

**1. Definitions**

- 1.1 “AWC” means 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” means the person/s requesting AWC to provide the Services as specified in any invoice, document or order, and if there is more than one person requesting the Services is a reference to each person jointly and severally.
- 1.3 “Incidental Items” means any goods, documents, designs, drawings or materials supplied, consumed, created or deposited incidentally by AWC in the course of it conducting, or supplying to the Client, any Services.
- 1.4 “Services” means all Services supplied by AWC to the Client at the Client's request from time to time.
- 1.5 “Price” means the price payable for the Services as agreed between AWC and the Client in accordance with clause 5 of this contract.

**2. Acceptance**

- 2.1 The Client is taken to have exclusively accepted and is immediately bound, jointly and severally, by these terms and conditions if the Client places an order for, or accepts Services provided by AWC.
- 2.2 These terms and conditions may only be amended with AWC's consent in writing and shall prevail to the extent of any inconsistency with any other document or agreement between the Client and AWC.
- 2.3 Services 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.

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

- 3.1 Electronic signatures shall be deemed to be accepted by either party providing that the parties have complied with Section 9 of the Electronic Transactions (Victoria) Act 2000 or any other applicable provisions of that Act or any Regulations referred to in that Act.

**4. Change in Control**

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

**5. Price and Payment**

- 5.1 At AWC's sole discretion the Price shall be either:
  - (a) as indicated on any invoice provided by AWC to the Client; or
  - (b) AWC's quoted price (subject to clause 5.2) which will be valid for the period stated in the quotation or otherwise for a period of thirty (30) days.
- 5.2 AWC reserves the right to change the Price if a variation to AWC's quotation is requested. Any variation from the plan of scheduled Services or specifications (including, but not limited to, any variation as a result of additional Services required due to unforeseen circumstances such as poor weather conditions, limitations to accessing the site, availability of machinery, safety considerations, prerequisite work by any third party not being completed, hard rock or other barriers below the surface or reinforcing rods in concrete, or as a result of any increase 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.
- 5.3 At AWC's sole discretion a non-refundable deposit may be required.
- 5.4 Time for payment for the Services being of the essence, the Price will be payable by the Client on the date/s determined by AWC, which may be:
  - (a) on delivery of the Services;
  - (b) by way of instalments/progress payments in accordance with AWC's payment schedule. 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 Incidental Items delivered to the site but not yet installed;
  - (c) thirty (30) days following the end of the month in which a statement is posted to the Client's address or address for notices;
  - (d) the date specified on any invoice or other form as being the date for payment; or
  - (e) failing any notice to the contrary, the date which is seven (7) days following the date of any invoice given to the Client by AWC.
- 5.5 Payment may be made by cash, cheque, bank cheque, electronic/on-line banking, or by any other method as agreed to between the Client and AWC.
- 5.6 Unless otherwise stated the Price does not include GST. In addition to the Price the Client must pay to AWC an amount equal to any GST AWC must pay for any supply by AWC under this or any other agreement for providing AWC's Services. The Client must pay GST, without deduction or set off of any other amounts, at the same time and on the same basis as the Client pays the Price. In addition the Client must pay any other taxes and duties that may be applicable in addition to the Price except where they are expressly included in the Price.

**6. Delivery of Services**

- 6.1 At AWC's sole discretion delivery of the Services shall take place when the Services are supplied to the Client at the Client's nominated address.
- 6.2 Delivery of the Services to a third party nominated by the Client is deemed to be delivery to the Client for the purposes of this agreement.
- 6.3 At AWC's sole discretion the costs of delivery are either included in the Price or are in addition to the Price.
- 6.4 AWC may deliver the Services by separate instalments. Each separate instalment shall be invoiced and paid for in accordance with the provisions in these terms and conditions.
- 6.5 Any time specified by AWC for delivery of the Services is an estimate only and AWC will not be liable for any loss or damage incurred by the Client as a result of delivery being late. However both parties agree that they shall make every endeavour to enable the Services to be supplied at the time and place as was arranged between both parties. In the event that AWC is unable to supply the Services as agreed solely due to any action or inaction of the Client then AWC shall be entitled to charge a reasonable fee for re-supplying the Services at a later time and date.

**7. Risk**

- 7.1 Irrespective of whether AWC retains ownership of any Incidental Items all risk for such items shall pass to the Client as soon as such items are delivered to the Client and shall remain with the Client until such time as AWC may repossess the Incidental Items in accordance with clause 13.3(f). The Client must insure all Incidental Items on or before delivery.
- 7.2 AWC reserves its right to seek compensation or damages for any damage, destruction or loss suffered in relation to the Incidental Items as a result of the Client's failure to insure in accordance with clause 7.1.
- 7.3 AWC Shall not be held responsible for any damage to the worksite 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.
- 7.4 All potential waterproofing surfaces are subject to an inspection by AWC prior to the commencement of the Services. In the event that the surface is deemed unsuitable, then AWC reserves the right to halt the Services until such time as it is agreed between AWC and the Client as to the additional cost in further preparation of the surface in order to make it fit for waterproofing. The additional cost shall be charged as a variation to the quotation as per clause 5.2.

**8. Client's Responsibilities**

- 8.1 It is the intention of AWC and agreed by the Client that it is the responsibility of the Client to:
  - (a) ensure that any surface requiring waterproofing is suitable for the purpose. In the event that the Client requests AWC to prepare the surface for waterproofing, then at AWC's sole discretion a fee shall be charged for the Services, and shall become immediately due and payable.
  - (b) ensure that no other tradesmen work on the membrane applied to the surface, until the membrane is fully dried and cured to manufacturer's specifications. AWC shall not be liable for any costs, damages or loss however arising from the Client's failure to comply with this clause;
  - (c) ensure that no other tradesmen's work penetrates or punctures the membrane applied by AWC including, but not limited to, waste outlets, balustrades, coverings and/or downpipes.

**9. Accuracy of Client's Plans and Measurements**

- 9.1 AWC shall be entitled to rely on the accuracy of any plans, specifications and other information provided by the Client. The Client acknowledges and agrees that in the event that any of this information provided by the Client is inaccurate, AWC accepts no responsibility for any loss, damages, or costs however resulting from these inaccurate plans, specifications or other information.

**10. Access**

- 10.1 The Client shall ensure that AWC has clear and free access to the work site at all times to enable them to undertake the Services. 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.

**11. Underground Locations**

- 11.1 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.
- 11.2 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 11.1.

**12. Compliance with Laws**

- 12.1 The Client and AWC shall comply with the provisions of all statutes, regulations and bylaws of government, local and other public authorities that may be applicable to the Services.

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- 12.2 The Client shall obtain (at the expense of the Client) all licenses and approvals that may be required for the Services.
- 12.3 The Client agrees that the site will comply with any occupational health and safety laws relating to building/construction sites and any other relevant safety standards or legislation.

### 13. Title

- 13.1 AWC and the Client agree that where it is intended that the ownership of Incidental Items is to pass to the Client that such ownership shall not pass until:
- (a) the Client has paid AWC all amounts owing for the Services; 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.
- 13.2 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 Incidental Items shall continue.
- 13.3 It is further agreed that:
- (a) the Client is only a bailee of the Incidental Items and must return the Incidental Items to AWC immediately upon request by AWC;
  - (b) the Client holds the benefit of the Client's insurance of the Incidental Items on trust for AWC and must pay to AWC the proceeds of any insurance in the event of the Incidental Items being lost, damaged or destroyed;
  - (c) the Client must not sell, dispose, or otherwise part with possession of the Incidental Items. If the Client sells, disposes or parts with possession of the Incidental Items then the Client must hold the proceeds of sale of the Incidental Items on trust for AWC and must pay or deliver the proceeds to AWC on demand.
  - (d) the Client should not convert or process the Incidental Items or intermix them with other goods, but if the Client does so then the Client holds the resulting product on trust for the benefit of AWC and must dispose of or return the resulting product to AWC as AWC so directs.
  - (e) the Client shall not charge or grant an encumbrance over the Incidental Items nor grant nor otherwise give away any interest in the Incidental Items while they remain the property of AWC;
  - (f) the Client irrevocably authorises AWC to enter any premises where AWC believes the Incidental Items are kept and recover possession of the Incidental Items.

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

- 14.1 In this clause financing statement, financing change statement, security agreement, and security interest has the meaning given to it by the PPSA.
- 14.2 Upon assenting to these terms and conditions in writing the Client acknowledges and agrees that these terms and conditions constitute a security agreement for the purposes of the PPSA and creates a security interest in:
- (a) all Incidental Items previously supplied by AWC to the Client;
  - (b) all Incidental Items will be supplied in the future by AWC to the Client; and
  - (c) all the Client's present and after acquired property being a charge, including anything in respect of which the Client has at any time a sufficient right, interest or power to grant a security interest in for the purposes of securing repayment of all monetary obligations of the Client to AWC for Services – that have previously been provided and that will be provided in the future by AWC to the Client.
- 14.3 The Client undertakes to:
- (a) promptly sign any further documents and/or provide any further information (such information to be complete, accurate and up-to-date in all respects) which AWC may reasonably require to;
    - (i) register a financing statement or financing change statement in relation to a security interest on the Personal Property Securities Register;
    - (ii) register any other document required to be registered by the PPSA; or
    - (iii) correct a defect in a statement referred to in clause 14.3(a)(i) or 14.3(a)(ii);
  - (b) indemnify, and upon demand reimburse, AWC for all expenses incurred in registering a financing statement or financing change statement on the Personal Property Securities Register established by the PPSA or releasing any Incidental Items charged thereby;
  - (c) not register a financing change statement in respect of a security interest without the prior written consent of AWC;
  - (d) not register, or permit to be registered, a financing statement or a financing change statement in relation to the Incidental Items in favour of a third party without the prior written consent of AWC.
- 14.4 AWC and the Client agree that sections 96, 115 and 125 of the PPSA do not apply to the security agreement created by these terms and conditions.
- 14.5 The Client waives their rights to receive notices under sections 95, 118, 121(4), 130, 132(3)(d) and 132(4) of the PPSA.
- 14.6 The Client waives their rights as a grantor and/or a debtor under sections 142 and 143 of the PPSA.
- 14.7 Unless otherwise agreed to in writing by AWC, the Client waives their right to receive a verification statement in accordance with section 157 of the PPSA.
- 14.8 The Client must unconditionally ratify any actions taken by AWC under clauses 14.2 to 14.5.
- 14.9 Subject to any express provisions to the contrary nothing in these terms and conditions is intended to have the effect of contracting out of any of the provisions of the PPSA.

**15. Security and Charge**

- 15.1 In consideration of AWC agreeing to supply Services, the Client charges all of its rights, title and interest (whether joint or several) in any land, realty or other assets capable of being charged, owned by the Client either now or in the future, to secure the performance by the Client of its obligations under these terms and conditions (including, but not limited to, the payment of any money).
- 15.2 The Client indemnifies AWC from and against all AWC's costs and disbursements including legal costs on a solicitor and own client basis incurred in exercising AWC's rights under this clause.
- 15.3 The Client irrevocably appoints AWC and each director of AWC as the Client's true and lawful attorney/s to perform all necessary acts to give effect to the provisions of this clause 15 including, but not limited to, signing any document on the Client's behalf.

**16. Defects, Warranties and the Competition and Consumer Act 2010 (CCA)**

- 16.1 The Client must inspect AWC's Services on completion of the Services and must within seven (7) days notify AWC in writing of any evident defect in the Services or Incidental Items provided (including AWC's workmanship) or of any other failure by AWC to comply with the description of, or quote for, the Services which AWC was to supply. The Client must notify any other alleged defect in AWC's Services or Incidental Items as soon as is reasonably possible after any such defect becomes evident. Upon such notification the Client must allow AWC to review the Services or Incidental Items that were provided.
- 16.2 Under applicable State, Territory and Commonwealth Law (including, without limitation the CCA), certain statutory implied guarantees and warranties (including, without limitation the statutory guarantees under the CCA) may be implied into these terms and conditions (**Non-Excluded Guarantees**).
- 16.3 AWC acknowledges that nothing in these terms and conditions purports to modify or exclude the Non-Excluded Guarantees.
- 16.4 Except as expressly set out in these terms and conditions or in respect of the Non-Excluded Guarantees, AWC makes no warranties or other representations under these terms and conditions including, but not limited to, the quality or suitability of the Services. AWC's liability in respect of these warranties is limited to the fullest extent permitted by law.
- 16.5 If the Client is a consumer within the meaning of the CCA, AWC's liability is limited to the extent permitted by section 64A of Schedule 2.
- 16.6 If AWC is required to rectify, re-supply, or pay the cost of re-supplying the Services under this clause or the CCA, but is unable to do so, then AWC may refund any money the Client has paid for the Services but only to the extent that such refund shall take into account the value of Services and Incidental Items which have been provided to the Client which were not defective.
- 16.7 If the Client is not a consumer within the meaning of the CCA, AWC's liability for any defective Services or Incidental Items is:
- (a) limited to the value of any express warranty, warranty card or on the Certificate of Compliance and Warranty provided to the Client by AWC at AWC's sole discretion;
  - (b) otherwise negated absolutely.
- 16.8 Notwithstanding clauses 16.1 to 16.7 but subject to the CCA, AWC shall not be liable for any defect or damage which may be caused or partly caused by or arise as a result of:
- (a) the Client failing to properly maintain or store any Incidental Items;
  - (b) the Client using the Incidental Items for any purpose other than that for which they were designed;
  - (c) the Client continuing to use any Incidental Items after any defect became apparent or should have become apparent to a reasonably prudent operator or user;
  - (d) interference with the Services by the Client or any third party without AWC's prior approval;
  - (e) the Client failing to follow any instructions or guidelines provided by AWC;
  - (f) structural or thermal movement of any description;
  - (g) mechanical damage of any description;
  - (h) fair wear and tear, any accident, or act of God.

**17. Intellectual Property**

- 17.1 Where AWC has designed, drawn or developed Incidental Items for the Client, then the copyright in any Incidental Items shall remain the property of AWC.
- 17.2 The Client warrants that all designs, specifications or instructions given 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.
- 17.3 The Client agrees that AWC may (at no cost) use for the purposes of marketing or entry into any competition, any Incidental Items which AWC has created for the Client or photographs of the Services provided.

**18. Default and Consequences of Default**

- 18.1 Interest on overdue invoices shall accrue daily from the date when payment becomes due, until the date of payment, at a rate of two and a half percent (2.5%) per calendar month (and at AWC's sole discretion such interest shall compound monthly at such a rate) after as well as before any judgment.
- 18.2 If the Client owes AWC any money the Client shall indemnify AWC from and against all costs and disbursements incurred by AWC in recovering the debt (including but not limited to internal administration fees, legal costs on a solicitor and own client basis, AWC's contract default fee, and bank dishonour fees).

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- 18.3 If any account remains overdue after thirty (30) days then an amount of the greater of twenty dollars (\$20) or ten percent (10%) of the amount overdue (up to a maximum of two hundred dollars (\$200)) shall be levied for administration fees which sum shall become immediately due and payable.
- 18.4 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) under these terms and conditions AWC may suspend or terminate the supply of Services to the Client. 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.
- 18.5 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 if:
- (a) any money payable to AWC becomes overdue, or in AWC's opinion the Client will be unable to make a payment when it falls due;
  - (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.
- 19. Cancellation**
- 19.1 AWC may cancel any contract to which these terms and conditions apply or cancel delivery of Services at any time before the Services are commenced by giving written notice to the Client. On giving such notice AWC shall repay to the Client any money paid by the Client for the Services. AWC shall not be liable for any loss or damage whatsoever arising from such cancellation.
- 19.2 In the event that the Client cancels delivery of the Services the Client shall be liable for any and all loss incurred (whether direct or indirect) by AWC as a direct result of the cancellation (including, but not limited to, any loss of profits).
- 20. Privacy Act 1988**
- 20.1 The Client agrees for AWC to obtain from a credit reporting body (CRB) a credit report containing personal credit information (e.g. name, address, D.O.B, occupation, previous credit applications, credit history) about the Client in relation to credit provided by AWC.
- 20.2 The Client agrees that AWC may exchange information about the Client with those credit providers and with related body corporates for the following purposes:
- (a) to assess an application by the Client; and/or
  - (b) to notify other credit providers of a default by the Client; and/or
  - (c) to exchange information with other credit providers as to the status of this credit account, where the Client is in default with other credit providers; and/or
  - (d) to assess the creditworthiness of the Client including the Client's repayment history in the preceding two years.
- 20.3 The Client consents to AWC being given a consumer credit report to collect overdue payment on commercial credit.
- 20.4 The Client agrees that personal credit information provided may be used and retained by AWC for the following purposes (and for other agreed purposes or required by):
- (a) the provision of Services; and/or
  - (b) analysing, verifying and/or checking the Client's credit, payment and/or status in relation to the provision of Services; and/or
  - (c) processing of any payment instructions, direct debit facilities and/or credit facilities requested by the Client; and/or
  - (d) enabling the collection of amounts outstanding in relation to the Services.
- 20.5 AWC may give information about the Client to a CRB for the following purposes:
- (a) to obtain a consumer credit report;
  - (b) allow the CRB to create or maintain a credit information file about the Client including credit history.
- 20.6 The information given to the CRB may include:
- (a) personal information as outlined in 20.1 above;
  - (b) name of the credit provider and that AWC is a current credit provider to the Client;
  - (c) whether the credit provider is a licensee;
  - (d) type of consumer credit;
  - (e) details concerning the Client's application for credit or commercial credit (e.g. date of commencement/termination of the credit account and the amount requested);
  - (f) advice of consumer credit defaults, overdue accounts, loan repayments or outstanding monies which are overdue by more than sixty (60) days and for which written notice for request of payment has been made and debt recovery action commenced or alternatively that the Client no longer has any overdue accounts and AWC has been paid or otherwise discharged and all details surrounding that discharge (e.g. dates of payments);
  - (g) information that, in the opinion of AWC, the Client has committed a serious credit infringement;
  - (h) advice that the amount of the Client's overdue payment is equal to or more than one hundred and fifty dollars (\$150).
- 20.7 The Client shall have the right to request (by e-mail) from AWC:

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- (a) a copy of the information about the Client retained by AWC and the right to request that AWC correct any incorrect information; and
  - (b) that AWC does not disclose any personal information about the Client for the purpose of direct marketing.
- 20.8 AWC will destroy personal information upon the Client's request (by e-mail) or if it is no longer required unless it is required in order to fulfil the obligations of this agreement or is required to be maintained and/or stored in accordance with the law.
- 20.9 The Client can make a privacy complaint by contacting AWC via e-mail. AWC will respond to that complaint within seven (7) days of receipt and will take all reasonable steps to make a decision as to the complaint within thirty (30) days of receipt of the complaint. In the event that the Client is not satisfied with the resolution provided, the Client can make a complaint to the Information Commissioner at [www.oaic.gov.au](http://www.oaic.gov.au).

### 21. Dispute Resolution

- 21.1 If a dispute arises between the parties to this contract then either party shall send to the other party a notice of dispute in writing adequately identifying and providing details of the dispute. Within fourteen (14) days after service of a notice of dispute, the parties shall confer at least once, to attempt to resolve the dispute. At any such conference each party shall be represented by a person having authority to agree to a resolution of the dispute. In the event that the dispute cannot be so resolved either party may by further notice in writing delivered by hand or sent by certified mail to the other party refer such dispute to arbitration. Any arbitration shall be:
- (a) referred to a single arbitrator to be nominated by the President of the Institute of Arbitrators Australia; and
  - (b) conducted in accordance with the Institute of Arbitrators Australia Rules for the Conduct of Commercial Arbitration.

### 22. Building and Construction Industry Security of Payment Act 2002

- 22.1 At AWC's sole discretion, if there are any disputes or claims for unpaid Services then the provisions of the Building and Construction Industry Security of Payment Act 2002 may apply.
- 22.2 Nothing in this agreement is intended to have the effect 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.

### 23. General

- 23.1 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. 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.
- 23.2 These terms and conditions and any contract to which they apply shall be governed by the laws of Victoria in which AWC has its principal place of business, and are subject to the jurisdiction of the courts in Victoria.
- 23.3 Subject to clause 16 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 (alternatively AWC's liability shall be limited to damages which under no circumstances shall exceed the Price of the Services).
- 23.4 The Client shall not be entitled to set off against, or deduct from the Price, any sums owed or claimed to be owed to the Client by AWC nor to withhold payment of any invoice because part of that invoice is in dispute.
- 23.5 AWC may license or sub-contract all or any part of its rights and obligations without the Client's consent.
- 23.6 The Client agrees that AWC may amend these terms and conditions at any time. If AWC makes a change to these terms and conditions, then that change will take effect from the date on which AWC notifies the Client of such change. The Client will be taken to have accepted such changes if the Client makes a further request for AWC to provide Services to the Client.
- 23.7 Neither party shall be liable for any default due to any act of God, war, terrorism, strike, lock-out, industrial action, fire, flood, storm or other event beyond the reasonable control of either party.
- 23.8 The Client warrants that it has the power to enter into this agreement and has obtained all necessary authorisations to allow it to do so, it is not insolvent and that this agreement creates binding and valid legal obligations on it.