

**1. Definitions**

- 1.1 **"Confidential Information"** means information of a confidential nature whether oral, written or in electronic form including, but not limited to, this Contract, either party's intellectual property, operational information, know-how, trade secrets, financial and commercial affairs, Contracts, client information (including but not limited to, **"Personal Information"** such as: name, address, D.O.B, occupation, driver's license details, electronic contact (email, Facebook or Twitter details), medical insurance details or next of kin and other contact information (where applicable), previous credit applications, credit history) and pricing details.
- 1.2 **"Contract"** means the terms and conditions contained herein, together with any quotation, order, invoice or other document or amendments expressed to be supplemental to this Contract.
- 1.3 **"Cookies"** means small files which are stored on a user's computer. They are designed to hold a modest amount of data (including Personal Information) specific to a particular client and website and can be accessed either by the web server or the client's computer. **If the Customer does not wish to allow Cookies to operate in the background when using TMF's website, then the Customer shall have the right to enable / disable the Cookies first by selecting the option to enable / disable provided on the website, prior to making enquiries via the website.**
- 1.4 **"Customer"** means the person/s, entities or any person acting on behalf of and with the authority of the Customer requesting TMF to provide the Works as specified in any proposal, quotation, order, invoice or other documentation, and:  
(a) if there is more than one Customer, is a reference to each Customer jointly and severally; and  
(b) if the Customer is a partnership, it shall bind each partner jointly and severally; and  
(c) if the Customer is a part of a Trust, shall be bound in their capacity as a trustee; and  
(d) includes the Customer's executors, administrators, successors and permitted assigns.
- 1.5 **"GST"** means Goods and Services Tax as defined within the "A New Tax System (Goods and Services Tax) Act 1999" (Cth).
- 1.6 **"Price"** means the Price payable (plus any GST where applicable) for the Works as agreed between TMF and the Customer in accordance with clause 6 below.
- 1.7 **"TMF"** means TMF Engineering Pty Ltd T/A TMF Engineering Solutions, its successors and assigns or any person acting on behalf of and with the authority of TMF Engineering Pty Ltd T/A TMF Engineering Solutions.
- 1.8 **"Works"** means all Works (including consultation, manufacturing and/or installation services) or Materials supplied by TMF to the Customer at the Customer's request from time to time (where the context so permits the terms 'Works' or 'Materials' shall be interchangeable for the other).
- 1.9 **"Worksite"** means the address nominated by the Customer to which the Materials/Works are to be supplied by TMF.

**2. Acceptance**

- 2.1 The parties acknowledge and agree that:  
(a) they have read and understood the terms and conditions contained in this Contract; and  
(b) the parties are taken to have exclusively accepted and are immediately bound, jointly and severally, by these terms and conditions if the Customer places an order for or accepts delivery of the Works.
- 2.2 In the event of any inconsistency between the terms and conditions of this Contract and any other prior document or schedule that the parties have entered into, the terms of this Contract shall prevail.
- 2.3 Any amendment to the terms and conditions contained in this Contract may only be amended in writing by the consent of both parties.
- 2.4 The Customer acknowledges and accepts that the supply of Works on credit shall not take effect until the Customer has completed a credit application with TMF and it has been approved with a credit limit established for the account.
- 2.5 In the event that the supply of Works requested exceeds the Customer's credit limit and/or the account exceeds the payment terms, TMF reserves the right to refuse delivery.
- 2.6 Electronic signatures shall be deemed to be accepted by either party providing that the parties have complied with Section 9 the Electronic Transactions (Victoria) Act 2000 or any other applicable provisions of that Act or any Regulations referred to in that Act.

**3. Authorised Representatives**

- 3.1 The Customer acknowledges and agrees that TMF shall (for the duration of the Works) liaise directly with one (1) authorised representative, and that once introduced as such to TMF, that person shall have the full authority of the Customer to order any Works, Materials and/or to request any variation thereto on the Customer's behalf. The Customer accepts that they will be solely liable to TMF for all additional costs incurred by TMF (including TMF's profit margin) in providing any Works, Materials or variation/s requested thereto by the Customer's duly authorised representative.

**4. Errors and Omissions**

- 4.1 The Customer acknowledges and accepts that TMF shall, without prejudice, accept no liability in respect of any alleged or actual error(s) and/or omission(s):  
(a) resulting from an inadvertent mistake made by TMF in the formation and/or administration of this Contract; and/or  
(b) contained in/omitted from any literature (hard copy and/or electronic) supplied by TMF in respect of the Works.
- 4.2 In circumstances where the Customer is required to place an order for Materials, in writing, or otherwise as permitted by these terms and conditions, the Customer is responsible for supplying correct order information such as, without limitation, measurements and quantity, when placing an order for Materials (whether they are made to order Materials or not) ("**Customer Error**"). The Customer must pay for all Materials it orders from TMF notwithstanding that such Materials suffer from a Customer Error and notwithstanding that the Customer has not taken or refuses to take delivery of such Materials. TMF is entitled to, at its absolute discretion to waive its right under this sub-clause in relation to Customer Errors.

**5. Change in Control**

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

**6. Price and Payment**

- 6.1 At TMF's sole discretion, the Price shall be either:
- (a) as indicated on invoices provided by TMF to the Customer in respect of Works performed or upon placement of an order for the Materials; or
  - (b) TMF's quoted Price (subject to clause 6.2) which shall be binding upon TMF provided that the Customer shall accept TMF's quotation in writing within thirty (30) days.
- 6.2 TMF reserves the right to change the Price:
- (a) if a variation to the Materials which are to be supplied is requested; or
  - (b) if a variation to the Works originally scheduled (including any applicable plans or specifications) is requested; or
  - (c) where additional Works are required due to the discovery of hidden or unidentifiable difficulties (including, but not limited to, poor weather, limitations to accessing the Worksite, obscured structural defects, incorrect measurements provided by the Customer, safety considerations (discovery of asbestos, etc.), prerequisite work by any third party not being completed, remedial work required due to existing workmanship being of a poor quality or non-compliant to the building code, hard rock barriers below the surface, iron reinforcing rods in concrete, or hidden pipes and wiring in walls etc which are only discovered on commencement or during the course of the Works; or
  - (d) in the event of increases to TMF in the cost of labour or Materials which are beyond TMF's control.
- 6.3 Variations will be charged for on the basis of TMF's quotation, and will be detailed in writing, and shown as variations on TMF's invoice. The Customer shall be required to respond to any variation submitted by TMF within ten (10) working days. Failure to do so will entitle TMF to add the cost of the variation to the Price. Payment for all variations must be made in full at the time of their completion.
- 6.4 At TMF's sole discretion, a reasonable non-refundable deposit may be required upon placement of an order for Materials/Works, in accordance with any quotation provided by TMF or as notified to the Customer prior to the placement of an order for Materials/Works.
- 6.5 Time for payment for the Works being of the essence, the Price will be payable by the Customer on the date/s determined by TMF, which may be:
- (a) on or before completion of the Works; or
  - (b) thirty (30) days following the end of the month in which a statement is posted to the Customer's address or address for notices; or
  - (c) the date specified on any invoice or other form as being the date for payment; or
  - (d) failing any notice to the contrary, the date which is seven (7) days following the date of any invoice given to the Customer by TMF.
- 6.6 Payment may be made by cash, cheque, bank cheque, electronic/on-line banking, credit card (a surcharge may apply per transaction), or by any other method as agreed to between the Customer and TMF.
- 6.7 TMF may in its discretion allocate any payment received from the Customer towards any invoice that TMF determines and may do so at the time of receipt or at any time afterwards. On any default by the Customer TMF may re-allocate any payments previously received and allocated. In the absence of any payment allocation by TMF, payment will be deemed to be allocated in such manner as preserves the maximum value of TMF's Purchase Money Security Interest (as defined in the PPSA) in the Materials.
- 6.8 The Customer shall not be entitled to set off against, or deduct from the Price, any sums owed or claimed to be owed to the Customer by TMF nor to withhold payment of any invoice because part of that invoice is in dispute. Once in receipt of an invoice for payment, if any part of the invoice is in dispute, then the Customer must notify TMF in writing within three (3) business days, the invoice shall remain due and payable for the full amount, until such time as TMF investigates the disputed claim, no credit shall be passed for refund until the review is completed. Failure to make payment may result in TMF placing the Customer's account into default and subject to default interest in accordance with clause 18.1.
- 6.9 Unless otherwise stated the Price does not include GST. In addition to the Price, the Customer must pay to TMF an amount equal to any GST TMF must pay for any supply by TMF under this or any other Contract for the sale of the Materials. The Customer must pay GST, without deduction or set off of any other amounts, at the same time and on the same basis as the Customer pays the Price. In addition, the Customer must pay any other taxes and duties that may be applicable in addition to the Price except where they are expressly included in the Price.

**7. Provision of the Works**

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

**8. Dimensions, Plans and Specifications**

- 8.1 All customary industry tolerances shall apply to the dimensions and measurements of the Materials unless the Customer and TMF agree otherwise in writing.
- 8.2 TMF shall be entitled to rely on the accuracy of any plans, specifications and other information provided by the Customer. The Customer acknowledges and agrees that in the event that any of this information provided by the Customer is inaccurate, TMF accepts no responsibility for any loss, damages, or costs however resulting from these inaccurate plans, specifications or other information.
- 8.3 Where the Customer is to supply TMF with any design specifications (including, but not limited to, Computer Aided Drawings ("CAD")) the Customer shall be responsible for providing accurate data. TMF shall not be liable whatsoever for any errors in the Materials that are caused by incorrect or inaccurate data being supplied by the Customer.
- 8.4 If the giving of an estimate or quotation for the supply of Materials involves TMF estimating measurements and quantities, it shall be the responsibility of the Customer to verify the accuracy of TMF's estimated measurements and quantities, before the Customer places an order based on such estimate or accepts such quotation.
- 8.5 Should the Customer require any changes to TMF's estimated measurements and quantities, the Customer shall request such changes in writing, in the case of an estimate before placing an order based on that estimate and in the case of a quotation before acceptance of that quotation.
- 8.6 The Customer acknowledges and accepts that:
- (a) all descriptive specifications, illustrations, drawings, data, dimensions, ratings and weights stated in TMF's fact sheets, price lists or advertising material, are approximate only and are given by way of identification only. The Customer shall not be entitled to rely on such information, and any use of such does not constitute a sale by description, and does not form part of the Contract, unless expressly stated as such in writing by TMF; and
  - (b) while TMF may have provided information or figures to the Customer regarding the performance and/or sustainability of the Materials, the Customer acknowledges that TMF has given these in good faith and are estimates based on industry prescribed estimates.

**9. Risk**

- 9.1 If TMF retains ownership of the Materials under clause 13 then:
- (a) where TMF is supplying Materials only, all risk for the Materials shall immediately pass to the Customer on delivery and the Customer must insure the Materials on or before delivery. The cost of delivery will be payable by the Customer in accordance with the quotation provided by TMF to the Customer, or as otherwise notified to the Customer prior to the placement of an order for the Materials. Delivery of the Materials shall be deemed to have taken place immediately at the time that either:
    - (i) the Customer or the Customer's nominated carrier takes possession of the Materials at TMF's address; or
    - (ii) the Materials are delivered by TMF or TMF's nominated carrier to the Customer's nominated delivery address (even if the Customer is not present at the address).
  - (b) where TMF is to both supply and install Materials then TMF shall maintain a Contract works insurance policy until the Works are completed. Upon completion of the Works all risk for the Works shall immediately pass to the Customer.
- 9.2 Notwithstanding the provisions of clause 9.1 if the Customer specifically requests TMF to leave Materials outside TMF's premises for collection or to deliver the Materials to an unattended location then such Materials shall always be left at sole risk of the Customer and it shall be the Customer's responsibility to ensure the Materials are insured adequately or at all. In the event that such Materials are lost, damaged or destroyed then replacement of the Materials shall be at the Customer's expense.
- 9.3 Where TMF is required to install the Materials the Customer warrants that the structure of the premises or equipment in or upon which these Materials are to be installed or erected is sound and will sustain the installation and work incidental thereto and TMF shall not be liable for any claims, demands, losses, damages, costs and expenses howsoever caused or arising should the premises or equipment be unable to accommodate the installation.
- 9.4 The Customer acknowledges and accepts that:
- (a) TMF is only responsible for parts that are replaced/supplied by TMF and does not at any stage accept any liability in respect of components supplied by any other third party that subsequently fail and are found to be the source of the failure, the Customer agrees to indemnify TMF against any loss or damage to the Materials, or caused thereby, or any part thereof howsoever arising; and
  - (b) Materials supplied may exhibit variations in shade, colour, texture, surface and finish. TMF will make every effort to match batches of product supplied in order to minimise such variations but shall not be liable in any way whatsoever where such variations occur.
- 9.5 TMF shall not be liable for any defect or damage to the Materials resulting from incorrect or faulty installation.

**10. Worksite Access and Condition**

- 10.1 TMF is not responsible for the removal of rubbish from or clean-up of the building/construction Worksite/s. All rubbish generated by TMF will be placed in a designated area appointed by the Customer but the responsibility of removal of same is the Customer or the Customer's agent, unless otherwise agreed.
- 10.2 It is the intention of TMF and agreed by the Customer that:
- (a) the Customer shall ensure that TMF has clear and free access to the Worksite at all times to enable them to undertake the Works (including carrying out Worksite inspections, gain signatures for required documents, and for the delivery and installation of the Materials). TMF shall not be liable for any loss or damage to the Worksite (including, without limitation, damage to pathways, driveways and concreted or paved or grassed areas) unless due to the negligence of TMF; and
  - (b) it is the Customer's responsibility to provide TMF, while at the Worksite, with adequate access to available amenities as may be required.
- 10.3 The Customer agrees to be present at the Worksite when and as reasonably requested by TMF and its employees, contractors and/or agents.
- 10.4 Where TMF requires that Materials, tools etc. required for the Works be stored at the Worksite, the Customer shall supply TMF a safe area for storage and shall take all reasonable efforts to protect all items from destruction, theft or damage. In the event that any of the stored items are destroyed, stolen or damaged, then the cost of repair or replacement shall be the Customer's responsibility.
- 10.5 *Worksite Inductions*

- (a) in the event the Customer requires an employee or sub-contractor of TMF to undertake a Worksite induction during working hours, the Customer will be liable to pay the hourly charges for that period. If any induction needs to be undertaken prior to the commencement date then the Customer shall be liable to pay TMF's standard (and/or overtime, if applicable) hourly labour rate; or
- (b) where TMF is in control of the Worksite, the Customer and/or the Customer's third-party contractors must initially carry out TMF's Health & Safety induction course before access to the Worksite will be granted. Inspection of the Worksite during the course of the Works will be by **appointment only** and unless otherwise agreed, in such an event the Customer and/or third party acting on behalf of the Customer must at all times be accompanied by TMF.

#### **11. Underground Locations**

- 11.1 Prior to TMF commencing any work the Customer must advise TMF of the precise location of all underground services on the Worksite and clearly mark the same. The underground mains and services the Customer must identify include, but are not limited to, electrical services, gas services, sewer services, pumping services, sewer connections, sewer sludge mains, water mains, irrigation pipes, telephone cables, fibre optic cables, oil pumping mains, and any other services that may be on the Worksite.
- 11.2 Whilst TMF will take all care to avoid damage to any underground services the Customer agrees to indemnify TMF 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 Customer and TMF shall comply with the provisions of all statutes, regulations and bylaws of government, local and other public authorities that may be applicable to the Materials/Works, including any occupational health and safety (OHS) laws or any other relevant safety standards or legislation pertaining to the Works.
- 12.2 The Customer shall obtain (at the expense of the Customer) all licenses and approvals that may be required for the Works.

#### **13. Title**

- 13.1 TMF and the Customer agree that ownership of the Materials shall not pass until:
  - (a) the Customer has paid TMF all amounts owing to TMF; and
  - (b) the Customer has met all of its other obligations to TMF.
- 13.2 Receipt by TMF 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.
- 13.3 It is further agreed that until ownership of the Materials passes to the Customer in accordance with clause 13.1:
  - (a) the Customer is only a bailee of the Materials and unless the Materials have become fixtures must return the Materials to TMF on request;
  - (b) the Customer holds the benefit of the Customer's insurance of the Materials on trust for TMF and must pay to TMF the proceeds of any insurance in the event of the Materials being lost, damaged or destroyed;
  - (c) the production of these terms and conditions by TMF shall be sufficient evidence of TMF's rights to receive the insurance proceeds direct from the insurer without the need for any person dealing with TMF to make further enquiries;
  - (d) the Customer must not sell, dispose, or otherwise part with possession of the Materials other than in the ordinary course of business and for market value. If the Customer sells, disposes or parts with possession of the Materials then the Customer must hold the proceeds of any such act on trust for TMF and must pay or deliver the proceeds to TMF on demand;
  - (e) the Customer should not convert or process the Materials or intermix them with other goods but if the Customer does so then the Customer holds the resulting product on trust for the benefit of TMF and must sell, dispose of or return the resulting product to TMF as it so directs;
  - (f) unless the Materials have become fixtures the Customer irrevocably authorises TMF to enter any premises where TMF believes the Materials are kept and recover possession of the Materials;
  - (g) TMF may recover possession of any Materials in transit whether or not delivery has occurred;
  - (h) the Customer shall not charge or grant an encumbrance over the Materials nor grant nor otherwise give away any interest in the Materials while they remain the property of TMF; and
  - (i) TMF may commence proceedings to recover the Price of the Materials sold notwithstanding that ownership of the Materials has not passed to the Customer.

#### **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 Customer acknowledges and agrees that these terms and conditions constitute a security agreement for the purposes of the PPSA and creates a security interest in all Materials and/or collateral (account) – being a monetary obligation of the Customer to TMF for Works – that have previously been supplied and that will be supplied in the future by TMF to the Customer.
- 14.3 The Customer 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 TMF 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, TMF 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 Materials charged thereby;
  - (c) not register a financing change statement in respect of a security interest without the prior written consent of TMF;
  - (d) not register, or permit to be registered, a financing statement or a financing change statement in relation to the Materials and/or collateral (account) in favour of a third party without the prior written consent of TMF; and

- (e) immediately advise TMF of any material change in its business practices of selling the Materials which would result in a change in the nature of proceeds derived from such sales.
- 14.4 TMF and the Customer 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 Customer hereby waives its rights to receive notices under sections 95, 118, 121(4), 130, 132(3)(d) and 132(4) of the PPSA.
- 14.6 The Customer waives its 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 TMF, the Customer waives its right to receive a verification statement in accordance with section 157 of the PPSA.
- 14.8 The Customer shall unconditionally ratify any actions taken by TMF under clauses 14.3 to 14.5.
- 14.9 Subject to any express provisions to the contrary (including those contained in this clause 14), 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 TMF agreeing to supply the Materials and/or provide its Works, the Customer grants TMF a security interest by way of a floating charge (registerable by TMF pursuant to the PPSA) over all of its present and after acquired rights, title and interest (whether joint or several) in all other assets that is now owned by the Customer or owned by the Customer in the future, to the extent necessary to secure the repayment of monies owed under this Contract for provision of the Materials and/or Works under this Contract and/or permit TMF to appoint a receiver to the Customer in accordance with the *Corporations Act 2001* (Cth).
- 15.2 The Customer indemnifies TMF from and against all TMF's costs and disbursements including legal costs on a solicitor and own client basis incurred in exercising TMF's rights under this clause.
- 15.3 In the event that the Customer defaults or breaches any term of this Contract and as a result, the security provided in clauses 13.1, 14.2 and 15.1 as applicable, is deemed insufficient by TMF to secure the repayment of monies owed by the Customer to TMF, the Customer hereby grants TMF a security interest as at the date of the default, by way of a charge, that enables the right and entitlement to lodge a caveat over any real property and or land owned by the Customer now, or owned by the Customer in the future, to secure the performance of the Customer of its obligations under these terms and conditions (including, but not limited to, the payment of any money).
- 16. Defects, Warranties and Returns, Competition and Consumer Act 2010 ("CCA")**
- 16.1 The Customer must inspect all Materials on delivery (or the Works on completion) and must within seven (7) days of delivery notify TMF in writing of any evident defect/damage, shortage in quantity, or failure to comply with the description or quote. The Customer must notify any other alleged defect in the Materials/Works as soon as reasonably possible after any such defect becomes evident. Upon such notification the Customer must allow TMF to inspect the Materials or to review the Works 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 TMF 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, TMF makes no warranties or other representations under these terms and conditions including but not limited to the quality or suitability of the Materials/Works. TMF's liability in respect of these warranties is limited to the fullest extent permitted by law.
- 16.5 If the Customer is a consumer within the meaning of the CCA, TMF's liability is limited to the extent permitted by section 64A of Schedule 2.
- 16.6 If TMF is required to replace any Materials under this clause or the CCA, but is unable to do so, TMF may refund any money the Customer has paid for the Materials.
- 16.7 If TMF is required to rectify, re-supply, or pay the cost of re-supplying the Works under this clause or the CCA, but is unable to do so, then TMF may refund any money the Customer has paid for the Works but only to the extent that such refund shall take into account the value of Works and Materials which have been provided to the Customer which were not defective.
- 16.8 If the Customer is not a consumer within the meaning of the CCA, TMF's liability for any defect or damage in the Materials is:
- (a) limited to the value of any express warranty or warranty card provided to the Customer by TMF at TMF's sole discretion;
  - (b) limited to any warranty to which TMF is entitled, if TMF did not manufacture the Materials; and/or
  - (c) otherwise negated absolutely.
- 16.9 Subject to this clause 16, returns will only be accepted provided that:
- (a) the Customer has complied with the provisions of clause 16.1; and
  - (b) TMF has agreed that the Materials are defective; and
  - (c) the Materials are returned within a reasonable time at the Customer's cost (if that cost is not significant); and
  - (d) the Materials are returned in as close a condition to that in which they were delivered as is possible.
- 16.10 Notwithstanding clauses 16.1 to 16.9 but subject to the CCA, TMF 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 Customer failing to properly maintain or store any Materials;
  - (b) the Customer using the Materials for any purpose other than that for which they were designed;
  - (c) the Customer continuing to use any Materials after any defect became apparent or should have become apparent to a reasonably prudent operator or user;
  - (d) interference with the Works by the Customer or any third party without TMF's prior approval;
  - (e) the Customer failing to follow any instructions or guidelines provided by TMF; and/or
  - (f) fair wear and tear, any accident, or act of God.
- 16.11 Notwithstanding anything contained in this clause if TMF is required by a law to accept a return then TMF will only accept a return on the conditions imposed by that law.

**17. Intellectual Property**

- 17.1 Where TMF has designed, drawn, written plans or a schedule of Works, or created any products for the Customer, then the copyright in all such designs, drawings, documents, plans, schedules and products shall remain vested in TMF, and shall only be used by the Customer at TMF's discretion. Under no circumstances may such designs, drawings and documents be used without the express written approval of TMF.
- 17.2 The Customer warrants that all designs, specifications or instructions given to TMF will not cause TMF to infringe any patent, registered design or trademark in the execution of the Customer's order and the Customer agrees to indemnify TMF against any action taken by a third party against TMF in respect of any such infringement.
- 17.3 The Customer agrees that TMF may (at no cost) use for the purposes of marketing or entry into any competition, any documents, designs, drawings, plans or products which TMF has created for the Customer.

**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 TMF's sole discretion such interest shall compound monthly at such a rate) after as well as before any judgment.
- 18.2 If the Customer owes TMF any money, the Customer shall indemnify TMF from and against all costs and disbursements:
- (a) incurred; and/or
  - (b) which would be incurred and/or
  - (c) for which by the Customer would be liable;
- in regard to legal costs on a solicitor and own client basis incurred in exercising TMF's rights under these terms and conditions, internal administration fees, TMF's Contract fees owing for breach of these terms and conditions', including, but not limited to, contract default fees and/or recovery costs (if applicable), as well as bank dishonour fees.
- 18.3 Further to any other rights or remedies TMF may have under this Contract, if a Customer has made payment to TMF, and the transaction is subsequently reversed, the Customer shall be liable for the amount of the reversed transaction, in addition to any further costs incurred by TMF under this clause 18 where it can be proven that such reversal is found to be illegal, fraudulent or in contravention to the Customer's obligations under this Contract.
- 18.4 Without prejudice to TMF's other remedies at law TMF shall be entitled to cancel all or any part of any order of the Customer which remains unfulfilled and all amounts owing to TMF shall, whether or not due for payment, become immediately payable if:
- (a) any money payable to TMF becomes overdue, or in TMF's opinion the Customer will be unable to make a payment when it falls due;
  - (b) the Customer has exceeded any applicable credit limit provided by TMF;
  - (c) the Customer becomes insolvent or bankrupt, convenes a meeting with its creditors or proposes or enters into an arrangement with creditors, or makes an assignment for the benefit of its creditors; or
  - (d) a receiver, manager, liquidator (provisional or otherwise) or similar person is appointed in respect of the Customer or any asset of the Customer.

**19. Cancellation**

- 19.1 Without prejudice to any other remedies the parties may have, if at any time either party is in breach of any obligation (including those relating to payment) under these terms and conditions ("**the Breaching Party**") the other party may suspend or terminate the supply or purchase of Materials and/or Works to the other party, with immediate effect, by providing the Breaching Party with written notice. Neither party will be liable for any loss or damage the other party suffers because one of the parties has exercised its rights under this clause.
- 19.2 If TMF, due to reasons beyond TMF's reasonable control, is unable to deliver any Materials and/or Works to the Customer, TMF may cancel any Contract to which these terms and conditions apply or cancel delivery of Materials and/or Works at any time before the Materials and/or Works are delivered by giving written notice to the Customer. On giving such notice TMF shall repay to the Customer any money paid by the Customer for the Materials and/or Works. TMF shall not be liable for any loss or damage whatsoever arising from such cancellation.
- 19.3 The Customer may cancel delivery of the Materials and/or Works by written notice served within forty-eight (48) hours of placement of the order. If the Customer cancels delivery in accordance with this clause 19.3, the Customer will not be liable for the payment of any costs of TMF, except where a deposit is payable in accordance with clause 6.4.
- 19.4 However, cancellation of orders for products made to the Customer's specifications, or for non-stocklist items, will definitely not be accepted once production has commenced, or an order has been placed.

**20. Privacy Policy**

- 20.1 All emails, documents, images or other recorded information held or used by TMF is Personal Information, as defined and referred to in clause 20.3, and therefore considered Confidential Information. TMF acknowledges its obligation in relation to the handling, use, disclosure and processing of Personal Information pursuant to the Privacy Act 1988 ("the Act") including the Part IIIC of the Act being Privacy Amendment (Notifiable Data Breaches) Act 2017 (NDB) and any statutory requirements, where relevant in a European Economic Area ("EEA"), under the EU Data Privacy Laws (including the General Data Protection Regulation "GDPR") (collectively, "EU Data Privacy Laws"). TMF acknowledges that in the event it becomes aware of any data breaches and/or disclosure of the Customer's Personal Information, held by TMF that may result in serious harm to the Customer, TMF will notify the Customer in accordance with the Act and/or the GDPR. Any release of such Personal Information must be in accordance with the Act and the GDPR (where relevant) and must be approved by the Customer by written consent, unless subject to an operation of law.
- 20.2 Notwithstanding clause 20.1, privacy limitations will extend to TMF in respect of Cookies where the Customer utilises TMF's website to make enquiries. TMF agrees to display reference to such Cookies and/or similar tracking technologies, such as pixels and web beacons (if applicable), such technology allows the collection of Personal Information such as the Customer's:
- (a) IP address, browser, email client type and other similar details;
  - (b) tracking website usage and traffic; and
  - (c) reports are available to TMF when TMF sends an email to the Customer, so TMF may collect and review that information ("collectively Personal Information").

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**TMF Engineering Pty Ltd T/A TMF Engineering Solutions – Terms & Conditions of Trade**

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- If the Customer consents to TMF's use of Cookies on TMF's website and later wishes to withdraw that consent, the Customer may manage and control TMF's privacy controls via the Customer's web browser, including removing Cookies by deleting them from the browser history when exiting the site.
- 20.3 The Customer agrees for TMF to obtain from a credit reporting body (CRB) a credit report containing personal credit information (e.g. name, address, D.O.B, occupation, driver's license details, electronic contact (email, Facebook or Twitter details), medical insurance details or next of kin and other contact information (where applicable), previous credit applications, credit history) about the Customer in relation to credit provided by TMF.
- 20.4 The Customer agrees that TMF may exchange information about the Customer with those credit providers and with related body corporates for the following purposes:
- (a) to assess an application by the Customer; and/or
  - (b) to notify other credit providers of a default by the Customer; and/or
  - (c) to exchange information with other credit providers as to the status of this credit account, where the Customer is in default with other credit providers; and/or
  - (d) to assess the creditworthiness of the Customer including the Customer's repayment history in the preceding two (2) years.
- 20.5 The Customer consents to TMF being given a consumer credit report to collect personal credit information relating to any overdue payment on commercial credit.
- 20.6 The Customer agrees that personal credit information provided may be used and retained by TMF for the following purposes (and for other agreed purposes or required by):
- (a) the provision of Works; and/or
  - (b) analysing, verifying and/or checking the Customer's credit, payment and/or status in relation to the provision of Works; and/or
  - (c) processing of any payment instructions, direct debit facilities and/or credit facilities requested by the Customer; and/or
  - (d) enabling the collection of amounts outstanding in relation to the Works.
- 20.7 TMF may give information about the Customer to a CRB for the following purposes:
- (a) to obtain a consumer credit report; and/or
  - (b) allow the CRB to create or maintain a credit information file about the Customer including credit history.
- 20.8 The information given to the CRB may include:
- (a) Personal Information as outlined in 20.3 above;
  - (b) name of the credit provider and that TMF is a current credit provider to the Customer;
  - (c) whether the credit provider is a licensee;
  - (d) type of consumer credit;
  - (e) details concerning the Customer'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 (provided TMF is a member of an approved OAIC External Disputes Resolution Scheme), 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 Customer no longer has any overdue accounts and TMF has been paid or otherwise discharged and all details surrounding that discharge(e.g. dates of payments);
  - (g) information that, in the opinion of TMF, the Customer has committed a serious credit infringement; and/or
  - (h) advice that the amount of the Customer's overdue payment is equal to or more than one hundred and fifty dollars (\$150).
- 20.9 The Customer shall have the right to request (by e-mail) from TMF:
- (a) a copy of the Personal Information about the Customer retained by TMF and the right to request that TMF correct any incorrect Personal Information; and
  - (b) that TMF does not disclose any Personal Information about the Customer for the purpose of direct marketing.
- 20.10 TMF will destroy Personal Information upon the Customer's request (by e-mail) or if it is no longer required unless it is required in order to fulfil the obligations of this Contract or is required to be maintained and/or stored in accordance with the law.
- 20.11 The Customer can make a privacy complaint by contacting TMF via e-mail. TMF 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 Customer is not satisfied with the resolution provided, the Customer can make a complaint to the Information Commissioner at [www.oaic.gov.au](http://www.oaic.gov.au).
- 21. Building and Construction Industry Security of Payment Act 2002**
- 21.1 At TMF's sole discretion, if there are any disputes or claims for unpaid Works and/or Materials then the provisions of the Building and Construction Industry Security of Payment Act 2002 may apply.
- 21.2 Nothing in this Contract 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.
- 22. Unpaid Seller's Rights**
- 22.1 Where the Customer has left any item with TMF for repair, modification, exchange or for TMF to perform any other service in relation to the item and TMF has not received or been tendered the whole of any monies owing to it by the Customer, TMF shall have, until all monies owing to TMF are paid:
- (a) a lien on the item; 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.
- 22.2 The lien of TMF shall continue despite the commencement of proceedings, or judgment for any monies owing to TMF having been obtained against the Customer.

**23. Service of Notices**

- 23.1 Any written notice given under this Contract shall be deemed to have been given and received:
- (a) by handing the notice to the other party, in person;
  - (b) by leaving it at the address of the other party as stated in this Contract;
  - (c) by sending it by registered post to the address of the other party as stated in this Contract;
  - (d) if sent by facsimile transmission to the fax number of the other party as stated in this Contract (if any), on receipt of confirmation of the transmission; or
  - (e) if sent by email to the other party's last known email address.
- 23.2 Any notice that is posted shall be deemed to have been served, unless the contrary is shown, at the time when by the ordinary course of post, the notice would have been delivered.

**24. Trusts**

- 24.1 If the Customer at any time upon or subsequent to entering in to the Contract is acting in the capacity of trustee of any trust or as an agent for a trust ("Trust") then whether or not TMF may have notice of the Trust, the Customer covenants with TMF as follows:
- (a) the Contract extends to all rights of indemnity which the Customer now or subsequently may have against the Trust, the trustees and the trust fund;
  - (b) the Customer has full and complete power and authority under the Trust or from the Trustees of the Trust as the case may be to enter into the Contract and the provisions of the Trust do not purport to exclude or take away the right of indemnity of the Customer against the Trust, the trustees and the trust fund. The Customer will not release the right of indemnity or commit any breach of trust or be a party to any other action which might prejudice that right of indemnity;
  - (c) the Customer will not during the term of the Contract without consent in writing of TMF (TMF will not unreasonably withhold consent), cause, permit, or suffer to happen any of the following events:
    - (i) the removal, replacement or retirement of the Customer as trustee of the Trust;
    - (ii) any alteration to or variation of the terms of the Trust;
    - (iii) any advancement or distribution of capital of the Trust; or
    - (iv) any resettlement of the trust fund or trust property.

**25. General**

- 25.1 Any dispute or difference arising as to the interpretation of these terms and conditions or as to any matter arising herein, shall be submitted to, and settled by, mediation before resorting to any external dispute resolution mechanisms (including arbitration or court proceedings) by notifying the other party in writing setting out the reason for the dispute. The parties shall share equally the mediator's fees. Should mediation fail to resolve the dispute, the parties shall be free to pursue other dispute resolution avenues.
- 25.2 The failure by either party to enforce any provision of these terms and conditions shall not be treated as a waiver of that provision, nor shall it affect that party's right to subsequently enforce that provision. If any provision of these terms and conditions shall be invalid, void, illegal or unenforceable, that provision shall be severed from this Contract, and the validity, existence, legality and enforceability of the remaining provisions shall not be affected, prejudiced or impaired.
- 25.3 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 Shepparton Court in that state. These terms prevail over all terms and conditions of the Customer (even if they form part of the Customer's purchase order).
- 25.4 TMF may licence and/or assign all or any part of its rights and/or obligations under this Contract without the Customer's consent provided the assignment does not cause detriment to the Customer.
- 25.5 The Customer cannot licence or assign without the written approval of TMF.
- 25.6 TMF may elect to subcontract out any part of the Works but shall not be relieved from any liability or obligation under this Contract by so doing. Furthermore, the Customer agrees and understands that they have no authority to give any instruction to any of TMF's sub-contractors without the authority of TMF.
- 25.7 The Customer agrees that TMF may amend their general terms and conditions for subsequent future Contracts with the Customer by disclosing such to the Customer in writing. These changes shall be deemed to take effect from the date on which the Customer accepts such changes, or otherwise at such time as the Customer makes a further request for TMF to provide Works to the Customer.
- 25.8 Neither party shall be liable for any default due to any act of God, war, terrorism, strike, lock-out, industrial action, fire, flood, storm, national or global pandemics and/or the implementation of regulation, directions, rules or measures being enforced by Governments or embargo, including but not limited to, any Government imposed border lockdowns (including, worldwide destination ports), etc, ("Force Majeure") or other event beyond the reasonable control of either party. This clause does not apply to a failure by the Customer to make a payment to TMF, once the parties agree that the Force Majeure event has ceased.
- 25.9 Both parties warrant that they have the power to enter into this Contract and have obtained all necessary authorisations to allow them to do so, they are not insolvent and that this Contract creates binding and valid legal obligations on them.
- 25.10 The rights and obligations of the parties will not merge on completion of any transaction under this Contract, and they will survive the execution and delivery of any assignment or other document entered, for the purpose of, implementing any transaction under this Contract.
- 25.11 If part or all of any term of this Contract is or becomes invalid, illegal or unenforceable, it shall be severed from this Contract and shall not affect the validity and enforceability of the remaining terms of this Contract.