- 18.8.1. the supply, layout, assembly, installation or operation of the Goods and/or Services;
- 18.8.2. the Company's negligence or in any way whatsoever; or
- 18.8.3. the acts or omissions of any third party whatsoever.
- 18.9. The Customer acknowledges and agrees that where the Works involve Goods that are custom made by the Company or its subcontractors, the Goods and/or Services may not be fit for purpose or may not work exactly as the Customer expects, due to the customisations made or factors beyond the Company's control.

19. NO WARRANTY

- 19.1. The Company makes no express warranties to the Customer, except those expressly set out in the Contract and these Terms and Conditions.
- 19.2. The Company will not be liable in any circumstances for any loss or damage whatsoever allegedly incurred and arising out of any:
- 19.2.1. Conditions, warranties, and terms implied by statute or general law or custom except any implied condition or warranty the exclusion of which would contravene any statute or cause this clause to be void ("**Non-Excludable Condition**");
- 19.2.2. Alleged liability to the Customer in contract for consequential or indirect damages arising out of or in connection with the Works or the Contract, even if the Company knew they were possible or they were otherwise unforeseeable, including, without limitation:
- a. lost profits and damages suffered as a result of claims by a third party;
- b. glass breakage, cracking, thermal cracking or spontaneous breakage following installation by the Company;
- c. damage to Goods caused by cleaning agents.
- 19.2.3. Claims by the Customer in negligence for acts or omissions of the Company or its employees, Agents, or contractors arising out of or in connection with the Contract;
- 19.3. The Company's liability for breach of any express provision of these Terms and Conditions or any Non Excludable Condition (except a Non Excludable Condition referred to above or one implied by section 64 of the Australian Consumer Law) is limited at the Company's option to one of supplying, replacing or repairing the Goods and/or Services in respect of which the breach occurred.
- 19.4. This clause 19 survives the termination or natural expiration of any Contract.

20. LIABILITY AND INDEMNITY

- 20.1. The Company shall not be liable to the other party in contract, tort, warranty, strict liability, or any other legal theory for any indirect, consequential, incidental, punitive or exemplary damages, or for any claim for loss of profits and the Customer agrees that the Company may plead these Terms and Conditions as a bar to any such claims whether they arise at law, in equity, under any statute, regulation, or other legislative instrument, or under any contract, deed, or any other instrument made or approved under any law.
- 20.2. The Customer hereby releases and indemnifies and agrees to keep the Company indemnified from any and all costs (including all legal fees and costs) and any other legal or other expenses incurred by it in investigating or defending any action or threatened actions on an indemnity basis), damages, liabilities, penalties, fines, expenses or losses including indirect, incidental, consequential, punitive or exemplary loss or damage (including but not limited to loss of profit), whether resulting from breach of contract, tort, warranty, strict liability, statute or any other legal theory or otherwise that the Company may incur in relation to the Customer or any third party, including where the cost, damage, liability, penalty, fine, expense or loss is caused by or contributed to by the Company in any way or for any reason whatsoever.
- 20.3. The Customer is liable for all costs and disbursements incurred by the Company or its appointed agents on an indemnity basis in recovering payment of any outstanding monies or enforcing its rights under the Contract, including, but not limited to all legal fees and costs and any other legal or other expenses incurred by it in investigating or defending any action or threatened actions.
- 20.4. This clause 20 survives the termination or natural expiration of any Contract.

21. VARIATIONS AND EXTRAS

- 21.1. Any variation to the Works or the Contract must be in agreed to via the exchange of emails between a representative of the Company and the Customer, confirming the:
- 21.1.1. precise scope of the variation; and
- 21.1.2. the amount or means of calculating the amount that the Customer is to pay the Company for the variation; and
- 21.1.3. any change to the Price as a result of the variation.
- The Customer agrees that the Company may revise and amend the Price of the Works and charge an administration fee to the Customer, if there are any such variations.
- 21.2. Any variation made after the Contract is entered in to will incur an administration fee to be charged by the Company in addition to the costs of the variation separately charged.
- 21.3. Where variation to the Works or the Contract is necessary:
- 21.3.1. To comply with any written direction lawfully given by a person acting under a written law; or
- 21.3.2. By virtue of circumstances that could not reasonably have been foreseen by the Company at the time when the Contract was entered into,
- the Company shall be entitled to payment for such variation provided that before carrying out the Works in relation to the variation, the Company gives to the Customer a statement setting out the reason for, and the cost to be incurred on account of the variation, together with a copy of any written direction referred to in clause 21.3.1.
- 21.4. From time to time, the Company may review and amend these Terms and Conditions and the Customer shall be bound by any variation which shall apply to the supply of any Goods and/or Services following the effective date of the variation.

22. PHOTOS

- 22.1. The Customer authorises the Company to take photos of any Goods and/or Services and at any property that is the subject of a Contract and irrevocably grants the Company a royalty-free license to use those photos for any purpose whatsoever.

23. TERMINATION

- 23.1. Any request by the Customer to cancel an order must be made in writing. The Company may, at its discretion, accept or reject the request and specify any terms and reasonable charges upon which such request may be agreed to.
- 23.2. The Company may, in addition to any other rights under these Terms and Conditions or the Contract, terminate the Contract in any one of the following events:
- 23.2.1. The Customer entering into possession of the Works prior to completion or without the Company's consent;
- 23.2.2. Any deliberate and substantial prevention of or interference with the Works or progress thereof caused by the Customer whether directly or indirectly;
- 23.2.3. Substantial damage to or interference with the Works or access thereto by any cause beyond the control of the Company including (but without limiting in any way the generality thereof) water, flood, fire, storm tempest, rioting, earthquake, civil commotion or industrial action;
- 23.2.4. Any substantial breach of the Contract or these Terms and Conditions by the Customer;
- 23.2.5. If the Customer shall make any assignment for the benefit of or enter into any arrangement or composition with its creditors or go into liquidation (whether voluntary or compulsory except for the purpose of reconstruction or amalgamation) or have a receiver appointed or commit an act of bankruptcy or if a sequestration order is made against the Customer's estate;
- 23.2.6. Any failure by the Customer for 10 days after the due date hereof to pay any part of the Price, subject to clause 25.
- 23.3. The Customer may terminate the Contract if the Company shall make an assignment for the benefit of or enter into any composition with its creditors or go into liquidation (whether voluntary or compulsory except for the purpose of reconstruction or amalgamation) or have a receiver appointed or if a sequestration order is made against the Company's estate.
- 23.4. Except as provided herein neither party shall terminate the Contract whether pursuant to the Contract, these Terms and Conditions, or at law or in equity without first giving to the other party a notice in writing specifying the matter complained of and requesting that other party to remedy it within 10 days of service of such notice. If such notice is given and the other party fails within such period to remedy the matter complained of then the party giving such notice may terminate the Contract by notice to the other party forthwith.
- 23.5. If a Contract is terminated, the Customer shall pay the Company for all Services and Goods provided by the Company, all work done by the Company, and all materials used or procured by the Company and properly chargeable to the date of termination.

24. CUSTOMER'S BREACH

- 24.1. If the Customer defaults in the due and punctual observe of all or any of its obligations or covenants under a Contract, dies, commits an act of bankruptcy, takes or shall have taken against it any action for its winding up, is placed under official management, administration or receivership, then the Company may without prejudice to any other right or remedies it has:
- 24.1.1. treat as discharged all or any obligation arising from any Contract;

24.1.2. retain any security given or monies paid by the Customer or available through enforcement of any guarantee, security or bond and apply this in reduction of any sum of money owed or owing by the Customer to the Company; and

24.1.3. take such steps as the Company may deem necessary in its sole discretion to mitigate its damages suffered including the putting to use, hiring out, sale or disposal of any goods supplied or to be supplied under a Contract.

25. DISPUTES

25.1. The parties agree not to commence proceedings in relation to any dispute arising in regard to a Contract without first having regard to the procedure set out in this clause 25.

25.2. Should any dispute or difference arise between the Customer and the Company in connection with a Contract, then:

25.2.1. The party that alleges that a dispute or difference has arisen shall serve the other party, by hand, pre-paid post or by e-mail, with a Notice of Dispute in writing adequately identifying and providing details of the dispute or difference.

25.2.2. Within 7 days of receipt of the Notice of Dispute served in accordance with the previous clause herein, the parties must confer and take reasonable steps to resolve the dispute or difference.

25.2.3. If the dispute or difference cannot be resolved within 14 days of service of the Notice of Dispute, then either party may submit the dispute or difference to arbitration.

25.3. If the dispute or difference is not resolved within 28 days of service of the Notice of Dispute (or any longer period as agreed to by the parties), either party who has complied with this clause may end this dispute resolution process by written notice to the other party and immediately thereafter commence court proceedings in relation to this dispute or difference.

25.4. Nothing in this clause 25 operates to prevent the Company from instituting proceedings for recovery of monies owing under any Contract.

26. ENTERING ONTO THE CUSTOMER'S PREMISES

26.1. If the Customer fails to pay the full Price when due in accordance with a Contract, defaults in the due and punctual observance of all or any of its obligations or covenants under a Contract, dies, commits an act of bankruptcy, takes or shall have taken against it any action for its winding up, is placed under official management, administration or receivership, then the Company may (without giving Notice) enter the premises of the Customer and retake possession of the Goods and/or Services supplied to the Customer by the Company and the Customer hereby authorises and allows the Company and/or its representatives, servants, agents or employees to enter the premises upon which the Goods and/or Services are situated for the purpose of retaking possession of Goods and/or Services.

26.2. The Customer indemnifies the Company against any claim, action, damage, loss, liability, cost, charge, expense, outgoing or payment which the Company suffers, incurs, or is liable to in respect of the Company's exercise of its rights under clause 26.1.

26.3. This clause 26 survives the termination or natural expiration of any Contract.

27. ASSIGNMENT AND SUBCONTRACTING

27.1. The Company may assign, sub-contract or sub-let any part of the Works without seeking the consent of the Customer.

27.2. The Company may transfer or assign to any person or corporation the whole or any part of the Customer's or Guarantors' liabilities and obligations to the Company in any Contract without seeking the consent of the Customer.

27.3. The Customer may not assign, sub-contract or sub-let any part of the Works, or any of its rights, liabilities, or obligations under any Contract, without the prior written consent of the Company.

28. CUSTOMER IS A CORPORATION, TRUSTEE, OR PARTNERSHIP

28.1. If there is any variation in the information supplied in a Contract or the Deed of Guarantee annexed hereto concerning the Customer, the proprietorship of the Customer's trading name or the Customer, the Company shall forthwith be notified by the Customer. Unless such notification is given to the Company, the Customer and the Guarantors shall remain liable to the Company as though any goods and/or services supplied by the Company prior to such notification were supplied to, or at the request of, the original Customer.

28.2. If the Customer is a corporation, the Customer warrants that its constitution does not preclude the Customer from entering in to, or performing its obligations under, all Contracts.

28.3. If the Customer is or becomes a trustee, the Customer covenants that:

28.3.1. the Customer will provide the Company with a true copy of the relevant executed and stamped trust deed (and any amendments) if and when requested by the Company;

28.3.2. the Customer will be bound by these Terms and Conditions and liable under all Contracts in its own capacity and in its several capacity, as the Customer is requesting Goods and/or Services from the Company in both capacities;

28.3.3. at the date of entering into a Contract, the Customer is the sole trustee under the trust and not in default as trustee under the trust;

28.3.4. if the Customer is a trustee at the date of entering into a Contract and the trust is a fixed trust, the Customer will provide to the Company a true and accurate list of the beneficiaries and their respective interests in the trust if and when requested by the Company;

28.3.5. during the term of all Contracts, the Customer remains the sole trustee of the trust;

28.3.6. the Customer as trustee is empowered by the trust deed constituting the trust to enter into all Contracts on behalf of the trust;

28.3.7. during the term of all Contracts, there will be no change to the trust deed or the beneficiaries of the trust (or the potential beneficiaries of a discretionary trust) or the interests of the beneficiaries (or the potential beneficiaries of a discretionary trust) or any advancement of the vesting date or revocation of the trust deed; and

28.3.8. during the term of all Contracts, there will be no distribution, resettlement or disposal of the whole or part of the capital of the trust nor will the right to income from the trust be assigned unless the Company's written consent is first obtained.

28.4. If the Customer is a partnership:

28.4.1. the Customer warrants that all partners have entered into all Contracts as the Customer; and

28.4.2. the Customer must ensure that there is no dissolution or change in the membership of the partnership unless the Company's prior written consent is obtained.

29. PRIVACY ACT

29.1. The Customer and Guarantors authorise the Company to carry out credit checks and obtain credit reports in respect of their creditworthiness in accordance with any relevant law in force from time to time and disclose to credit reporting agencies the details of any Contracts. The Customer and Guarantors agree that the Company may give to and seek information about the Customer's arrangements from any trade references or credit providers and any credit providers that may be named in a credit report issued by a credit reporting agency.

30. WAIVER

30.1. Any waiver by the Company must be in writing signed by the Company.

30.2. Failure by the Company to enforce any right or remedy is not a waiver of any right or remedy, or a waiver in respect of a continuing breach.

31. SEVERANCE

31.1. If any provision contained in these Terms and Conditions is held by a court to be unlawful, invalid or unenforceable, the validity and enforceability of the remaining provisions in these Terms and Conditions are not affected.

32. GOVERNING LAW AND JURISDICTION

32.1. These Terms and Conditions and all Contracts are governed and is to be construed in accordance with the laws in force in the State of Western Australia.

32.2. These Terms and Conditions and all Contracts are subject to the exclusive jurisdiction of the courts of Western Australia.

33. NOTICES

33.1. A party must give any notice required under these Terms and Conditions or the Contract in accordance with this clause 33.

33.2. A party must give any notice in the English language and in writing.

33.3. A party must address a notice to the other party at its address set out in the Contract and must serve the notice at that address.

33.4. A party may deliver a notice by hand, post, or by electronic mail.

33.5. If before 4 pm local time in the place of delivery, a party delivers a notice by hand or by electronic mail and the sending party completes the transmission, the notice will be taken to be given on the day of delivery or transmission, and in any other case on the next day.

33.6. If the party gives notice by post the notice will be taken as given on the 7th day in the place of delivery after the notice is posted.

33.7. A party may give notice of another address (within Australia) or electronic mail address to the other party and the new address or electronic mail address shall be the address for service of the party for the purposes of this clause.

34. RECEIPT AND ADVICE

34.1. The Customer and the Guarantors hereby acknowledge receipt of these Terms and Conditions and agree to be bound by them. The Customer and the Guarantors accept these Terms and Conditions in acknowledgement that they are legally binding and presently enforceable. The Customer and the Guarantors further acknowledge that they have had the opportunity of obtaining independent legal advice and that the Customer and the Guarantors understand the Terms and Conditions outlined above.

