

## Terms & Conditions

### 1. General

- (a) These Terms apply to all transactions between the Customer and the Company relating to the provision of Goods and Services, including all Orders, Quotes, contracts and variations.
- (b) Subject only to Clause (c), these Terms take precedence over any terms and conditions contained in any document of the Customer, or elsewhere, and shall prevail to the extent of any inconsistency.
- (c) The variation or waiver of a provision of these Terms or a party's consent to a departure from a provision by another party is ineffective unless in writing signed by the parties.
- (d) The Company may amend any details in a Quote by notice in writing to the Customer and such amendment supersedes any prior detail in an earlier Quote or dealings between the parties on and from that date.

### 2. Definitions and interpretation

#### 2.1 Definitions

**ACL** means the Australian Consumer Law as set out in Schedule 2 of the *Competition and Consumer Act* 2010 (Cth) and amended from time to time and includes, to the extent applicable, all subsidiary laws and regulations applicable thereunder and the provisions of the *Sale of Goods Act* 1895 (WA).

**Additional Charge** means:

- (e) fees or charges for additional work performed at the Customer's request or reasonably required as a result of the Customer's conduct, the condition of any Customer supplied goods, site or premises (including, for example, the presence of hazardous materials), or any other matters beyond Company's reasonable control, calculated in accordance with the Company's then current prices; and
- (f) expenses incurred by the Company, at the Customer's request or reasonably required as a result of the Customer's conduct.

**Business Day** means a day that is not a Saturday, Sunday or public holiday in the place where the Services are principally being carried out or the Goods provided.

**Customer** means the person identified on a Quote or Order as the customer and includes the Customer's agents and permitted assigns.

**Company** means Elcon Services Pty Ltd (ACN 612 176 379), licenced EC 12399, trading as EVCS Electric Vehicle Charging Solutions (ABN 65 867 858 595).

**Fault Report** means the written notice to be given to the Company in accordance with Clause 6.5 below.

**Goods** means any goods supplied by the Company including those supplied in the course of providing the Services.

**GST** means a tax imposed under the *A New Tax System (Goods and Services Tax) Act* 1999.

**GST Act** means the *A New Tax System (Goods and Services Tax) Act* 1999.

**IP Rights** means any intellectual property rights of any kind whatsoever whether protected by statute or common law, including but not limited to copyright, trademarks, patents and registered designs.

**Loss** means (without limitation) any increased cost or expenses, delay or liquidated damages, liability to pay costs (including any legal or recovery costs), penalties or damages (whether for personal injury, property loss, loss of use, or damage) whatsoever, arising out of or in connection with the Works and includes any suit, claim, demand or proceeding whatsoever brought or threatened in connection with same.

**Minimum Order Value** means the minimum amount of an order for Goods or Services which the Company will accept, as amended from time to time and is currently as determined on a case by case basis in the Company's absolute discretion.

**Order** means a purchase order or a work order for Goods or Services placed by a Customer in response to a Quote and as varied in writing from time to time by the parties or, at the Company's discretion, an instruction received from an authorised representative of the Customer whether by email or otherwise.

**PPS Law** means:

- (a) the *Personal Property Security Act 2009* (Cth) and any regulation made at any time under it (each as amended from time to time); and
- (b) any amendment made at any time to any other legislation as a consequence of a PPS Law.

**Price** means the cost of the Goods or Services as agreed between the Company and the Customer subject to Clause 5 of these Terms and any additional amount which is or becomes due or payable to the Company pursuant to these Terms.

**Quote** means a written description of the Goods and Services requested by the Customer and the Company's estimate of the Price and timeframe for the delivery to, or performance of, same to the Customer.

**Services** means the licenced electrical works or services to be provided by the Company to the Customer in accordance with a Quote and these Terms.

**Terms** means the terms and conditions set out herein together with those endorsed upon the relevant Quote as amended from time to time in the Company's absolute discretion, including any variations agreed to in writing by the parties.

**Works** means any works agreed to and conducted by the Company for the Customer, including but not limited to the provision of the Goods or the Services.

**Work Hours** means the Company's normal working hours as amended from time to time by notification upon its website and which are currently 6:00am through 5:00pm Monday through Friday (inclusive) with the exclusion of any day that is declared a public holiday in Western Australia.

## 2.2 Interpretation

In these terms and conditions, unless the context otherwise requires:

- (a) a reference to writing includes email;
- (b) the singular includes the plural and vice versa;
- (c) a reference to a Clause or paragraph is a reference to a clause or paragraph of these Terms including where relevant each sub-clause within it;
- (d) a reference to a party to these Terms or any other document or arrangement includes that party's executors, administrators, successors and permitted assigns;
- (e) where an expression is defined, another part of speech or grammatical form of that expression has a corresponding meaning;
- (f) headings are for ease of reference only and do not affect the meaning or interpretation of these Terms;
- (g) if the date on which any act, matter or thing is to be done falls on a day which is not a Business Day, that act, matter or thing:
  - (i) if it involves a payment other than a payment which is due on demand must be done on the preceding Business Day; and
  - (ii) in all other cases, must be done on the next Business Day.

## 3. Acceptance of Terms

### 3.1 Acceptance

Any instructions received by the Company from the Customer for the supply of Goods and/or Services and/or the Customer's acceptance of Goods and/or Services supplied by the Company shall constitute acceptance of these Terms. Should the Customer not understand anything stated in the Terms or wish to request any amendments thereto it must contact the Company without delay.

### **3.2 Customer Liability**

Where more than one Customer has entered into this agreement, the Customers shall be jointly and severally liable for all payments of the Price.

### **3.3 Irrevocable**

- (a) Upon acceptance by the Customer, these Terms are irrevocable and can only be rescinded in accordance with these Terms or the written consent of the managing director of the Company.
- (b) None of the Company's agents or representatives are authorised to make any representations, statements, conditions or agreements not expressed by the managing director of the Company in writing, nor is the Company bound by any such unauthorised statements.

### **3.4 Change of Details**

The Customer undertakes to give the Company not less than fourteen (14) days prior written notice of any proposed change in the Customer's name and/or any other change in the Customer's details (including but not limited to, changes in the Customer's physical or web address, email address, or business practice).

## **4. Scope of Works**

### **4.1 Quote**

With the exception of pre-existing Customer relationships, the Company will provide the Customer with a quote prior to the commencement of any Works, with such Quote to consist of the Company's estimate of:

- (a) the Works required by the Customer;
- (b) the timeframe in which the Company expects to be able to complete the Works; and
- (c) the Price.

### **4.2 Time Frame Estimate**

An indication in a Quote of the time frame for the provision of the Goods or Services is an estimate only and is not a fixed time frame. To the extent permitted by law, this estimate is not binding upon the Company.

### **4.3 Acceptance of Quote**

Following provision of a Quote to the Customer, the Company is not obliged to commence work until the Quote has been accepted by the Customer. This occurs by the Customer issuing a valid purchase order, instructions (verbal or written) for the Company to proceed from an authorised representative or completing an Order form and returning the form to the Company within thirty (30) days of the Customer receiving the Quote from the Company, or where an earlier period is stated in the Quote, within that earlier period.

### **4.4 Right to amend due to error or omission**

The Company reserves the right to amend a Quote at any time to rectify any errors or omission and will in such case notify the Customer of the revised Quotation as soon as practicable. The Customer shall be deemed to accept the Quote as amended unless written notice rejecting the amendment is provided to the Company within two (2) business days.

### **4.5 Right to amend due to increased costs**

The Company reserves the right to amend any Quote before the Order has been completed to take into account any rise or fall in the cost of completing the Quote or Order. The Company will notify the Customer of any amendment as soon as practicable, at which point the amended Quote will be the Quote for the purposes of the Terms. The Customer shall be deemed to accept the Quote as amended unless written notice rejecting the amendment is provided to the Company within two (2) business days.

### **4.6 Right to modify components or methods**

The Company reserves the right to substitute, modify or make amendments or alterations to the components of any Goods or the method or manner of performance of any Services it supplies to the Customer, provided that in each case, any such amended or modified Goods or Services shall not be materially different in terms of cost, function, or quality, from those contemplated in the Quote.

#### **4.7 Reasonable Expenses**

The Customer shall reimburse the Company for any additional expenses reasonably incurred by the Company as a consequence of performing the Works outside the Perth Metropolitan Area. Such expenses shall include but are not limited to travel, accommodation, meals, drinks, laundry, communications, delivery and transportation expenses.

#### **4.8 Ownership of goods removed during Works**

Where the Works contemplate removal of any property (such as existing goods or associated infrastructure including, but not limited to, wiring, fixtures, furniture or cabling), unless otherwise stated within the Quote, any and all property in those items shall pass to the Company upon removal and the Company shall be entitled to treat them as its own property and act in its absolute discretion, including by way of sale or disposal without any obligation to account to the Customer whatsoever.

#### **4.9 GST**

The Company and the Customer agree to comply with their obligations in relation to the GST Act and any other applicable legislation governing GST.

### **5. Delivery of Goods/Services**

#### **5.1 Delivery**

At the sole discretion of the Company, delivery of the goods shall take place when:

- (a) the Customer takes possession of the Goods at the Company's address; or
- (b) the Customer takes possession of the Goods at the Customer's nominated address; or
- (c) the Goods are delivered to a third party nominated by the Customer, which event shall be a deemed delivery to the Customer for the purposes of the Terms.

#### **5.2 Damage to Goods**

If any Goods are damaged, destroyed or stolen during or after delivery and prior to payment being received by the Company, the Company shall remain entitled to payment in full for those Goods and for any other monies owed to the Company subject only to the Terms.

#### **5.3 Unattended Premises**

If the Customer requests the Company to deliver goods to unattended premises or to an unattended location, they shall be left at the Customer's sole risk and liability.

#### **5.4 Delivery Date**

If a delivery date for delivery of Goods and/or Services is nominated, the Company shall take all reasonable steps to dispatch the Goods and/or Services on or about that date. However, the Company does not make any warranty or promise that the Goods and/or Services will be available on that date. In the event that the Company is unable to deliver the Goods and/or Services on that date, the Company will not be liable for any Loss, including any consequential loss, for failure or delay in delivery due to any cause whatsoever.

### **6. Acceptance of Goods & Services**

#### **6.1 Supply of Goods Only**

Where the Company is to supply Goods only without Services, acceptance of the Goods shall be deemed to occur when the Goods have been delivered to the Customer and then seven (7) consecutive days, including the date of delivery, have elapsed in which no valid Fault Report on the Goods has been received by the Company.

#### **6.2 Supply of Goods with Installation**

Except as otherwise specified below, where the Company is to supply Goods in conjunction with Services (including but not limited to installation, modification or customisation associated with Goods), acceptance of the Goods and Services shall be deemed to occur when the Services are completed and then seven (7) consecutive days, including the date of completion, have elapsed in which no valid Fault Report on the Goods or Services has been received by the Company.

#### **6.3 Acceptance of Services**

Acceptance of Services supplied by the Company shall occur when the Services are completed and then seven (7) consecutive days, including the date of completion, have elapsed in which no valid Fault Report on the Services has been received by the Company.

## 6.4 Loss or Damage of Goods

Notwithstanding the above terms, in the event Goods are lost or damaged after the risk of loss or damage has passed to the Customer but before acceptance has occurred by way of one of the above Terms, acceptance of the Goods shall be deemed to have occurred prior to the time of the loss or damage and, to the extent permitted by law, the Customer shall remain liable to pay the Company for them, subject only to the Terms.

## 6.5 Fault Reports

- (a) The Customer must make Fault Reports to the Company in certain circumstances.
- (b) Fault Reports must:
  - (i) refer to a failure or defect which has actually occurred or been detected (**Failure**);
  - (ii) be made to the Company within seven (7) days of the occurrence of the Failure;
  - (iii) be given in accordance with the requirements for notice under the Terms and must contain:
    - (1) the name of the Customer;
    - (2) the identity and location of the Goods or Services in which the Failure has occurred;
    - (3) the date of occurrence of the Failure;
    - (4) documentary evidence of the Failure such as copies of screen displays or printed reports;
    - (5) a description of the events leading up to the Failure; and
- (c) Fault Reports not made in accordance with this Term may be disregarded by the Company and will not delay Acceptance of any Goods and/or Services.

## 7. Defects & returns

### 7.1 Customer to Inspect Goods

The Customer shall inspect the Goods on delivery and shall within seven (7) days of delivery notify the Company of any alleged defect, shortage in quantity, damage or failure to comply with the description or Quote. The Customer shall afford the Company a reasonable opportunity to inspect the Goods within seven (7) days if the Customer believes the Goods are defective in any way. The parties agree that the period for notice contemplated by this Clause 7 is, in all of the circumstances, reasonable such that, the absence of notice by the Customer within that period shall be deemed acceptance that the Goods or Services have been delivered in accordance with the Terms, are free from any defect or damage and not otherwise deficient.

### 7.2 Defective Goods

For defective Goods, which the Company has agreed in writing that the Customer is entitled to reject, the Company's liability is limited to either (at the Company's discretion) replacing the Goods, supplying alternate Goods of the same value, or repairing the Goods as soon as reasonably practicable, provided that:

- (a) the Customer has complied with the provisions of Clause 7.1; and
- (b) the Goods are returned at the Customer's cost within seven (7) days of the Company's agreement, however, the Company will not under any circumstances be liable for Goods which the Customer has not stored or used in a proper manner.

### 7.3 Handling Fee

The Company may in its absolute discretion accept the return of any Goods for credit, but this may incur a handling fee of 20% of the value of the returned Goods plus any freight or third-party expenses incurred by the Company in relation to the Goods.

### 7.4 Special Orders

Any Goods made to special order, Customer specification, or non-catalogue items, are under no circumstances acceptable for credit or return. Cancellation of orders for special or non-catalogue items will not be accepted once these orders are in production.

## 8. Title and Risk

### 8.1 Risk in Goods

Risk in Goods passes to the Customer immediately upon delivery.

### 8.2 Title in Goods

- (a) Property and title in Goods supplied to the Customer under the Terms does not pass to the Customer until all money (including money owing in respect of other transactions between the Company and the Customer) due and payable to the Company by the Customer have been fully paid.



- (b) Where Goods are supplied by the Company to the Customer without payment in full, the Customer:
- (i) is a bailee of the Goods until property in them passes to the Customer;
  - (ii) irrevocably appoints the Company to be its attorney to do all acts and things necessary to ensure the retention of title to goods including the registration of any security interest in favor of the Company with respect to the Goods under applicable law;
  - (iii) must be able upon demand by the Company to separate and identify as belonging to the Company Goods supplied by the Company from other goods which are held by the Customer;
  - (iv) must not allow any person to have or acquire any security interest in the Goods;
  - (v) agrees that the Company may repossess the Goods if payment is not made within 60 days (or such longer time as the Company may, in its complete discretion, approve in writing) of the supply of the Goods; and
  - (vi) the Customer grants an irrevocable licence to the Company or its servants or agents to enter upon the Customer's premises in order to recover possession of the Goods pursuant to this paragraph. The Customer indemnifies the Company for and against any liability whatsoever for damage to property or personal injury which occurs in connection with the Company entering the Customer's premises for the purposes of this Clause 8.

### 8.3 Title in New Goods

- (a) Where Goods are supplied by the Company to the Customer without payment in full of all moneys payable in respect of the Goods and any Services provided by the Company in respect of those Goods, and:
- (i) the Customer makes a new object from the Goods, whether finished or not;
  - (ii) the Customer mixes the Goods with other goods; or
  - (iii) the Goods become part of other goods (**New Goods**),
- the Customer agrees with the Company that the ownership of the New Goods immediately passes to the Company. The Customer will hold the New Goods on trust for the Company until payment of all sums owing to the Company whether under these terms and conditions or any other contract have been made. The Company may require the Customer to store the New Goods in a manner that clearly shows the ownership of the Company.
- (b) For the avoidance of doubt, under this Clause 8, the ownership of the New Goods passes to the Company at the beginning of the operation or event by which the Goods are converted into, are mixed with, or become part of, other goods.

### 8.4 Sale of Goods

Despite Clause 8.2, the Customer may transfer, sell or dispose of Goods, including New Goods, to a third party in the ordinary course of business, provided that:

- (a) where the Customer is paid by a third party in respect of Goods including New Goods, the Customer holds the whole of the proceeds of sale, less any GST, on trust for the Company as if in a separate bank account, until all amounts owed by the Customer to the Company have been paid; or
- (b) where the Customer is not paid by a third party, the Customer agrees to assign all of its rights against the third party to the Company upon the Company giving the Customer notice in writing to that effect and for the purpose of giving effect to that assignment the Customer irrevocably appoints the Company as its attorney.

### 8.5 Registration of interests under the PPS Law

- (a) In relation to any security interest constituted or contemplated in the Goods by the Terms, and in relation to any proceeds arising from any dealing in the Goods, the Customer consents to the Company affecting and maintaining a registration on the register (in the manner the Company considers necessary, including a master security interest registration that stays on the Customer's record at all times, even if no Goods are currently being hired by the Customer from the Company) of that security interest under the PPS Law.
- (b) The Customer also agrees to sign any documents and provide all cooperation to the Company required to facilitate that registration and maintenance. At Company's sole discretion, Company may register a financing statement or financing change statement in respect of a security interest (including any purchase money security interest) at any time. The Customer's right to receive notice of a verification statement regarding the registration of a security interest on the register in respect of the Goods is hereby waived.
- (c) The Customer agrees not to register a financing change statement in respect of a security interest contemplated or constituted by the Terms, or in favour of a third party, without the Company's prior written consent.
- (d) If Chapter 4 of the PPS Law would otherwise apply to the enforcement of a security interest arising under or in connection with the Terms and sections 115(1) or 115(7) of the PSS Law allows for

contracting out, then the following provisions of the PPS Law will not apply, and the Customer will have no rights under them:

- (i) in respect of section 115(1), section 95 (to the extent of notices to the grantor); section 96; section 118 (to the extent of notices to the grantor); sections 121(4); 125; 130; 132(3)(d); 132(4); 135; 142; and 143; and
  - (ii) in respect of section 115(7): sections 127; 129(2); 129(3); 130(i); 132; 134(s); 135; 136(3); 136(4); 136(5); 137; and 275(7)(c).
- (e) The Customer and Company agree not to disclose information of the kind referred to in section 275(1) of the PPS Law.
- (f) For the sake of clarity, the Goods is the collateral and the security agreement is the Terms pursuant to the PPS Law.
- (g) Money received from the Customer in connection with the Terms may be applied by Company towards the Customers obligations under any security interest contemplated or constituted by the Terms in any way the Company determines.
- (h) The Customer agrees to notify Company immediately in writing of any material change to the information contained in or associated with any Quote, Order or credit application.
- (i) Subject only to any inconsistent provision of the Terms, the Customer must not create, purport to create or allow to be created any security interest in the Goods without the Company's prior obtained written consent.

## 9. Damage to Premises

The Customer acknowledges that whilst the Company will take every care to avoid damage to the Customer's property during the performance of the Works, to the extent permitted by law, the Company shall have no liability whatsoever to the Customer if any damage should occur.

## 10. Price and Payment

### 10.1 Price of Goods/Services

At the Company's sole discretion;

- (a) The Price shall be as indicated on invoices provided by the Company to the Customer in respect of Goods supplied and/or Services rendered; or
- (b) The Price of the Goods/Services shall, subject to Clauses 4.5 and 10, be the Company's quoted Price which shall be binding upon the Company provided that the Customer has accepted in writing the Company's quotation within the prescribed period for the Quote.

### 10.2 Variation of Price

The Company may by giving notice to the Customer (verbally or otherwise) at any time before delivery increase the Price of the Goods to reflect any event beyond the reasonable control of the Company which increases the costs of the Goods or Services by more than 10% of the quoted Price.

### 10.3 Time for Payment

Time for payment for the Goods and Services shall be of the essence and, unless otherwise agreed in writing by the Company (including by invoice, quotation or correspondence signed by its managing director) all payments owed to the Company shall be due and payable:

- (a) 14 days from date of invoice; and
- (b) where progress payments indicated upon a Quote:
  - (i) 30% of the Price is to be paid by deposit upon acceptance of the Quote or issue of an Order;
  - (ii) 50% of the Price must be paid upon delivery of the Goods or commencement of the Services; and
  - (iii) 20% of the Price must be paid upon commissioning and, not later than 7 days from delivery of the Goods or completion of the Services.

#### **10.4 Cancellation of Order**

If the Customer cancels or alters any Order or Works at any time after the Company has processed the Order or Quote, then the Company reserves the right to charge to the Customer the cost of any Goods or materials acquired for those Works, together with its cost of labour and tooling expended on any Services in connection with them, to the date of such cancellation or alteration. This is a genuine pre-estimate of costs and expenses which will be incurred by the Company to that date and the Customer agrees to pay them as an Additional Charge.

#### **10.5 Form of Payment**

Payment will be made by direct credit, electronic funds transfer, or by any other method agreed between the Customer and the Company from time to time and in the Company's ultimate discretion.

#### **10.6 Taxation**

The Price shall be increased by the amount of any GST and other taxes and duties which may be applicable, save only to the extent that such taxes are expressly included in any quotation given by the Company.

#### **10.7 No right to set-off or non-payment of undisputed invoices**

The Customer must pay the undisputed amount of each invoice issued by the Company within the timeframe specified by the Company and without any deduction or set-off whatsoever arising from or in relation to any Works separately invoiced or charged to the Customer or otherwise in relation to any Loss, dispute or claims, whether between the parties, or at all.

#### **10.8 Credit given in Company's discretion**

Granting of a credit account shall be at the absolute discretion of the Company and unless otherwise demanded by the Company, the Customer shall make payment upon the terms approved upon its credit account. The Company reserves the right to vary any credit terms from time to time upon reasonable notice to the Customer.

#### **10.9 Additional Charges**

- (a) The Company reserves the right to charge, and the Customer agrees to pay, any Additional Charges contemplated by the Terms which arise out of or in connection with the Works and which materially increase the costs of performing the Works to the Company.
- (b) Additional Charges will be notified to the Customer as soon as practicable, with the Company to provide an explanation, justification and any available supporting evidence for the Additional Charges to the Customer, in each case.
- (c) The Customer shall have seven (7) days from receipt of the Company's notice to dispute any Additional Charges, after which time they shall be deemed accepted and thereafter invoiced at the Company's discretion.
- (d) The Company's invoice for Additional Charges shall, unless otherwise agreed to by the Company in writing, be payable within fourteen (14) days.

### **11. Default and Consequences**

#### **11.1 Non-payment**

If the customer fails to make payment of any amount due to the Company under a Quote, invoice or these Terms by the due date, the Company may in its absolute discretion:

- (a) Require the payment of cash upon delivery and commencement of any further Works;
- (b) Charge interest at the rate prescribed in the *Civil Judgements Enforcement Act 2004 (WA)* on all overdue amounts (including late payment charges and amounts other than the Price) calculated on a day to day basis on any monies due but unpaid, such interest to be computed from the due date for payment AND the parties agree that such default is not a penalty but is a true measure of damages incurred by the Company. Payments received from the Customer will be credited first against any default interest and all such charges shall be payable upon demand;
- (c) Claim from the Customer all costs relating to any action taken by the Company to recover moneys or goods due from the Customer including, but not limited to, any legal costs and disbursements on a solicitor-client basis and any recovery agents' fees at their invoiced cost; and



- (d) Cease any further Works for the Customer and terminate any Quote or agreement in relation to any Works that have not been provided or delivered to the Customer whatsoever.

## 12. Warranties

### 12.1 Company's guarantees and warranties

- (a) The Company guarantees to the Customer that the workmanship of all Works and Services delivered to the Customer will be for a period of 12 months from the date they are accepted pursuant to these Terms.
- (b) Where the Goods (including components and parts supplied as part of any Services) from third party suppliers are subject to a manufacturer's warranty (as distinct from any statutory warranty imposed by law), the Company warrants that, subject to the Terms, it will extend to the Customer a back to back warranty on the same terms as are extended to it, by the respective manufacturer or supplier of the Goods.
- (c) To the extent required by and, subject to the conditions of any warranty or guarantee set out in the ACL, the Company warrants that if a defect in any of the Works carried out by the Company is reported to the Company within 12 months of the acceptance of the Works in accordance with the Terms, then the Company will either replace or remedy the Works subject to the Terms.
- (d) To the extent permitted by law, each and all of the Company's warranties given under the Terms will not be applicable in the following circumstances:
- (i) Where any defect or damage is caused wholly, or in part by, or arises out of:
    - (1) a failure by the Customer to properly maintain the Goods or follow any instructions or guidelines provided by the Company in relation to the Goods;
    - (2) the use of the Goods in any other way than is outlined or anticipated in the Quote;
    - (3) any breach of the Customer's warranties contained in Clause 12.2; or
    - (4) by the Customer or any third party's negligence.
  - (ii) The Customer continues to use any of the Goods or Services after any defect becomes apparent or would have become apparent to a reasonably prudent operator or user of them;
  - (iii) The Customer allows someone other than an appropriately qualified and licenced professional to deal with the Goods or Services; or
  - (iv) If the Goods fail due to water ingress, fair wear and tear or any accident or an act of God.
- (e) To the extent permitted by law, each warranty shall cease and the Company shall thereafter in no circumstances be liable under the terms of the warranty if the Goods or Services are serviced, repaired, altered or amended without the Company's express written consent.
- (f) In respect of all warranty claims, the Company shall not be liable to compensate the Customer for any delay in either replacing or remedying the Goods or workmanship or in properly assessing the Customer's claim.
- (g) If the Company must make an inspection outside of its premises, the Company may charge the Customer as Additional Charges all reasonable costs incurred including labour, travelling and other out-of-pocket expenses incurred if the fault or defect is deemed to be outside this warranty.
- (h) Where the Customer seeks to have defective goods replaced, the goods must be returned to the Company within 12 months of the Customer's receipt of them and at the Customer's cost.
- (i) If the Company replaces defective goods, ownership in those defective goods transfers wholly and unconditionally to the Company.
- (j) If a claim is made by the Customer and the Company, after assessing the Goods or Services, deem them to be outside of the warranties provided by the Terms, the Company will make reasonable attempts to contact the Customer to arrange for the items to be returned. If, after 30 days, the Customer has not made arrangements to have the Goods or Services returned, the Company may dispose of the items, at the Customer's expense.
- (k) Time is of the essence in relation to all stipulated time requirements in this Clause 12.

### 12.2 Customer's warranties

The Customer warrants to the Company that:

- (a) it has checked and confirmed the accuracy of all Orders and instructions issued to the Company and has lawful authority to give those instructions to the Company;
- (b) it has given full and accurate information to the Company regarding its requirements and expectations in relation to the Works and any Quote requested from the Company, including any circumstance, requirement or site conditions which may affect the Company's performance of the Works, or the Price;
- (c) unless otherwise agreed to by the Company in writing, any site, place or infrastructure, where the Works are to be performed, or upon which the Works rely, will be:
- (i) compliant with applicable laws, safe and suitable for the performance of the Works without interruption and in as near to a continuous workflow as is reasonably practicable; and

- (ii) accessible by the Company and its servants and agents during Work Hours on the mutually agreed date(s) for performance of the Works;
- (d) it will preserve and protect any IP Rights arising from or in connection with the Works or the benefit of the Company;
- (e) it will notify the Company as soon as possible of any change to the information it has given to the Company, whether at the time of requesting the Quote, under this Clause 12.2 or at all, where that change may affect the Company or its performance of the Works; and
- (f) it will at all times ensure that the Goods are used and maintained in accordance with all applicable laws, Australian standards, the manufacturers' installation guidelines, recommendations and user manuals provided by the Company and industry best practice.

## 13. Liability & Customer's indemnity

### 13.1 Limited Liability

To the extent permitted by law, the Company's liability shall be limited to, at the Company's discretion:

- (a) In the case of Goods:
  - (i) The replacement of the Goods or the supply of Goods of an equivalent value;
  - (ii) The repair of the Goods;
  - (iii) The payment of the cost of replacing the Goods or of acquiring equivalent Goods; or
  - (iv) The payment of the cost of having the Goods repaired, and
- (b) In the case of Services:
  - (i) The supplying of the Services again; or
  - (ii) The payment of the cost of having the Services supplied again.

### 13.2 Limitation of Liability

To the extent permitted by law, in no event shall the Company's liability to the Customer for any Loss arising from or in connection with the Works exceed the amount of the Quote giving rise to them.

### 13.3 Exclusion of consequential loss and damage

To the extent permitted by law neither party (in this sub-clause 13.3 only, the **First Party**) shall be liable to the other party (in this sub-clause 13.3 only, the **Second Party**) for any indirect, consequential, special, economic or incidental loss, damage or liability whatsoever suffered, threatened against, or incurred by the Second Party which arises out of, or in connection, with the Works, including in circumstances of the First Party's negligence, breach of statutory duty, or breach of these Terms.

### 13.4 Matters for which the Company accepts no liability

The parties agree that, to the extent permitted by law, in no event shall the Company be liable for the following matters:

- (a) any claim Loss or damage whatsoever arising from or in connection with a failure on the part of the Customer to follow any instructions or guidelines provided by the Company or the manufacturer of the Goods;
- (b) the visual presentation or noise levels of the Goods or any installed products or components of the Goods;
- (c) any delay, interruption, expense or costs whatsoever arising from or in connection with electrical isolation or shut-downs required for, or associated with, the safe performance of the Works, whether as required by applicable laws, standards or regulations, or industry best practice, as are applicable in the Company's absolute discretion;
- (d) any Additional Charges (such as re-commissioning, disassembly and re-assembly) arising from the Company's performance of a third-party's warranty repair or replacements;
- (e) Goods not used, stored or maintained in accordance with these Terms;
- (f) any Loss occasioned by the Customer's act or omission in contravention with the Terms;
- (g) any Loss including indirect or consequential loss whatsoever suffered, threatened, or incurred by any third party in connection with the Works; and
- (h) any damage to property arising from the Works, save only to the extent caused by the negligence or willful misconduct of the Company.

## **12.5 Customer's indemnity against Additional Charges & Excluded Liabilities**

In consideration for the Company's preparation of the Quote or performance (including any part performance) of the Works, the Customer shall indemnify, defend and hold harmless (including against its legal costs on a solicitor-client basis) the Company, from and against:

- (a) any Additional Charges incurred in performing the Works, whether as provided for by these Terms, or at all;
- (b) any loss, damage or liability whatsoever arising from the Works, save only to the extent caused by the negligence or willful misconduct of the Company;
- (c) any breach of these Terms by the Customer;
- (d) any breach of the Customer's warranties;
- (e) any Special Order made by or on behalf of the Customer; and
- (f) each and every matter for which the Company accepts no liability under these Terms including those matters stated in Clause 13.4 and save only to the extent contemplated by the exclusion set out in clause 13.3.

## **14. Variation & Amendment**

### **14.1 Variation**

Any modification to these Terms shall not be binding or effective unless agreed to in writing and signed by the managing director of the Company.

### **14.2 Amendment of Terms**

- (a) The Company may amend the Terms from time to time in its absolute discretion.
- (b) The publication of each amendment shall be notified to the Customer in writing (by email or upon a Quote or invoice issued by the Company) and the terms as amended will be published upon the Company's website.
- (c) The Customer agrees to review the Terms as amended from time to time and shall notify the Company of any issue or dispute arising from any amendment within 14 days of receiving any notice under this Clause 14.2, after which time it will be deemed to have read, understood and accepted the Terms as amended and to be bound by them.

## **15. Notice**

- (a) A notice or other communication required or permitted to be given by one party to another under the Terms must be in writing to the address shown on a Quote or Order (or as otherwise notified to the other party under these Terms) and delivered personally, sent by pre-paid mail to the address of the addressee; or sent by email to the email address of the addressee specified in the Quote or Order (or as otherwise notified to the other party under these Terms).
- (b) A notice or other communication is taken to have been given (unless otherwise proved) if mailed, on the fifth Business Day after posting; or if sent by email before 4 pm one Business Day at the place of receipt, on the day it is sent and otherwise on the next Business Day at the place of receipt, unless the sender receives an email delivery failure notification indicating the email has not been delivered to the addressee.

## **16. Termination**

- (a) If the Customer fails to comply with any of these Terms or, being a natural person or persons commits any act of bankruptcy or, being a corporation passes a resolution for winding up or liquidation (other than for the purposes of re-organisation or reconstruction) or, enters into any composition or arrangement with creditors or, if a receiver or manager is appointed for any property or assets of the Customer or, if it becomes liable to be wound up by reason of insolvency or, if any petition is presented for its winding up, or if a liquidator or provisional liquidator is appointed, then the Company may, in addition to exercising all or any of its rights against the Customer, suspend any further Works and immediately recover possession of any Goods not paid for in accordance with the Terms.
- (b) The Company will not be liable for any loss or damage the Customer suffers as a result of the Company exercising its rights under this Clause 16.
- (c) The Company reserves its rights as a seller under the ACL, as amended from time to time.

## 17. Force majeure

- (a) If circumstances beyond the Company's control prevent or hinder its provision of the Goods or Services, the Company is free from any obligation to provide the Goods or Services while those circumstances continue.
- (b) If such circumstances continue for a period of 21 days or more, the Company may elect to terminate any affected agreement it has with the Customer or keep such agreement on foot until such circumstances have ceased, and it will do so in consultation with the Customer.
- (c) Circumstances beyond the Company's control include, but are not limited to, unavailability of materials or components, failure or unavailability of Government infrastructure (such as power supplies or generation, black-outs), strikes, lockouts, riots, natural disasters, fire, war, acts of God, Government decrees, proclamations or orders, transport difficulties and failures or malfunctions of computers or other information technology systems.

## 18. Privacy Act 1988

- (a) The Customer hereby acknowledges that:
  - (i) The Company collects personal information such as contact details, bank account details, insurance details and credit card details and holds such information for seven (7) years. The purpose of the collection of personal information is only for the Company's internal use;
  - (ii) they have been informed by the Company that personal information about them may be disclosed to or acquired from a credit reporting agency; and
  - (iii) if they require further information regarding the Company's Privacy Policy they may obtain by providing notice to the Company.
- (b) The Customer hereby agrees:
  - (i) that the Company may contact any trade references or other credit references at any time whether now or in the future for the purpose of assessing credit worthiness;
  - (ii) to the Company receiving from any other credit provider or providing to any credit provider any information about the Customer whether by way of report, record, or otherwise relating to credit worthiness for the purposes of exchanging information, assessing credit worthiness and notification of default at any time whether now or in the future;
  - (iii) to the Company obtaining from a credit reporting agency or a business which provides credit information, a credit report or any other information as to creditworthiness on the Customer for the purposes of assessing any credit application and the Customer further consents to Company obtaining such reports for information from time to time for the purposes of assessing credit worthiness during the continuance of credit provision by the Company;
  - (iv) That, in the event of default of payment of any of their debts, the Company may disclose all information relating to the Customer and its account to its recovery agents for the purpose of their efforts to recover any or all amounts outstanding.

## 19. Intellectual property rights

- (a) The Company shall own any and all IP Rights created in the performance of the Works, including any designs, drawings or documents arising from the Works, whether developed for the Works, the Customer, or otherwise at all.
- (b) The Company grants to the Customer a perpetual, non-transferable, revocable and royalty free licence to use any of the IP Rights arising from the Works, but only to the extent necessary to enjoy the Works and, subject at all times to the Company's knowledge and consent to the Customer's proposed use of those IP Rights.
- (c) Any licence granted by the Company under this Clause 19 can be withdrawn at any time immediately upon notice to the Customer and in the Company's absolute discretion.
- (d) The Customer must keep any intellectual property of the Company (including but not limited to methods of work or testing, documentation associated with the Works, designs, methods and any systems or procedures associated with the Works) strictly confidential.
- (e) The Customer must account for any profits derived from its use of any IP Rights conferred under the Terms upon request from the Company and pay them to the Company upon demand.

## **20. Dispute Resolution**

### **20.1 Dispute Resolution Procedure**

If a dispute arises between the Customer and the Company, the following procedure applies:

- (a) A party may give another party a notice of the dispute and the dispute must be dealt with in accordance with the procedure set out in this Clause 19.
- (b) A party must not commence legal proceedings (except proceedings seeking urgent interlocutory relief) in respect of a dispute unless the dispute has been referred for resolution in accordance with this Clause 19.
- (c) A party must not oppose any application for a stay of any legal proceedings that may be issued in respect of a dispute pending the completion or termination of the procedure set out in this paragraph.
- (d) If a dispute is notified, the dispute must immediately be referred to the parties' respective senior management. Those representatives must endeavour in good faith to resolve the dispute as soon as possible and in any event within 5 Business Days (or other period as agreed).
- (e) Notwithstanding the existence of a dispute, each party must continue to perform its obligations under the Terms.
- (f) The parties must keep confidential, unless otherwise required by law or at the direction of a court of competent jurisdiction, all information relating to the subject matter of the dispute that is disclosed during or for the purposes of dispute resolution. The parties acknowledge that the purpose of any exchange of information or documents or the making of any offer of settlement pursuant to this procedure is to attempt to settle the dispute between the parties. No party may use any information or documents obtained through the dispute resolution process for any purpose other than an attempt to settle the dispute between the parties.

### **20.2 Non-disparagement**

Notwithstanding the existence of any dispute between the Company and Customer, both parties agree that they will not make, nor cause to be made, nor tolerate the making or continuation of, any public remarks, publication or comment whatsoever which does, or is likely to, disparage or negatively affect the business reputation or integrity of the other party, or any trade association or affiliate of that party whatsoever.

## **21. Survival**

To the extent permitted by law, Clauses 3.2, 8.2, 11.1, 13, 18, 19 and 20 of these Terms shall survive the termination or expiration of each and every agreement arising from or in connection with the Terms.

## **22. Miscellaneous**

- (a) These Terms are governed by the laws of Western Australia and each party irrevocably submits to the non-exclusive jurisdiction of the courts of that state.
- (b) These Terms and any Quotes and variations agreed to in writing by the Company represent the whole agreement between the parties relating to the subject matter of them.
- (c) These Terms supersede all oral and written negotiations and communications by and on behalf of either of the parties.
- (d) In entering into these Terms, the Customer has not relied on any warranty, representation or statement, whether oral or written, made by the Company or any of its employees or agents relating to or in connection with the subject matter of these Terms save those set out expressly herein.
- (e) If any provision of the Terms at any time is or becomes void, voidable or unenforceable, then it shall be deemed to have been struck out and all remaining provisions will continue to have full force and effect.
- (f) A party's failure or delay to exercise a power or right does not operate as a waiver of that power or right.
- (g) The Company may assign all or any part of its rights and obligations at any time and without the Customer's consent.