

# Terms and Conditions Trade

## 1. Offer and Acceptance

- 1.1 The Trader offers to the Consumer its Goods and/or Services in accordance with these Terms and Conditions of Trade.
- 1.2 The Consumer is deemed to have accepted and will be immediately bound, both jointly and/or severally, to these Terms and Conditions of Trade if the Consumer places an order for, or otherwise accepts, delivery of the Goods and/or Services.
- 1.3 These Terms and Conditions of Trade constitute the entire agreement between the Consumer and Trader regarding the Goods and/or Services and no prior guarantees, warranties or representations have been made in respect of the Goods and/or Services. Where this may be inconsistent, these Terms and Conditions of Trade supersede all prior guarantees, warranties or representations.

## 2. Definitions

- 2.1 **Consumer** means the entity or person purchasing the Goods and/or Services as specified in the documents, an order and/or the invoice given by the Trader to the Consumer and if more than one Consumer, it is a reference to each jointly and severally. Reference to Consumer is not taken to be a "consumer" as defined under the CCA.
- 2.2 **CCA** means the *Competition and Consumer Act 2010* as amended from time to time.
- 2.3 **Claim** means and loss, damage, cost, expense, charge, claim, demand, debt, interest, refund, replacement, repair whether direct and/or indirect or consequential (including in respect of loss of profit) or otherwise.
- 2.4 **Goods** means all the merchandise supplied by the Trader to the Consumer from time to time.
- 2.5 **Personal Information** means any information that may be disclosed in accordance with the *Privacy Act 1988* (and as amended from time to time) including, but not limited to personal particulars (name, sex, address, previous address, date of birth, driver's licence number, gender or otherwise), details of any application for credit or continuing provision of credit to the Consumer from the Trader, information relating to any overdue accounts or default under these Terms and Conditions of Trade, information relating to any refusal, failure or neglect to meet any obligation under these Terms and Conditions of Trade and any dishonor of payment of the Price when due, owing and payable to the Trader from the Consumer.
- 2.6 **Services** means the services in which the Trader provides to the Consumer from time to time and includes, where applicable, transportation of the Goods and installation of the Goods.
- 2.7 **Trader** means Jelecka Enterprises Pty Ltd T/A Kelwin Coastal Carpets & Antiba Tiles, its successors and assigns or any person acting on behalf of, and with the authority of, the Trader.
- 2.8 **Price** means the amount payable for the Good and/or Services as agreed between the Trader and Consumer as set out in these Terms and Conditions of Trade.
- 2.9 **PPSA** means the *Personal Properties Securities Act 2009* (and as amended from time to time).
- 2.10 **PPSR** means the Personal Properties Security Register.
- 2.11 **Website** means the website address maintained by the Trader on the world wide web with the website address and style [www.kelwincoastalcarpets.com.au](http://www.kelwincoastalcarpets.com.au).
- 2.12 **Worksite** means the location where the Consumer has requested the Trader to perform the Services.

## 2.13 In interpreting these Terms and Conditions of Trade:

- (a) an undefined word is taken to have its broadest possible meaning;
- (b) a provision or part is to be interpreted in a way that would best achieve the purpose or object (whether that purpose or object is expressly stated) which is to be preferred to any other interpretation; and
- (c) any reference to a word includes the plural and vis-à-vis.

## 3. Change of Ownership and Retention of Title

### 3.1 The Consumer must:

- (a) not attempt to change the nature of the ownership of the Goods if the Price has not been paid in full; and
- (b) notify the Trader of any change of name, address or other contact details including telephone number within a reasonable time of the change.

### 3.2 Ownership of the Goods shall not pass unless and until:

- (a) the Consumer has paid the whole of the Price to the Trader for the Goods and/or Services; and
- (b) the Consumer has met all its other obligations to the Trader in accordance with these Terms and Conditions of Trade.

### 3.3 Unless and until ownership of the Goods passes to the Consumer in accordance with clause 3.2 of these Terms and Conditions of Trade, then the Consumer:

- (a) will be a bailee of the Goods and must return them to the Trader upon written demand. In that respect, if the Consumer has paid a proportion of the Price, the Trader is entitled to refund the Consumer in its sole discretion and election, in which case the Consumer accepts that such refund is in full and final settlement of any Claim;
- (b) beneficially holds any insurance policies over the Goods in the name of the Trader up to, and including, the whole of the Price and ownership passes to the Consumer;
- (c) must not use, destroy, sell, dispose, or otherwise deal with the Goods in any way, other than as agreed by the Trader in writing; and
- (d) irrevocably authorises and permits the Trader to enter any premises where the Goods are kept and recover possession of the Goods, which is taken to also include recovering Goods in transit, whether delivered or not.

## 4. Price, Variation, Payment, Privacy and Credit Reporting

### 4.1 The Price of the Goods and/or Services is:

- (a) as agreed between the Consumer and Trader as set out in writing or by way of quote; or alternatively
- (b) as otherwise indicated on any invoice provided from the Trader to the Consumer from time to time.

### 4.2 From time to time, the Trader may, in its absolute discretion, require the Consumer to pay a deposit for the Goods and/or Services. The deposit paid in accordance with this clause is non-refundable in the event of the Consumer changing its mind.

### 4.3 The Consumer must not vary the Goods and/or Services in any way, shape or form and/or unless in accordance with the written consent of the Trader.

### 4.4 The Trader reserves the right to change the Price in the event of the Consumer requiring variation to the Goods and/or Services

or in the event of a latent or patent defect or discovery or change in weather which otherwise affects the appropriateness of the Goods (including materials used) or amount of time the Trader spends providing Services (including labour).

4.5 Any variation or change to the Price as a result of this clause 4 must be paid by the Consumer to Trader in accordance with clause 4.6.

4.6 The Consumer must pay to the Trader the Price (and any additions to the Price or corresponding proportion of the Price if delivered in parts, pieces, or separate instalments) in accordance with the date/s or time/s as determine by the Trader, which is the earlier of:

- (a) delivery of the Goods; or
- (b) delivery of the Services; or
- (c) the time specified in any invoice given by the Trader; or the later of
- (d) the time or date/s otherwise specified by the Trader in writing.

4.7 Payment of the Price by the Consumer to the Trader may be made by cash, cheque, electronic funds transfer, credit card (plus a surcharge of up to two (2) and a half (1/2) percent (%) of the Price) or by any other method set out by the Trader in writing.

4.8 Unless otherwise specified, the Price is not taken to include Goods and Services Tax (GST) or any other tax as set out in applicable Australian legislation from time to time.

4.9 Where GST or any other tax is not specified, it is in addition to the Price and must be paid by the Consumer to the Trader pursuant to the time and date requirements set out in clause 4.6 of these Terms and Conditions of Trade.

4.10 The Consumer acknowledges and accepts the Trader's Privacy Policy contained on its Website is expressly incorporated into these Terms and Conditions of Trade by operation of this clause.

4.11 The Consumer agrees that the Trader may, in its absolute discretion, obtain, retain, share, provide, disclose or exchange its Personal Information with any credit provider or other third party for the purposes of;

- (a) obtaining a credit report on the Consumer;
- (b) determining the Consumer's ability to meets its obligations under these Terms and Conditions of Trade;
- (c) determining the creditworthiness of the Consumer;
- (d) accessing any application made by the Consumer from time to time;
- (e) notifying a credit provider of default by the Consumer under these Terms and Conditions of Trade; and/or
- (f) any reasons contained within its Privacy Policy.

4.12 The Trader may, in its absolute discretion, accept or refuse any credit to the Consumer based on any Personal Information being collected from time to time without being required to give reasons.

## 5. Delivery of Goods and Completion of Services

5.1 The Consumer is responsible and must arrange:

- (a) to personally collect the Goods at the Trader's nominated business address from time to time; or
- (b) for the Goods to be collected by the Consumer's nominated carrier service.

5.2 Upon request of the Consumer, the Trader may arrange for

the Goods to be delivered by the Trader or its nominated carrier service, which will be at the Consumer's expense and if not included or specified in the Price, shall be in addition to it and payable in accordance with clause 4.6 of these Terms and Conditions of Trade.

5.3 Delivery of the Goods is deemed to occur upon:

- (a) The Consumer or its nominated carrier service taking possession of the Goods at the Trader's nominated business address; or alternatively
- (b) The Trader or its nominated carrier service delivering the Goods to the Consumer's nominated address and in accordance with any special instruction, irrespective of the Consumer being physically present or not.

5.4 Completion of the Services is deemed to occur upon practical completion (the date the Trader deems the Services is complete), save and except for minor omissions or defects, which will not (and the rectification of which will not) prevent or impair the normal or ordinary use of the Goods.

5.5 If the Goods or Services is delivered in part, pieces, or separate instalments, then that part, piece, or separate instalment is:

- (a) deemed to be a separate and distinct delivery/completion; and
- (b) payable in accordance with clause 4.6 at its corresponding value as set out by the Trader from time to time in accordance with clause 4.1.

## 6. General Risks and Insurance

6.1 The risk of loss or damage to the Goods and/or Services passes to the Consumer upon delivery.

6.2 The Consumer must:

- (a) Obtain public liability insurance for the Worksite for not less than \$20,000,000.00 until such time that the Trader or its agents have substantially completed any Services pursuant to clause 5.4;
- (b) obtain insurance for the Goods on or before delivery up to an including the date that the Price is paid; and
- (a) notify the Trader of any Claim made to its insurer for loss or damage to the Goods; and
- (b) ensure that the Trader is listed on any such insurance policy as an interested party with a vested interest.

6.3 In the event of loss or damage to the Goods following delivery but prior to ownership passing to the Consumer or the Price being paid in accordance with clause 4.6, the Trader is entitled to receive all insurance proceeds payable for the Goods. In that respect, the Consumer irrevocably consents:

- (a) to its insurer communicating with, and providing any and all Personal Information to, the Trader; and
- (b) paying directly to the Trader's nominated banking institution the component of insurance that relates to the Goods and/or Services and hereby indemnifies its insurer in doing so from any Claim in doing so.

6.4 Production of these Terms and Conditions of Trade to the Consumer's insurer is deemed to be sufficient evidence of the Trader's right to receive the insurance proceeds without the need of further consent by the Consumer.

6.5 If the Consumer requests the Trader to leave Goods at a location which is unattended or otherwise outside, then it is at the Consumer's sole risk and responsibility (that is, the consumer voluntarily accepts the risk of loss or damage).

## 7. Tile Risks

- 7.1 The Consumer acknowledges and accepts:
- (a) that variations do occur with colour, shade and grain in respect of tiles and are generally inherent in all kiln fired products and natural stone;
  - (b) that whilst effort is taken by the Trader to match colour, shade, or grain of products, it is not always possible;
  - (c) that there may be difference between the colour, shade, or grain of sample tiles and the Goods supplied;
  - (d) there is no guarantee that tiles will not crack, chip or scratch with ordinary use and with fair wear and tear; and
  - (e) it has been given a copy of the manufacturer's product guide for the tile in which it is purchasing, which is incorporated into these Terms and Conditions of Trade by reference, and that it understands the nature and effect of the document, including in relation to its general aesthetics, specifications, appropriateness and risks.

7.2 The Consumer acknowledges that it must:

- (a) check quantities and the accuracy of on-site measurements before fixing tiles; and
- (b) provide accurate measurements and plans to the Trader.

7.3 The Consumer indemnifies the Trader from all Claims arising out of, or incidental to:

- (a) ordering insufficient tiles which requires a further order, which results in different variations of colour, shade, or grain or otherwise cannot be supplied at all;
- (b) the Consumer affixing tiles with an insufficient number to complete the intended works; and
- (c) the risks identified in clause 7.1 and 7.2 or its failure to understand the nature and effect of the manufacturer's product guide.

## 8. Carpet Risks

8.1 The Client acknowledges and accepts:

- (a) that variations do occur with colour (dye) and shade in respect of carpet and are generally inherent between different batches of products and/or between sale samples and the Goods being supplied;
- (b) there is no guarantee to produce perfectly uniform patterned products and/or products that will match perfectly when installed;
- (c) the installation process for carpet may require seams and cross-joins and the appearance of these may be affected by fair wear and tear, light source and the construction process in relation to the Goods; and
- (d) it has been given a copy of the manufacturer's product guide for the carpet in which it is purchasing, which is incorporated into these Terms and Conditions of Trade by reference, and that it understands the nature and effect of the document, including in relation to its general aesthetics, specifications, appropriateness and risks.

8.2 The Consumer acknowledges that it must:

- (a) check quantities and the accuracy of on-site measurements before fixing carpet; and
- (b) provide accurate measurements and/or plans to the Trader.

8.3 The Consumer indemnifies the Trader from all Claims arising

from, or incidental to:

- (a) ordering insufficient carpet which requires a further order, which results in different variations of colour (dye) or shade or otherwise cannot be supplied at all;
- (b) the Consumer affixing carpet with an insufficient amount to complete the intended works; and
- (c) the risks identified in clause 8.1 and 8.2 or its failure to understand the nature and effect of the manufacturer's product guide.

## 9. Timber Risks

9.1 The Client acknowledges and accepts that timber is a natural product and:

- (a) may exhibit variations in texture, shade, colour, surface, finish, markings, veining, and contain natural fissures, occlusions, and indentations;
- (b) that whilst effort is taken by the Trader to match texture, shade, colour, surface, finish, markings, veining, and contain natural fissures, occlusions, and indentations, it is not always possible;
- (c) there may be differences between the sample Goods and the Goods supplied;
- (d) is a hygroscopic material subject to expansion and contraction and it is the obligation of the Consumer to check manufacturer guidelines and specifications;
- (e) may fade or change colour over time, expand, contract or distort as a result of exposure to different weather conditions, mark or stain if exposed to certain substances and be damaged or disfigured by impact or scratching; and
- (f) it has been given a copy of the manufacturer's product guide for the timber in which it is purchasing, which is incorporated into these Terms and Conditions of Trade by reference, and that it understands the nature and effect of the document, including in relation to its general aesthetics, specifications, appropriateness and risks.

9.2 The Consumer indemnifies the Trader from all Claims arising from, or incidental to:

- (a) ordering insufficient timber which requires a further order, which results in different variations of texture, shade, colour, surface, finish, markings, veining, and contain natural fissures, occlusions, and indentations or otherwise cannot be supplied at all;
- (b) the Consumer affixing timber with an insufficient amount to complete the intended works; and
- (c) the risks identified in clause 9.1 or its failure to understand the nature and effect of the manufacturer's product guide.

## 10. Flooring Risks and Other Exclusions / Risks

10.1 The Consumer acknowledges and accepts that the Trader will not accept liability for any loss or damage caused to the Consumer arising out of, or incidental to:

- (a) micromovements caused as a consequence of air-conditioning, heating, large expanses of glass windows, curtains, blinds or anything outside what would be considered the ordinary use for the Goods;
- (b) contamination or discoloration caused during or after installation of flooring by natural contaminants including dust, hair, sand, dirt, or any other natural product;
- (c) minor marks or imperfections in floor finishing which can only be ascertained by crouching or kneeling and which do

not otherwise affect the ordinary or intended use of the flooring, such minor marks or imperfections of which are not to be considered minor or major defects;

- (d) riot, war, invasion, act of foreign enemies, hostilities (whether war be declared or not) acts of terrorism, civil war, rebellion, revolution, insurrection of military or usurped power, requisition or compulsory acquisition by any governmental or competent authority;
- (e) ionising radiation or contamination, radio activity from any nuclear fuel or from any nuclear waste from the combustion of nuclear fuel, radioactive toxic explosive or other hazardous properties of any explosive assembly or nuclear component;
- (f) pressure waves caused by aircraft or other aerial devices travelling at sonic or supersonic speeds;
- (g) earthquakes, flood, fire or other physical natural disaster, but excluding weather conditions regardless of severity; and
- (h) any other event which could be considered *force majeure*.

10.2 The Trader is not insured to remove furniture or fittings or otherwise licensed to move gas or other electrical appliances and therefore is unable to do so.

## 11. Consumer Responsibilities

11.1 The Consumer must:

- (a) ensure all areas are clean, clear and free from objects or risks which could cause injury or death to enable scheduled Services to be completed;
- (b) do everything reasonably necessary to comply with the Trader's directions from time to time;
- (c) not access, or allow anyone else to access, or otherwise impede the Worksite during Services being undertaken by the Trader;
- (d) remove all existing floor coverings, tacks and staples;
- (e) disclose all pertinent information which could affect the Trader from undertaking the Services, including, but not limited to, disclosing breaks, tears in the membrane, extensions of existing slabs, thickened beams, curing compounds which may have been used from time to time, the use of concrete over 25 mpa, risks that could otherwise cause injury or death;
- (f) ensure the sub-floor is adequately ventilated and is structurally sound;
- (g) ensure that all floors are level to prevent unevenness, gaps or otherwise;
- (h) remove all personal effects and/or furnishings from the Worksite which could be readily broken including glassware, crockery, pot plants, furniture and other ornaments;
- (i) place sufficient dustsheets over all personal effects and/or furnishings as are necessary to protect the Consumers personal and/or real property from dust, debris, crumbling, flaking or otherwise which may occur during the Services being performed or Goods being delivered;
- (j) extinguish any flames during the Services being performed by the Trader, including in relation to stoves, candles, heaters, pilot lights and so on;
- (k) supply sufficient power within 8 meters of the Worksite;
- (l) provide adequate lighting at the Worksite to ensure that the

Services can be undertaken properly, diligently and sufficiently;

- (m) ensure adequate access to the Worksite on any agreed date and time;
- (n) not interrupt, hinder or impede in any way the Trader from performing the Services from time to time;
- (o) Co-operate with the Trader's workers or subcontractor on the Worksite;
- (p) ensure that the Worksite is safe for the Trader or any of its workers or subcontractor to be on the Worksite;
- (q) not hinder the Trader or any of its workers on the Worksite from performing their obligations under these Terms and Conditions of Trade;
- (r) ensure any drawings, preliminary design specifications and instructions are accurate, appropriate and adequate;
- (s) provide the Trader with any documents or information within a reasonable time which is reasonably necessary for the execution of the Services and which the Trader may request in writing from time to time;
- (t) ensure that any representative on behalf of the Consumer has the authority to act on its behalf with all matters pertaining to these Terms and Conditions of Trade;
- (u) take and maintain for any warranty-period photographs of the Worksite and/or Goods before and after commencement of any Services or delivery of any Goods.

## 12. Access to the Worksite and Hidden Amenities

- 12.1 The Consumer must ensure that the Trader and its workers are provided free and unencumbered access to the Worksite at all times for the purposes of the Services being performed by the Trader from time to time.
- 12.2 Prior to the Supplier commencing any work, the Consumer must locate, identify and advise the Trader of the precise location of any hidden amenities such as electrical points or connections, gas hoses or connections, sewerage pipes or connections, piping of whatsoever kind, mains, irrigation pipes, telephone cables, optic cables, cables connected to power or anything else which may affect the Trader undertaking the Services or could otherwise cause injury or death to the Trader or its workers.

## 13. PPSA

- 13.1 Any reference to a word in this section which is defined in the PPSA has the corresponding meaning given under the PPSA.
- 13.2 The Consumer agrees that these Terms and Conditions of Trade constitute a Security Agreement under the PPSA and creates a security interest in all the Goods which have been, or are yet to be, supplied to the Consumer from the Trader.
- 13.3 The Consumer undertakes to:
- (a) sign all necessary documents or things to give effect to:
    - (i) the registration of a Financing Statement or Financing Change Statement in respect of, or incidental to, a security interest under the PPSA;
    - (ii) register any other document which may be required from time to time so as to register it under the PPSA; and
    - (iii) a correction or defect in any document or things under the preceding sub-clauses.
  - (b) indemnify now and into the future the Trader in connection with, or arising out of, the Trader being required to register



any Financing Statement or Financial Change Statement on the PPSR including any releases required to be made in respect of the Goods which may be charged from time to time;

- (c) not register any security interest or other statement or charge over the Goods at any time without the prior written consent of the Trader; and
- (d) advise the Trader within 24 hours of any act or omission which could otherwise affect or result in a change to the character or nature of ownership of the Goods.

13.4 The Consumer agrees:

- (a) that section 96, 115 and 125 of the PPSA do not apply to this Security Agreement;
- (b) to waive all its rights that can be waived under the PPSA including under s 95, 118, 121(4), 130, 132(d) and 132(4), 142, 143, 157 and to unconditionally ratify any actions of the Trader under this Security Agreement;

13.5 Unless otherwise permitted by the PPSA, nothing in this Security Agreement is intended to have the effect of attempting to contract out of any provision of the PPSA and where this has unintentionally occurred, the severance provision of these Terms and Conditions of Trade applies.

#### 14. Appointment of Attorney

14.1 In consideration of the Trader supplying to the Consumer the Goods and/or Services, the Consumer hereby irrevocably agrees as follows:

- (a) to appoint the Trader to be his/her/its attorney and agent (whether jointly or severally) and on his/her/its behalf to execute sign and do all, and any, such instruments and things and generally to use his/her/its name for the purpose of giving the Trader (or its authorised nominee) the full benefit of the provisions in this clause 14 and in such respects, these Terms and Conditions of Trade shall be sufficient and conclusive evidence of the power hereby conferred;

#### 15. Defects, Guarantees, Warranties, Representations, Repairs, Replacements and Returns

15.1 The CCA applies to these Terms and Conditions of Trade.

15.2 By operation of the CCA and applicable State law, the Goods and/or Services have implied guarantees and warranties, which are non-excludable and by reference are incorporated into these Terms and Conditions of Trade. Generally (and not intended to be exhaustive);

- (a) the Consumer may be entitled to a repair, replacement or refund in the event of the Goods and/or Services are defective;
- (b) if the Goods and/or Services has a minor defect, the Consumer must accept a repair if offered by the Trader;
- (c) if the Goods and/or Services has a major defect, the Consumer is entitled to ask for a replacement or refund from the Trader.

15.3 Broadly, the Consumer:

- (a) must inspect the Goods and/or Services upon delivery or completion as the case may be;
- (b) must within three (3) business days of delivery of the Goods or completion of the Services, notify the Trader in writing of any patent defect, damage or other issue or failure;
- (c) must within a reasonable time notify the Trader in writing

of any latent defect, damage or other issue or failure in respect of the Goods and/or Services;

- (d) must maintain the Goods and follow all instructions in respect of the Goods in accordance with manufacturer guidelines;
- (e) must only use the Goods for their intended purpose in accordance with manufacturer guidelines;
- (f) must not continue to use the Goods where a latent or patent defect is discovered;
- (g) must allow the Trader to inspect the goods within a reasonable time to ascertain and obtain evidence of any latent or patent defect;
- (h) accepts that the Goods and/or Services are fit for their intended use;
- (i) accepts and understands that the Trader has not made any prior guarantees, warranties or other representations of whatsoever kind in respect of the Goods and/or Services including pertaining to the quality, suitability or otherwise and that by operation of this clause, the Trader's liability is limited to the extent that is permissible by operation of the law in respect of any allegation otherwise;
- (j) consents and accepts a refund if there is a major defect and the Goods cannot be reasonably replaced by the Trader.

15.4 If the Consumer:

- (a) can be properly defined as a "consumer" under the CCA then the Trader's liability is limited to the fullest extent permitted by s 64A of Schedule 2 of the CCA;
- (b) cannot be properly defined as a "consumer" pursuant to the CCA then the Trader's liability is:
  - (i) limited to the value of the Goods and/or Services and any express warranty as provided by the Trader; or
  - (ii) limited to the manufacturer's warranty; or
  - (iii) negated to the fullest extent permissible by operation of law.

15.5 In the event:

- (a) the Consumer refuses, fails or neglects to comply with, or perform, its obligations under this clause 15, the Trader will not be liable for any Claim;
- (b) the Goods are not defective, the Trader may in its absolute discretion, and at the expense of the Consumer, accept or refuse a return and/or refund; and
- (c) the Trader is required to repair, replace or refund the Goods and/or Services then the Trader is only required to do so to the extent as is required by law.

#### 16. Default of Payment of the Price and Cancellation

16.1 In the event of default of payment of the Price for the Goods and/or Services as required by these Terms and Conditions of Trade then:

- (a) the Trader is entitled to liquidated damages as a debt due, owing and payable to the Trader on and from the date the cause of action arises until such time that payment of the Price is made in full; and
- (b) interest shall accrue daily on any amount due, owing and payable to the Trader from the date the cause of action arises until such day that full payment or judgment is given (whichever occurs first) at a rate of two (2) per cent (%) per

calendar month.

16.2 Without prejudice to any other remedy of the Trader, in the event the Consumer is in breach of any provision of these Terms and Conditions of Trade (including any failure in respect of payment of the Price), becomes insolvent, bankrupt or goes into administration or liquidation or otherwise enters into an arrangement with creditors then the Trader may:

- (a) terminate all agreements between the Consumer and Trader, including these Terms and Conditions of Trade;
- (b) suspend or terminate the supply of Goods and/or Services irrespective of any remedy, including part-performance.

## 17. Guarantee, Indemnity and Security

17.1 The Consumer:

- (a) and its director(s) and partner(s) as the case may be hereby guarantees the performance of these Terms and Conditions of Trade (jointly and severally);
- (b) hereby indemnifies the Trader against:
  - (i) any Claim in relation to personal or real property;
  - (ii) any Claim in relation to injury or death;
  - (iii) any Claim in respect of statutory or manufacturer's warranty;
  - (iv) breaching these Terms and Conditions of Trade;
  - (v) terminating these Terms and Conditions of Trade or any other agreement between the Consumer and Trader from time to time;
  - (vi) cancelling an order (whether in whole or part) for Goods and/or refusing to perform Services (whether substantially completed or not);

arising out of, in connection with, or incidental to, the Consumer refusing, failing or neglecting to comply with, or perform, its obligations under these Terms and Conditions of Trade.

- (c) and its director(s) and partner(s) hereby jointly and severally charge in favour of the Trader all right, title and interest over their assets, land, realty, the Goods or otherwise and hereby authorise the Trader to lodge a mortgage or caveat over those assets to secure payment of the Price or monies owing to the Trader from time to time under these Terms and Conditions of Trade. For such purpose, the Consumer and its director(s) and partner(s) agree to execute any necessary documents which are required to perform the security granted herein.

## 18. General Matters

18.1 Any guarantee and indemnity under these Terms and Conditions of Trade may be enforced against any Consumer or any director or partner of the Consumer without the Trader first taking action against any one of them, or pursuing any other available recourse, and may be enforced despite any neglect or omission to enforce any rights against the Consumer, or if any of the agreements between the Consumer and Trader are wholly or partially unenforceable, or if the Consumer goes into administration, liquidation or is otherwise becomes personally insolvent or bankrupt.

18.2 If any part or provision of these Terms and Conditions of Trade are invalid, void, illegal or unenforceable then that part or provision shall be severed without affecting, impacting or otherwise impairing any other provision to these Terms and Conditions of Trade.

18.3 If the Consumer raises a dispute in respect of, or arising out of,

the Goods and/or Services or these Terms and Conditions of Trade, then the Consumer agrees:

- (a) to give the Trader a written notice stating the nature and details of the dispute within two (2) business days of the dispute arising;
- (b) to allow the Trader fourteen (14) business days to provide a written response to the written notice under clause 18.3(a); and
- (c) to refer the matter to a mediator of the Trader's choice within fourteen (14) days of the written response under clause 18.3(b) if the Consumer does not accept or agree with the the written response from the Trader;

before first commencing any legal proceeding against the Trader. Further, nothing in this clause is intended to be an obligation or to be binding on the Trader.

18.4 The Consumer is not entitled to:

- (a) set off against, or deduct, from the Price any monies alleged or claimed to be owing to the Consumer from the Trader for any reason, including as a result of a dispute arising between the parties to these Terms and Conditions of Trade; and
- (b) withhold payment of the Price because it, or part of it, is in dispute.

18.5 These Terms and Conditions of Trade are governed by the laws of the State of Queensland and the parties hereby submit to the non-exclusive jurisdiction of the Court and Tribunals of that State.

18.6 The Trader may engage a licensed entity or subcontractor to perform any of its obligations or Services without first being required to obtain the consent of the Consumer.

18.7 The Trader reserves the right to alter, change or amend these Terms and Conditions of Trade at any time, in which case the alternation, change or amendment shall take effect on, and from, the date the Consumer is notified. In that respect, the Consumer is deemed to have accepted such alternation, change or amendment if the Consumer continues to seek Goods and/or Services from the Trader from time to time.

18.8 The Consumer may not alter, change or amend these Terms and Conditions of Trade without the Trader's consent in writing.

18.9 Nothing in these Terms and Conditions of Trade create a relationship of employment, trust, agency, partnership or joint venture between the Consumer and Trader.

18.10 The Consumer warrants that it has the authority and power to enter these Terms and Conditions of Trade and that it is not an insolvent or in administration or otherwise contemplating insolvency or administration.

## 19. Execution

19.1 These Terms and Conditions of Trade are deemed executed by the Consumer and/or it's director(s) or partner(s) where:

- (a) an online order is placed through the Website;
- (b) the Reference Schedule is signed;
- (c) the Consumer has sought from the Trader Goods and/or Services from time to time.