

# Airocle Terms



## 1. Definitions and Interpretation

### 1.1 Definitions

In these terms and conditions (**Terms**):

**Acceptance Date** means the earliest of: (a) the date that the Purchaser accepts the Quotation in writing; (b) the date that the Company accepts the Order in writing; (c) the date that any part of the Works was performed by the Company; or (d) that date that an Invoice was provided to the Purchaser.

**Accepted Order** means either: (a) the Quotation; or (b) if there is no Quotation, that part of the Order accepted by the Company comprising only the Purchaser's Details and the Works Details.

**ACL** means Schedule 2 to the *Competition and Consumer Act 2010* (Cth).

**Business Day** means any day other than a Saturday, Sunday or public holiday in NSW or 27-31 December.

**Claim** means any right, claim, demand or cause of action on any basis whatsoever including contract, statute, negligence, tort, restitution, or otherwise at Law and irrespective of the cause (including delay, fault or defect in the Works), except for an Excluded Claim.

**Company** means IVR Group Pty Ltd t/as Airocle (ABN 64 140 999 631).

**Confidential Information** includes any information in any medium or form which by its nature is confidential, which is communicated as confidential or is known or ought reasonably to be known to be confidential and includes the Terms, Quotation(s) and Price List(s) (including financial information, applicable rates, charges or discounts therein) issued by the Company.

**Consequential Damage** includes Liability relating to: (a) use, production, income, profits, savings, delay, disruption, goodwill, operating costs, financing, data, records or tangible/intangible property; (b) any other economic special, indirect or consequential loss or damage; and (c) any third party cost, expense, loss and damage, including liquidated damages payable by a party to third parties in connection with delay or performance guarantees.

**Consultant** includes a consultant, contractor, subcontractor, supplier or Representative but excludes the Company.

**Contract** means these Terms and the Accepted Order.

**Cost Increase Factor** means any factor beyond the control of the Company which affects its costs of performing the Works (or any part thereof), including any: (a) foreign exchange fluctuation currency regulation; (b) alteration of duties; (c) increase in the costs of labour, materials or other costs of manufacture; (d) change in delivery dates, quantities, specifications or other details for the Works which are requested by the Purchaser; (e) delay or disruption caused by the Purchaser or its Consultants, including as a result of instructions, information or access provided by the Purchaser; (f) acts, omissions or failures of the Purchaser or its Consultants; (g) Latent Conditions; or (h) ambiguities or discrepancies in documents or information provided by the Purchaser relevant to the Works; (i) weather conditions and the effects of weather conditions; and (j) other events beyond the control of the Company (including, but not limited to, any variation as a result of additional Services or Goods required due to unforeseen circumstances such as poor weather conditions, limitations to accessing the site, availability of machinery, safety considerations or prerequisite work by any third party not being completed).

**Delivery Date** means the date the purchaser wishes the goods to be delivered when the order is placed. This date can be amended if done in writing within 5 business days of the original order.

**Deposit** means the amount being 30% of the Price.

**Deposit Guarantees** means one or more bank guarantees which in aggregate total the amount of the Deposit.

**Discount** means the discount in the event that the Purchaser pays all amounts under this Contract by the due dates stated in the Accepted Order.

**Excluded Claim** means a right, claim, demand or cause of action which cannot be lawfully excluded, restricted or modified by a term of the Contract without that term being void by operation of Law.

**Final Invoice** means the invoice issued by the Company headed "Final Invoice".

**Force Majeure Event** means any event or thing beyond the Company's control (including but not limited to transport stoppages/breakdowns, natural disasters, adverse weather or terrain, acts of God, theft, strikes, lock-outs, work stoppages, industrial action, wars, riots, civil commotion, acts of terrorism, interventions of public authorities, explosions, radiation contamination, material shortages, failures of any of the Company's suppliers to supply, accidents, power failures, breakdowns of plant or machinery, or import/export regulations or embargoes).

**Goods** means any goods to be provided by the Company to the Purchaser as set out in the Accepted Order or otherwise agreed in writing.

**GST** has the meaning given in the *A New Tax System (Goods and Services Tax) Act 1999*.

**Insolvency Breach** by the Purchaser occurs if the Purchaser is (or is anticipated to be): (a) bankrupt, insolvent, or in financial difficulty or default, including if a receiver, manager, liquidator or similar person (provisional or otherwise) is appointed in respect of the Purchaser or any of its assets; (b) the subject of any debt collection/restructuring, bankruptcy or insolvency claim, process, procedure arrangement, assignment or meeting; or (c) overdue in making, or unable to make, a payment when it falls due under this Contract.

**Intellectual Property Rights** means all beneficial and legal ownership and intellectual and industrial protection rights throughout the world, both present and future, including rights in respect of or in connection with any confidential information, copyright (including future copyright and rights in the nature of or analogous to copyright), Moral Rights, inventions (including patents), trademarks, service marks and designs (whether or not now existing and whether or not registered or registrable) and includes any right to apply for the registration of such rights and all renewals and extensions.

**Invoice** means an invoice from the Company to the Purchaser in respect of the Works.

**Latent Conditions** means all physical conditions at the Site and its near surrounds, including natural and artificial things in, on, above or under the Site, which differ materially from the physical conditions which were actually anticipated by the Company.

**Law** includes all of the following: (a) statutes (including legislation and regulations), ordinances, by-laws and proclamations, codes and standards; (b) common law (including equity); and (c) certificates, licences, consents, permits, approvals and requirements of organisations having jurisdiction.

**Liability** means actions, claims, costs, charges, damages, expenses, liabilities, losses or damages including Consequential Damage and legal costs (on an indemnity basis whether incurred by or awarded against the Company).

**Liquidated Damages** means a fee equal to 20% of the Price of the Goods the subject of the cancellation, being an agreed amount which represents a reasonable and good faith pre-estimate of the anticipated or actual loss or damage that will be incurred by the Company if the Purchaser cancels the Order.

**Moral Rights** has the meaning given in the Copyright Act 1968 (Cth).

**Notice of Claim** means a notice sent from the Purchaser and received by the Company which is headed "Notice of Claim" and which sets out the basis, reasons, quantum, calculations and other details of the Claim.

**Notice to Show Cause** means a notice by one party identifying a breach of contract by the other party and requiring the other party to show cause.

**Order** means the order placed by the Purchaser setting out the Works.

**Payment Terms** means the terms on which the Company requires payment including the dates upon which, or periods within which, the Price must be paid and the manner in which payment must be made, being: (a) as stated in the Quotation; or (b) to the extent that the Quotation is silent in respect of those details, within 5 Business Days of the date an Invoice is issued by the Company.

**PPSA** means the *Personal Properties Securities Act 2009* (Cth).

**Price** means the price for the Works comprising the total of: (a) the amounts specified in the Quotation or

if there is no Quotation, calculated by adding all applicable rates, charges and other amounts in accordance with the Price List; (b) any additional costs, losses or other amounts which are: (i) incurred or suffered (or to be incurred or suffered) by the Company in performing the Works as a result of a Cost Increase Factor which occurs, or has consequences which occur, after the date of the Quotation; or (ii) the Company is entitled to pursuant to the Contract.

**Price List** means the price list(s) issued by the Company from time to time as are applicable to the Works and current as at the Acceptance Date.

**Purchaser** means the person who engages the Company to perform the Works.

**Purchaser's Details** means the Purchaser's name, ABN, ACN and contact information as specified in or ascertainable from the Order.

**Relevant Insurance** means all insurance policies (including, as appropriate, contract works, public liability, and business insurance) that a competent and prudent purchaser in a like position to the Purchaser would be expected to maintain or that are otherwise necessary so that there is adequate insurance covering damage or loss to the Goods (occurring between the time that the Goods are supplied to the Purchaser and the time the whole of the Price has been paid by the Purchaser) due to theft, handling, storage, transportation, fire, water, breakdown and the like;

**Quotation** means the latest quotation for the Works provided by the Company to the Purchaser.

**Reasonable Value** means the value calculated: (a) having regard to: (i) the Price; (ii) any Cost Increase Factors; (iii) any materials or components required for or used in the Works, irrespective of whether they will become the property of the Purchaser; and (iv) any other Liabilities that the Company has incurred or will incur in connection with the Works (including liabilities to other persons providing materials, goods and services); but (b) without accounting for the cost of rectifying any defects in the Works.

**Representation** means a representation, guarantee, warranty or promise concerning the Works.

**Representative** of a party means an employee, agent or other representative of that party.

**Security** any security required to be provided by the Purchaser to the Company pursuant to the Quotation.

**Services** means any services to be provided by the Company to the Purchaser as set out in the Accepted Order or otherwise agreed in writing.

**Set out Information** means information, survey marks, documents, materials or representations provided by the Purchaser to the Company at any time in connection with the Works.

**Show Cause** means provide a written notice to the Company detailing the proposed response to the breach, including the payment of any damages and the giving of an undertakings, which is satisfactory to the Company in its sole discretion.

**Site** means anywhere where the Works are performed (or to be performed) by the Company, including as specified in the Works Details, and, where the Services include installation works, includes the area(s) where the installation works are being or to be performed.

**WHS Regime** means: (a) the *Work Health and Safety Act 2011* (NSW) and the *Work Health and Safety Regulation 2011* (NSW), and comparable legislation in other jurisdictions; and (b) any WHS Model Codes of Practice.

**Works** means the whole of the work to be carried out and completed in accordance with the Contract, including the provision by the Company to the Purchaser of the Goods and Services.

**Works Details** means, as specified in or ascertainable from the Accepted Order: (a) the Works to be performed including the Goods and/or Services to be supplied; (b) the Works Period/Date; and (c) the location at which the Works are to occur.

**Works Period/Date** means the later or longer of: (a) period(s) during which or date(s) by which the Company will perform the Works for the Purchaser as: (i) specified in the Accepted Order; (ii) otherwise agreed by the Company in writing; or (iii) where no such period(s) or date(s) is (or are) specified in the Accepted Order or agreed in writing, then the period(s) or date(s) notified by the Company from time to time during or by which the Works will be performed; or (b) such longer period(s) or later date(s) as is (or are) notified by the Company to the Purchaser as being required due to a Cost Increase Factor.

## 1.2 Interpretation

- (a) No amendment, alteration, waiver or cancellation of any part of the Contract is binding on the Company unless confirmed by the Company in writing.
- (b) In the Contract, any agreement, Representation or indemnity by two or more parties (including where two or more persons are included in the same defined term) binds them jointly and severally.
- (c) Any reference in the Contract to a statute or a provision of a statute will be construed as a reference to that statute or provision as in force at the relevant time.
- (d) Where an expression is defined, another part of speech or grammatical form of that expression has a corresponding meaning.
- (e) A reference to “includes”, “including” and “include” are to be read as if followed by the words “without limitation”. A reference to a person include an individual, firm or a body, corporate or unincorporated. A reference to a party is a reference to a party to this Contract.
- (f) A reference to a statute, regulation or other legislative requirement includes any amendment or replacement to it.
- (g) No rule of construction applies to the disadvantage of the party who prepared these Terms.
- (h) The heading in these Terms are for convenience only and will not affect their interpretation.
- (i) These Terms take precedence over any other terms which may be set out or referred to in any document provided by the Purchaser in connection with the Works (whether or not included in the Contract).
- (j) Where inconsistent levels of quality or standards are required to be complied with under this Contract, the lower or less onerous level of quality or standard applies.
- (k) To the extent that a dispute arises concerns an ambiguity or discrepancy in the Contract, the Purchaser must accept, and comply at its own cost with, any direction by the Company which resolves the ambiguity or discrepancy and the Purchaser will have no Claim in respect of the direction or compliance with it.

## 2. The Works

### 2.1 Fundamental Obligations

- (a) The Company agrees to perform the Works, and the Purchaser agrees to accept and pay for the Works, on the conditions set out in the Contract.
- (b) By placing an Order or accepting a Quotation, the Purchaser offers to accept the whole or part of the Works on the Conditions set out in the Contract. The Company reserves the right to perform only part of the Works by notifying the Purchaser in writing.
- (c) The Company may, by giving notice to the Purchaser at any time:
  - (i) increase the Price to account for any additional costs, losses or other amounts referred to in the definition of “Price” in these Terms, and the Purchaser must pay that increased Price to the Purchaser as and when it is Invoiced; and
  - (ii) change the Works Period/Date if the Company requires additional time to effect the Works (or any part thereof) due to a Cost Increase Factor.

### 2.2 Purchaser's Obligations

- (a) The Purchaser must, at its own cost:
  - (i) do all things reasonably required by the Company to enable it to perform the Works without delay or disruption, including providing services and facilities requested by the Purchaser and any things specified in the Quotation as being excluded or not the Company's responsibility;
  - (ii) ensure that the means of entering and exiting the Site and all other parts of the Site are without risks to the health and safety of any person, and that the Company has safe, clear and uninterrupted access to all parts of the Site which it reasonably requires access to; and
  - (iii) comply with all Laws, and ensure that its Consultants comply with all Laws, in connection with the Contract, including under the WHS Regime:
    - (A) eliminating (or where that is not reasonably practicable, minimising) risks to health and safety on Site;

- (B) providing to the Company with any appropriate, WHS management plans, safe work method statements, induction materials, toolbox talks records and other things to ensure that the Company is not expose to risks to health and safety on Site; and
- (C) complying with all suggestions and requirements in any WHS Model Codes of Practice.

- (b) If the Purchaser breaches any of its obligations in clause 2.2(a), then the Company need not perform the Works but the Purchaser is still liable to pay the Price, less any costs that the Company actually avoids incurring by not performing any of the Works.
- (c) The Purchaser warrants that:
  - (i) any structures to which the Goods are to be affixed are able to withstand and support the Works;
  - (ii) any electrical connections (including, but not limited to, meter boxes, main switches, circuit breakers, and electrical cable) are of suitable capacity to handle the Goods once installed and the Services as they are provided;
  - (iii) the Site is otherwise suitable in all respects for the Works; and
  - (iv) any Set Out Information is accurate, complete and correct in all respects.
- (d) In consideration of the Company agreeing to perform the Works:
  - (i) the Purchaser 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 Purchaser either now or in the future, to secure the performance by the Purchaser of its obligations under this Contract (including, but not limited to, the payment of any money); and
  - (ii) where the Purchaser has left any item with the Company for repair, modification, exchange or for the Company to perform any other service in relation to the item and the Company has not received or been tendered the whole of any monies owing to it by the Purchaser, the Company shall have, until all monies owing to the Company are paid:

- (A) a lien on the item (which shall continue despite the commencement of proceedings, or judgment for any monies owing to the Company having been obtained against the Purchaser); and
  - (B) the right to retain or sell the item, such sale to be undertaken in accordance with any legislation applicable to the sale or disposal of uncollected goods; and
- (iii) the Purchaser irrevocably appoints the Company and each director of the Company as the Purchaser's true and lawful attorney/s to perform all necessary acts to give effect to the provisions of this clause including, but not limited to, signing any document on the Purchaser's behalf.

### 2.3 Payment

- (a) On or about the date of this Contract, the Company will issue an Invoice to the Purchaser for the Deposit. Once the Deposit is received by the Company, it will provide the Deposit Guarantees to the Purchaser. The Purchaser must:
  - (i) not have recourse to the Deposit Guarantees unless the Contract is validly terminated as a result of Company's default;
  - (ii) return that Deposit Guarantee to the Company if:
    - (A) the Company advises that it has performed any part of the Works (including design, manufacturing, fabrication, procurement, supply, installation or other works), whose Reasonable Value is no less than the amount of a Deposit Guarantee,
    - (B) the Company terminates the Contract because of a breach of contract by the Purchaser.
- (b) The Company may issue Invoices to the Purchaser weekly from the date of the Contract, for that part of the Price equivalent to the sum of:
  - (i) the Reasonable Value of any part of the Works performed as at the date of the Invoice; and

- (ii) any amounts which the Company requires the Purchaser to pay in advance.
- (c) The Purchaser agrees to pay the Price to the Company, included all parts of the Price invoiced in Invoices:
  - (i) in accordance with the Payment Terms and on the basis that time is of the essence;
  - (ii) in cleared funds, without any deduction or discount other than as stated in the Contract or in the relevant Invoice.
- (d) In the event that the Purchaser makes all payments by their due dates, the Company will deduct from its Final Invoice, the amount of the Discount.
- (e) Unless otherwise stated, all prices in the Contract or a Price List or Invoice are exclusive of GST. However, the Company will charge and the Purchaser must pay any GST.
- (f) Where the Purchaser fails to pay any part of the Price in accordance with the Payment Terms, without prejudice to the Company's other rights:
  - (i) the Company may invoice and the Purchaser must pay:
    - (A) interest on outstanding amounts calculated on a daily basis at the rate of 8.33% per month from the date due for payment to the date payment is received by the Company from the Purchaser; and
    - (B) any debt collection costs, including legal costs and disbursements, incurred by the Company in obtaining payment.
  - (ii) the Company and its Representatives are entitled to and are irrevocably authorised by the Purchaser to take possession of any Goods and enter the Site or the Purchaser's premises for that purpose. The Purchaser accepts that the Company and its Representatives have no Claim for, and indemnify the Company against, any damage or injury caused in retaking the Goods under this clause; and
  - (iii) the Company may have recourse to the Security.

### 2.4 The Works

- (a) The Company will endeavour to perform the Works using reasonable care and skill, and having regard to the Works Details.
- (b) The Company will make the Goods available for collection or send them to the Purchaser in one or more stages, and the Purchaser:
  - (i) must not reject any delivery of the Goods by the Company; and
  - (ii) must have, within 5 Business Days of being notified of their availability, either collected or accepted delivery of all of the Goods so notified.
- (c) Unless the Purchaser has, by the earlier of:
  - (i) 2 Business Days after collection or delivery; or
  - (ii) the date that installation of the Goods commences at the Site,inspected the Goods and given written notice to the Company that the Goods do not comply with the relevant Representations, specifications or descriptions, the Goods are deemed to have been accepted in good order and condition.
- (d) Without prejudice to the Company's other rights, if the Purchaser fails to collect the Goods or accept delivery within:
  - (i) 5 Business Days of being notified of their delivery date, the Company may charge the Purchaser storage at the rate of \$10.00 per square metre per week.
  - (ii) 15 Business Days of being notified of their availability, the Company may terminate this Contract, keep the Deposit and resell the Goods.
- (e) From the time when the Goods are collected by or delivered to the Purchaser the Goods are entirely at the risk of the Purchaser, and until such time as the Price of the Goods has been paid in full in cash or cleared funds:
  - (i) ownership of and title to the Goods will not pass to the Purchaser;
  - (ii) the Purchaser must, at the Purchaser's expense:
    - (A) store the Goods separately from any other goods and so that the Goods are clearly identified as the Company's; and
    - (B) ensure that the Goods are not damaged;
  - (iii) the Purchaser:

- (A) is only a bailee of the Goods;
  - (B) must not sell, dispose, or otherwise part with possession of the Goods;
  - (C) must return the Goods to the Company on request; and
  - (D) must not convert or process the Goods or intermix them with other goods;
- (iv) the Purchaser holds the following on trust for the Company and must pay or transfer it to the Company upon demand:
- (A) the benefit of the Purchaser's insurance of the Goods;
  - (B) any proceeds resulting from any sale or other disposition of the Goods;
  - (C) the product resulting from any conversion or intermixing of the Goods.
- (f) While the Goods remain the property of the Company, the Purchaser must not:
- (i) charge or grant an encumbrance over the Goods;
  - (ii) grant or otherwise give away any interest in the Goods;
  - (iii) register a financing change statement in respect of a security interest without the prior written consent of the Company;
  - (iv) register, or permit to be registered, a financing statement or a financing change statement in relation to the Goods in favour of a third party without the prior written consent of the Company; or
  - (v) otherwise register or allow any interested to be registered on the Personal Property Securities Register in respect of the Goods,
- and the Purchaser agrees:
- (vi) that the Purchaser agrees that the Company has a Purchase Money Security Interest (as defined in the PPSA) attaching to all Goods in order to secure the payment by the Purchaser to the Company of the Price (**PPSA Security Interest**) and the Purchaser agrees to do all things necessary to assist the Company to perfect its PPSA Security Interest.
  - (vii) that the Purchaser waives their rights to receive notices under ss 95, 118, 121(4), 130, 132(3)(d), 135(1)(a) and 132(4) of the PPSA
  - (viii) that the Purchaser waives their rights as a grantor and/or a debtor under sections 143 of the PPSA;
  - (ix) that the Purchaser waives its right to receive a verification statement under s 157 of the PPSA;
  - (x) for the purpose of s125, the Company may delay disposing of or taking action to retain collateral in its discretion;
  - (xi) to immediately advise the Company of any material change in its business practices which would result in a change in the nature of proceeds derived from the sales of the Goods.
- (g) Where the manufacturer of the Goods (not being the Company) gives a warranty to or for the benefit of the Purchaser (including with regard to product standards), this Contract does not prevent a Claim by the Purchaser against the manufacturer.
- (h) The Purchaser warrants that the Goods will be used within Australia only, and will not be knowingly resold for export nor exported, unless the Company has given prior written consent.
- (i) On discovery of any defect in the Works, the Purchaser must:
- (i) immediately notify the Company in writing;
  - (ii) obtain the written consent of the Company before performing any remedial work, unless the remedial work needs to be performed immediately to prevent injury to a person or damage to property; and
  - (iii) provide the Company with access and opportunities to rectify any defects, as required by the Company.

## 2.5 Variations and Cancellations

An Accepted Order may only be cancelled, varied, modified or deferred, whether in whole or part:

- (a) by the Purchaser, with the prior written consent of the Company and subject to the Purchaser paying to the Company:
  - (i) in the event of a cancellation, Liquidated Damages, or (if the Company is disentitled from claiming Liquidated Damages for any reason) all

costs and losses and Consequential Damages of the Company arising out of or in connection with the cancellation; and

- (ii) in the event of a variation, modification or deferral, all costs and losses and Consequential Damages of the Company arising out of or in connection with the variation, modification or deferral; or
- (b) by the Company, by giving written notice to the Purchaser, in which case:
- (i) the Company will refund to the Purchaser, within 20 Business Days of the date of the Final Invoice, any part of the Price paid by the Purchaser which exceeds the Reasonable Value of the Works ultimately provided by the Company; and
  - (ii) the Purchaser shall not have any Liability for any Claim arising out of or in connection with the cancellation, variation, modification or deferral.

## 2.6 Insurance

From the time when the Goods are collected by or delivered to the Purchaser, until such time as the Price of the Goods has been paid in full in cash or cleared funds, the Purchaser must, at the Purchaser's expense:

- (a) effect and maintain Relevant Insurance;
- (b) provide the Company with evidence of Relevant Insurance (including copies of policies) forthwith upon request;
- (c) pay all premiums and other costs in effecting and maintaining Relevant Insurance, as well as all excesses, deductibles and other costs arising out of or in connection with claims on Relevant Insurance;
- (d) not cancel, vary or allow any Relevant Insurance to lapse during the period it is required to be maintained under the Terms without the prior written consent of the Company;
- (e) unless directed otherwise by the Company, reinstate or replace any Relevant Insurance which has lapsed or been cancelled;
- (f) comply fully with the terms of all Relevant Insurance;
- (g) promptly notify the Company in writing of any proposed cancellation of any Relevant Insurance and any actual, threatened or likely claims under any Relevant Insurance affecting the Goods; and thereafter must:
  - (h) make and diligently pursue claims under and in respect of Relevant Insurance as reasonably required by the Company; and
  - (i) pay (and direct it's insurers to pay) the Company any amounts received from Relevant Insurance, to the extent that any amounts are outstanding from the Purchaser to the Company under this Contract.

## 2.7 Intellectual Property

- (a) Intellectual Property Rights in the Works and anything created by or for the Company in connection with the Contract, remains the property of the Company.
- (b) Where the Purchaser gives anything (including designs, specifications and information) to the Company, the Purchaser warrants that: (a) no third party Intellectual Property Rights will be infringed as a result of the Company using that material for the purpose of the Works; and (b) it has procured from any applicable persons express agreement that they will not enforce any Moral Rights against the Company in connection with the use of that material.
- (c) The Company may (at no cost) use for the purposes of marketing or entry into any competition, use any documents, designs, photographic or digital imaging, drawings or things which the Company has created under or in connection with the Contract.

## 2.8 Privacy Act 1988

- (a) The Company may obtain from a credit reporting agency a credit report containing personal credit information about the Purchaser in relation to credit provided by the Company.
- (b) The Purchaser agrees that the Company may exchange information about the Purchaser with those credit providers either named as trade referees by the Purchaser or named in a consumer credit report issued by a credit reporting agency for the following purposes:
  - (i) to assess an application by the Purchaser; and/or

- (ii) to notify other credit providers of a default by the Purchaser; and/or
  - (iii) to exchange information with other credit providers as to the status of this credit account, where the Purchaser is in default with other credit providers; and/or
  - (iv) to assess the creditworthiness of the Purchaser.
- (c) The Purchaser understands that the information exchanged can include anything about the Purchaser's creditworthiness, credit standing, credit history or credit capacity that credit providers are allowed to exchange under the *Privacy Act 1988*.
- (d) The Purchaser consents to the Company being given a consumer credit report to collect overdue payment on commercial credit (Section 18K(1)(h) *Privacy Act 1988*).
- (e) The Purchaser agrees that personal credit information provided may be used and retained by the Company for the following purposes (and for other purposes as shall be agreed between the Purchaser and Company or required by Law from time to time):
- (i) the provision of Goods; and/or
  - (ii) the marketing of Goods by the Company, its agents or distributors; and/or
  - (iii) analysing, verifying and/or checking the Purchaser's credit, payment and/or status in relation to the provision of Goods; and/or
  - (iv) processing of any payment instructions, direct debit facilities and/or credit facilities requested by the Purchaser; and/or
  - (v) enabling the daily operation of Purchaser's account and/or the collection of amounts outstanding in the Purchaser's account in relation to the Goods.
- (f) The Company may give information about the Purchaser to a credit reporting agency for the following purposes:
- (i) to obtain a consumer credit report about the Purchaser;
  - (ii) allow the credit reporting agency to create or maintain a credit information file containing information about the Purchaser.

- (g) The information given to the credit reporting agency may include:
- (i) personal particulars (the Purchaser's name, sex, address, previous addresses, date of birth, name of employer and driver's licence number);
  - (ii) details concerning the Purchaser's application for credit or commercial credit and the amount requested;
  - (iii) advice that the Company is a current credit provider to the Purchaser;
  - (iv) advice of any overdue accounts, loan repayments, and/or any outstanding monies owing which are overdue by more than sixty (60) days, and for which debt collection action has been started;
  - (v) that the Purchaser's overdue accounts, loan repayments and/or any outstanding monies are no longer overdue in respect of any default that has been listed;
  - (vi) information that, in the opinion of the Company, the Purchaser has committed a serious credit infringement (that is, fraudulently or shown an intention not to comply with the Purchaser's credit obligations);
  - (vii) advice that cheques drawn by the Purchaser for one hundred dollars (\$100) or more, have been dishonoured more than once;
  - (viii) that credit provided to the Purchaser by the Company has been paid or otherwise discharged.

## 3. Liability and Warranties

### 3.1 Limited Liability

- (a) The Company's total aggregate liability to the Purchaser for any Claims arising out of or in connection with this Contract is limited to 10% of the Price.
- (b) The Company has no liability to the Purchaser for, and the Purchaser releases the Company from, any and all Claims:
  - (i) in respect of Consequential Damage; or
  - (ii) in respect of damage to the Site, or

- (iii) which are not detailed in a Notice of Claim received by the Company within 12 months of the date that the event giving rise to the Claim first occurs.
- (c) The Company's liability to the Purchaser in respect of a Claim is reduced to the extent that the Purchaser caused or contributed to the loss, damage, cost or expense the subject of the Claim.
- (d) The provision of any Law implying terms, conditions and warranties into the Contract is expressly negated and excluded, to the extent permitted at Law.
- (e) Any failure of the Company to provide part of the Works does not entitle the Purchaser to terminate the contract or assert that the Purchaser has repudiated the Contract, provided that some other part of the Works has or will be provided.
- (f) In entering into the Contract the Purchaser acknowledges that, to the extent that the Company's Representatives have made Representations which are not expressly stated in the Contract, including as to the suitability of the Goods or Services;
  - (i) the Company's Representatives were not authorised to make those Representations;
  - (ii) those Representations may be correct or incorrect;
  - (iii) the Purchaser does not rely upon those Representations; and
  - (iv) the Purchaser has no Claim in respect of those Representations.
- (g) Any typographical, clerical or other accidental error or omissions in any sales literature, Quotation, Price List, acceptance of offer, Invoice or other information issued by the Company may be corrected by the Company and the Purchaser will have no Claim in relation to that correction.
- (h) Time will not be of the essence in the performance of the Works or any part thereof.

### 3.2 Statutory Liability

This clause 3.2 applies notwithstanding anything to the contrary in the Contract.

- (a) These Terms do not apply to the extent that they would be void under a Law and should be read subject to the application of provisions of the Law which give rise to rights or liabilities which cannot be lawfully excluded, restricted or modified.
- (b) To the extent that the ACL applies to this Contract, then, noting that the Works comprise the supply of Goods and/or Services:
  - (i) to the extent that the Goods are not goods of a kind ordinarily acquired for personal, domestic or household use or consumption, the Company's liability to the Purchaser for any Claim in relation to the supply of the Goods is limited to, in the Company's sole discretion:
    - (A) replacing the Goods or supplying equivalent Goods;
    - (B) repairing the Goods;
    - (C) paying the cost of replacing the Goods or acquiring equivalent Goods; or
    - (D) paying the cost of having the Goods repaired; and
  - (ii) to the extent that the Services are not services of a kind ordinarily acquired for personal, domestic or household use or consumption, the Company's liability to the Purchaser for any Claim in relation to the supply of the Services is limited to, in the Company's sole discretion:
    - (A) supplying the Services again; or
    - (B) paying the cost of having the Services supplied again.

### 3.3 Purchaser's Liability

- (a) To the maximum extent permitted by Law, in the event that the Purchaser breaches a term or warranty in this Contract, without prejudice to the Company's other rights at Law:
  - (i) the Purchaser indemnifies the Company against all Liability (including internal administration costs, physical loss of or damage to property of the Company or any third party as well as any infringement, or alleged infringement, of any third party's Intellectual Property Rights) caused, or contributed to, by the acts or omissions of the Purchaser or its Consultants;
  - (ii) the Purchaser agrees to pay the Company damages including amounts equivalent to all

- Liabilities incurred or to be incurred by the Company in relation to the breach; and
- (iii) the Purchaser's liability to the Company will not be reduced proportionally to the extent that any negligent or unlawful act or omission of the Company contributes to the loss or Liability.

## 4. Suspension and Termination

### 4.1 Suspension

In the event of a breach of contract by the Purchaser, the Company may, without prejudice to its other rights, suspend the Works by giving notice to the Purchaser setting out the reason(s) for the suspension, in which case:

- (a) the suspension can continue until 5 Business Days after the Purchaser rectifies the breach to the satisfaction of the Company; and
- (b) the Purchaser is liable for all costs and losses incurred by the Company arising out of or in connection with the suspension;
- (c) the Purchaser has no entitlement to any claim against the Company in respect of the suspension.

### 4.2 Termination

This Contract may be terminated:

- (a) by the Company:
  - (i) in the event of an Insolvency Breach;
  - (ii) if, within 5 Business Days of being given a Notice to Show Cause by the Company, the Purchaser either fails to remedy a breach of the Contract, or (if the breach is not capable of being remedied) fails to Show Cause;
- (b) by the Purchaser if the Company fails to remedy a breach of the Contract within 20 Business Days of being given a Notice to Show Cause by the Purchaser, in which case:
- (c) the party terminating must notify the other party by written notice given under this clause; and
- (d) the parties' rights and liabilities shall be the same as if the defaulting party had repudiated the Contract and the other party elected to treat the Contract as at an end and receive damages.

### 4.3 Force Majeure

- (a) The Purchaser will not have any Claim against the Company in respect of any breach of contract caused or contributed to by a Force Majeure Event.
- (b) The Company may terminate the performance of its obligations in respect of the Works or part thereof affected by a Force Majeure Event, by giving notice to the Purchaser, if the delay caused by the Force Majeure Event delays the Company from complying with its obligations under these Terms for more than 5 consecutive Business Days, in which case the Company will refund the Purchaser any part of the Price paid by the Purchaser which exceeds the Reasonable Value of the Works ultimately provided by the Company.

## 5. Disputes

In the event of a dispute arising out of or in connection with this Contract:

- (a) subject to this Contract, both parties must continue to perform their obligations under the Contract;
- (b) either party may give the other a notice setting out details of the dispute;
- (c) within 7 Business Days of the date the notice is received, the parties must meet to attempt to resolve the dispute; and
- (d) if the dispute is not resolved within 7 Business Days of the date the notice is received, either party may submit the dispute to conciliation in accordance with, and subject to, The Institute of Arbitrators & Mediators Australia's Conciliation Rules, in which case both parties must participate in the conciliation with a view to endeavouring to resolve it.

## 6. Boilerplate Clauses

### 6.1 Contract Formation

- (a) Sales literature, Price Lists, Invoices and other information issued by the Company in relation to Goods and Services:
  - (i) may contain typographical, clerical or other accidental errors or omissions;
  - (ii) are subject to correction and alteration without notice in which respect the Purchaser will not have an entitlement to any Claim; and

- (iii) do not constitute offers to perform Works which are capable of acceptance by the Purchaser.
- (b) The Contract is deemed to have been formed on the Acceptance Date at the place of business of the Company from which the Quotation was issued, or (if no Quotation was issued) at which the Order was accepted.

### 6.2 Entire Agreement

The Contract constitutes the entire agreement between the parties in connection with its subject matter, and applies to all Supplies.

All conditions, terms and warranties that are or might otherwise be implied by Law, practice, trade usage or international convention, are excluded to the fullest extent permitted by Law.

### 6.3 Survival

The following clauses of the Contract survive termination: **Error! Reference source not found.**, 2.1(c)(i), 2.2(b), 2.2(d), 2.3,2.4(e), 2.4(f), 2.6, 2.7, 2.8, 3.1, 3.2, 3.3, 4.1(b), 4.1(c) 4.3(a), 5 and 6.

### 6.4 Notices

Any notices, correspondence or documents sent under this Contract may be served by sending them to the email, fax or postal address indicated in the Contract, or such replacement address(es) which:

- (a) the Purchaser gives the Company 5 Business Days' notice of, provided that the Purchaser is not permitted to nominate a post box or DX address but must nominate a physical address attended during normal business hours; or
- (b) the Company gives the Purchaser notice of.

### 6.5 Confidentiality

The Purchaser acknowledges that the Confidential Information is confidential, agrees to keep the Confidential Information confidential and promises that it will not disclose the Confidential Information to any other person.

### 6.6 Waiver of Breach

No failure by the Company to insist on strict performance of any of these Terms is a waiver of any right or remedy which the Company may have, and is not a waiver of any subsequent breach or default by the Purchaser.

### 6.7 Assignment and Subcontracting

The Purchaser:

- (a) may not assign the Contract, or any rights under the Contract, without the prior written consent of the Company, which may be given or refused at the Company's absolute discretion; and
- (b) must give the Company 5 Business Days' notice of any proposed substantial change of ownership of the Purchaser; and
- (c) is responsible for all acts and omissions of its Consultants as though they were acts and omission of the Purchaser.

The Company may subcontract any part of the Contract or the Works without notice to the Purchaser.

### 6.8 Severability

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

### 6.9 Governing Law

These Terms and the Contract will be governed by the law of New South Wales and the parties submit to the courts of New South Wales in respect of any dispute arising.

## 7. Execution

Signed on behalf of the Purchaser by:

.....  
Print Name of Authorized Person

.....  
Sign

.....  
Date