

**1. Definitions**

- 1.1 “AWC” shall mean Australian Waterproofing Company Pty Ltd its successors and assigns or any person acting on behalf of and with the authority of Australian Waterproofing Company Pty Ltd.
- 1.2 “Client” shall mean the Client (or any person acting on behalf of and with the authority of the Client) as described on any quotation, work authorisation or other form as provided by AWC to the Client.
- 1.3 “Guarantor” means that person (or persons), or entity, who agrees to be liable for the debts of the Client on a principal debtor basis.
- 1.4 “Goods” shall mean Goods supplied by AWC to the Client (and where the context so permits shall include any supply of Services as hereinafter defined) and are as described on the invoices, quotation, work authorisation or any other forms as provided by AWC to the Client.
- 1.5 “Services” shall mean all Services supplied by AWC to the Client and includes any advice or recommendations (and where the context so permits shall include any supply of Goods as defined above).
- 1.6 “Price” shall mean the price payable for the Goods as agreed between AWC and the Client in accordance with clause 4 of this contract.

**2. The Commonwealth Trade Practices Act 1974 (“TPA”) and Fair Trading Acts (“FTA”)**

- 2.1 Nothing in this agreement is intended to have the effect of contracting out of any applicable provisions of the TPA or the FTA in each of the States and Territories of Australia, except to the extent permitted by those Acts where applicable.

**3. Acceptance**

- 3.1 Any instructions received by AWC from the Client for the supply of Goods and/or the Client’s acceptance of Goods supplied by AWC shall constitute acceptance of the terms and conditions contained herein.
- 3.2 Where more than one Client has entered into this agreement, the Clients shall be jointly and severally liable for all payments of the Price.
- 3.3 Upon acceptance of these terms and conditions by the Client the terms and conditions are binding and can only be amended with the written consent of AWC.
- 3.4 The Client shall give AWC not less than fourteen (14) days prior written notice of any proposed change of ownership of the Client or any change in the Client’s name and/or any other change in the Client’s details (including but not limited to, changes in the Client’s address, facsimile number, or business practice). The Client shall be liable for any loss incurred by AWC as a result of the Client’s failure to comply with this clause.
- 3.5 Goods are supplied by AWC only on the terms and conditions of trade herein to the exclusion of anything to the contrary in the terms of the Client’s order notwithstanding that any such order is placed on terms that purport to override these terms and conditions of trade.

**4. Price And Payment**

- 4.1 At AWC’s sole discretion the Price shall be either:
  - (a) as indicated on invoices provided by AWC to the Client in respect of Goods supplied; or
  - (b) AWC’s quoted Price (subject to clause 4.2) which shall be binding upon AWC provided that the Client shall accept AWC’s quotation in writing within thirty (30) days.
- 4.2 AWC reserves the right to change the Price in the event of a variation to AWC’s quotation. Any variation from the plan of scheduled works or specifications (including, but not limited to, any variation as a result of additional works required due to hidden or unidentifiable difficulties such as hard rock barriers below the surface or iron reinforcing rods in concrete or as a result of increases to AWC in the cost of materials and labour) will be charged for on the basis of AWC’s quotation and will be shown as variations on the invoice. Payment for all variations must be made in full at their time of completion.
- 4.3 AWC may submit a detailed payment claim for work performed up to the end of each stage. The value of work so performed shall include the reasonable value of authorised variations and the value of materials delivered to the site but not yet installed.
- 4.4 At AWC’s sole discretion a non refundable deposit may be required.
- 4.5 At AWC’s sole discretion:
  - (a) payment shall be due on delivery of the Goods; or
  - (b) payment for approved Clients shall be made by instalments in accordance with AWC’s payment schedule; or
  - (c) payment for approved Clients shall be due thirty (30) days following the end of the month in which a statement is posted to the Client’s address or address for notices.
- 4.6 Time for payment for the Goods shall be of the essence and will be stated on the invoice or any other forms. If no time is stated then payment shall be due seven (7) days following the date of the invoice.
- 4.7 Payment will be made by cash, or by cheque, or by bank cheque, or by direct credit, or by any other method as agreed to between the Client and AWC.
- 4.8 GST and other taxes and duties that may be applicable shall be added to the Price except when they are expressly included in the Price.

**5. Delivery Of Goods**

- 5.1 At AWC’s sole discretion delivery of the Goods shall take place when the Client takes possession of the Goods at the Client’s nominated address (in the event that the Goods are delivered by AWC or AWC’s nominated carrier).
- 5.2 At AWC’s sole discretion the costs of delivery are:

- (a) included in the Price; or
- (b) in addition to the Price; or
- (c) for the Client's account.

- 5.3 The Client shall make all arrangements necessary to take delivery of the Goods whenever they are tendered for delivery. In the event that the Client is unable to take delivery of the Goods as arranged then AWC shall be entitled to charge a reasonable fee for redelivery.
- 5.4 Delivery of the Goods to a third party nominated by the Client is deemed to be delivery to the Client for the purposes of this agreement.
- 5.5 AWC may deliver the Goods by separate instalments. Each separate instalment shall be invoiced and paid in accordance with the provisions in these terms and conditions.
- 5.6 The failure of AWC to deliver shall not entitle either party to treat this contract as repudiated.
- 5.7 AWC shall not be liable for any loss or damage whatsoever due to failure by AWC to deliver the Goods (or any of them) promptly or at all, where due to circumstances beyond the control of AWC.

## 6. Risk

- 6.1 If AWC retains ownership of the Goods nonetheless, all risk for the Goods passes to the Client on delivery.
- 6.2 If any of the Goods are damaged or destroyed following delivery but prior to ownership passing to the Client, AWC is entitled to receive all insurance proceeds payable for the Goods. The production of these terms and conditions by AWC is sufficient evidence of AWC's rights to receive the insurance proceeds without the need for any person dealing with AWC to make further enquiries.
- 6.3 Where the Client expressly requests AWC to leave Goods outside AWC's premises for collection or to deliver the Goods to an unattended location then such Goods shall be left at the Client's sole risk and it shall be the Client's responsibility to ensure the Goods are insured adequately or at all.
- 6.4 AWC shall not be held responsible for any damage to the Goods caused by outside agents. Where the Client requests AWC to repair such damage then AWC reserves the right to charge the Client for any costs incurred in rectifying such damage.

## 7. Damages

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

## 8. Underground Locations

- 8.1 Prior to AWC commencing any work the Client must advise AWC of the precise location of all underground services on the site and clearly mark the same. The underground mains & services the Client must identify include, but are not limited to, electrical services, gas services, sewer services, pumping services, sewer connections, sewer sludge mains, water mains, irrigation pipes, telephone cables, fibre optic cables, oil pumping mains, and any other services that may be on site.
- 8.2 Whilst AWC will take all care to avoid damage to any underground services the Client agrees to indemnify AWC 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 8.1.

## 9. Title

- 9.1 AWC and the Client agree that ownership of the Goods shall not pass until:
- (a) the Client has paid AWC all amounts owing for the particular Goods; and
  - (b) the Client has met all other obligations due by the Client to AWC in respect of all contracts between AWC and the Client.
- 9.2 Receipt by AWC 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 and until then AWC's ownership or rights in respect of the Goods shall continue.
- 9.3 It is further agreed that:
- (a) where practicable the Goods shall be kept separate and identifiable until AWC shall have received payment and all other obligations of the Client are met; and
  - (b) until such time as ownership of the Goods shall pass from AWC to the Client AWC may give notice in writing to the Client to return the Goods or any of them to AWC. Upon such notice the rights of the Client to obtain ownership or any other interest in the Goods shall cease; and
  - (c) AWC shall have the right of stopping the Goods in transit whether or not delivery has been made; and
  - (d) if the Client fails to return the Goods to AWC then AWC or AWC's agent may enter upon and into land and premises owned, occupied or used by the Client, or any premises as the invitee of the Client, where the Goods are situated and take possession of the Goods; and
  - (e) the Client is only a bailee of the Goods and until such time as AWC has received payment in full for the Goods then the Client shall hold any proceeds from the sale or disposal of the Goods, up to and including the amount the Client owes to AWC for the Goods, on trust for AWC; and
  - (f) the Client shall not deal with the money of AWC in any way which may be adverse to AWC; and
  - (g) the Client shall not charge the Goods in any way nor grant nor otherwise give any interest in the Goods while they remain the property of AWC; and

- (h) AWC can issue proceedings to recover the Price of the Goods sold notwithstanding that ownership of the Goods may not have passed to the Client; and
- (i) until such time that ownership in the Goods passes to the Client, if the Goods are converted into other products, the parties agree that AWC will be the owner of the end products.

## 10. Defects

- 10.1 The Client shall inspect the Goods on delivery and shall within seven (7) days of delivery (time being of the essence) notify AWC of any alleged defect, shortage in quantity, damage or failure to comply with the description or quote. The Client shall afford AWC an opportunity to inspect the Goods within a reasonable time following delivery if the Client believes the Goods are defective in any way. If the Client shall fail to comply with these provisions the Goods shall be presumed to be free from any defect or damage. For defective Goods, which AWC has agreed in writing that the Client is entitled to reject, AWC's liability is limited to either (at AWC's discretion) replacing the Goods or repairing the Goods except where the Client has acquired Goods as a consumer within the meaning of the Trade Practices Act 1974 (Cwlth) or the Fair Trading Acts of the relevant state or territories of Australia, and is therefore also entitled to, at the consumer's discretion either a refund of the purchase price of the Goods, or repair of the Goods, or replacement of the Goods.
- 10.2 Goods will not be accepted for return other than in accordance with 10.1 above.

## 11. Warranty

- 11.1 Subject to the conditions of warranty set out in clause 11.2 AWC warrants that if any defect in any workmanship of AWC becomes apparent and is reported to AWC within the warranty period as specified by AWC in writing on AWC's Certificate of Compliance & Warranty then AWC will either (at AWC's sole discretion) replace or remedy the workmanship.
- 11.2 The conditions applicable to the warranty given by clause 11.1 are:
  - (a) the warranty shall not cover any defect or damage which may be caused or partly caused by or arise through:
    - (i) failure on the part of the Client to properly maintain any Goods; or
    - (ii) failure on the part of the Client to follow any instructions or guidelines provided by AWC; or
    - (iii) any use of any Goods otherwise than for any application specified on a quote or order form; or
    - (iv) the continued use of any Goods after any defect becomes apparent or would have become apparent to a reasonably prudent operator or user; or
    - (v) fair wear and tear, any accident or act of God.
  - (b) the warranty shall cease and AWC shall thereafter in no circumstances be liable under the terms of the warranty if the workmanship is repaired, altered or overhauled without AWC's consent.
  - (c) in respect of all claims AWC shall not be liable to compensate the Client for any delay in either replacing or remedying the workmanship or in properly assessing the Client's claim.
  - (d) The warranty shall not cover any defect or damage which may be caused structural movement of any Description, Thermal movement of any description, Mechanical damage of any description.
- 11.3 For Goods not manufactured by AWC, the warranty shall be the current warranty provided by the manufacturer of the Goods. AWC shall not be bound by nor be responsible for any term, condition, representation or warranty other than that which is given by the manufacturer of the Goods.
- 11.4 Additional conditions applicable to the warranty given on Goods supplied by AWC are contained on the "Certificate of Compliance & Warranty" that will be supplied with the Goods.

## 12. Intellectual Property

- 12.1 Where AWC has designed, drawn or written Goods for the Client, then the copyright in those designs and drawings and documents shall remain vested in AWC, and shall only be used by the Client at AWC's discretion.
- 12.2 The Client warrants that all designs or instructions to AWC will not cause AWC to infringe any patent, registered design or trademark in the execution of the Client's order and the Client agrees to indemnify AWC against any action taken by a third party against AWC in respect of any such infringement.
- 12.3 The Client hereby authorises AWC to utilise images of the Goods designed or drawn by AWC in advertising, marketing, or competition material by AWC.

## 13. Default & Consequences of Default

- 13.1 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 one half percent (2.5%) per calendar month (and at AWC's sole discretion such interest shall compound monthly at such a rate) after as well as before any judgment.
- 13.2 In the event that the Client's payment is dishonoured for any reason the Client shall be liable for any dishonour fees incurred by AWC.
- 13.3 If the Client defaults in payment of any invoice when due, the Client shall indemnify AWC from and against all costs and disbursements incurred by AWC in pursuing the debt including legal costs on a solicitor and own client basis and AWC's collection agency costs.
- 13.4 Without prejudice to any other remedies AWC may have, if at any time the Client is in breach of any obligation (including those relating to payment), AWC may suspend or terminate the supply of Goods to the Client and any of its other obligations under the terms and conditions. AWC will not be liable to the Client for any loss or damage the Client suffers because AWC has exercised its rights under this clause.

- 13.5 If any account remains overdue after thirty (30) days then an amount of the greater of twenty dollars (\$20.00) or ten percent (10%) of the amount overdue (up to a maximum of two hundred dollars (\$200.00) shall be levied for administration fees which sum shall become immediately due and payable.
- 13.6 Without prejudice to AWC's other remedies at law AWC shall be entitled to cancel all or any part of any order of the Client which remains unfulfilled and all amounts owing to AWC shall, whether or not due for payment, become immediately payable in the event that:
- (a) any money payable to AWC becomes overdue, or in AWC's opinion the Client will be unable to meet its payments as they fall due; or
  - (b) the Client becomes insolvent, convenes a meeting with its creditors or proposes or enters into an arrangement with creditors, or makes an assignment for the benefit of its creditors; or
  - (c) a receiver, manager, liquidator (provisional or otherwise) or similar person is appointed in respect of the Client or any asset of the Client.

#### **14. Security And Charge**

- 14.1 Despite anything to the contrary contained herein or any other rights which AWC may have howsoever:
- (a) where the Client and/or the Guarantor (if any) is the owner of land, realty or any other asset capable of being charged, both the Client and/or the Guarantor agree to mortgage and/or charge all of their joint and/or several interest in the said land, realty or any other asset to AWC or AWC's nominee to secure all amounts and other monetary obligations payable under these terms and conditions. The Client and/or the Guarantor acknowledge and agree that AWC (or AWC's nominee) shall be entitled to lodge where appropriate a caveat, which caveat shall be withdrawn once all payments and other monetary obligations payable hereunder have been met.
  - (b) should AWC elect to proceed in any manner in accordance with this clause and/or its sub-clauses, the Client and/or Guarantor shall indemnify AWC from and against all AWC's costs and disbursements including legal costs on a solicitor and own client basis.
  - (c) the Client and/or the Guarantor (if any) agree to irrevocably nominate constitute and appoint AWC or AWC's nominee as the Client's and/or Guarantor's true and lawful attorney to perform all necessary acts to give effect to the provisions of this clause 14.1.

#### **15. Cancellation**

- 15.1 AWC may cancel any contract to which these terms and conditions apply or cancel delivery of Goods at any time before the Goods are delivered by giving written notice to the Client. On giving such notice AWC shall repay to the Client any sums paid in respect of the Price. AWC shall not be liable for any loss or damage whatsoever arising from such cancellation.
- 15.2 In the event that the Client cancels delivery of Goods the Client shall be liable for any loss incurred by AWC (including, but not limited to, any loss of profits) up to the time of cancellation.
- 15.3 Cancellation of orders for Goods made to the Client's specifications or non-stocklist items will definitely not be accepted, once production has commenced.

#### **16. Privacy Act 1988**

- 16.1 The Client and/or the Guarantor/s agree for AWC to obtain from a credit reporting agency a credit report containing personal credit information about the Client and Guarantor/s in relation to credit provided by AWC.
- 16.2 The Client and/or the Guarantor/s agree that AWC may exchange information about the Client and the Guarantor/s with those credit providers either named as trade referees by the Client or named in a consumer credit report issued by a credit reporting agency for the following purposes:
- (a) to assess an application by 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 credit worthiness of Client and/or Guarantor/s.
- 16.3 The Client consents to AWC being given a consumer credit report to collect overdue payment on commercial credit (Section 18K(1)(h) Privacy Act 1988).
- 16.4 The Client agrees that personal credit information provided may be used and retained by AWC for the following purposes and for other purposes as shall be agreed between the Client and AWC or required by law from time to time:
- (a) provision of Goods; and/or
  - (b) marketing of Goods by AWC, its agents or distributors in relation to the Goods; and/or
  - (c) analysing, verifying and/or checking the Client's credit, payment and/or status in relation to provision of Goods; and/or
  - (d) processing of any payment instructions, direct debit facilities and/or credit facilities requested by Client; and/or
  - (e) enabling the daily operation of Client's account and/or the collection of amounts outstanding in the Client's account in relation to the Goods.
- 16.5 AWC may give information about the Client to a credit reporting agency for the following purposes:
- (a) to obtain a consumer credit report about the Client; and/or
  - (b) allow the credit reporting agency to create or maintain a credit information file containing information about the Client.

**17. Building and Construction Industry Security of Payment Act 2002**

- 17.1 At the Seller's sole discretion, if there are any disputes or claims for unpaid Goods and/or Services then the provisions of the Building and Construction Industry Security of Payment Act 2002 may apply.
- 17.2 Nothing in this agreement 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.

**18. General**

- 18.1 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.
- 18.2 These terms and conditions and any contract to which they apply shall be governed by the laws of Victoria and are subject to the jurisdiction of the courts of Victoria.
- 18.3 AWC shall be under no liability whatsoever to the Client for any indirect and/or consequential loss and/or expense (including loss of profit) suffered by the Client arising out of a breach by AWC of these terms and conditions.
- 18.4 In the event of any breach of this contract by AWC the remedies of the Client shall be limited to damages which under no circumstances shall exceed the Price of the Goods.
- 18.5 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 AWC nor to withhold payment of any invoice because part of that invoice is in dispute.
- 18.6 AWC may license or sub-contract all or any part of its rights and obligations without the Client's consent.
- 18.7 The Client agrees that AWC may review these terms and conditions at any time. If, following any such review, there is to be any change to these terms and conditions, then that change will take effect from the date on which AWC notifies the Client of such change.
- 18.8 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.
- 18.9 The failure by AWC to enforce any provision of these terms and conditions shall not be treated as a waiver of that provision, nor shall it affect AWC's right to subsequently enforce that provision.