

Sydney Smart Gates & Automatic Driveway Gates – Terms & Conditions of Trade

1. **Definitions**
- 1.1 "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.
- 1.2 "Supplier" means Sydney Smart Gates Pty Ltd T/A Sydney Smart Gates & Automatic Driveway Gates, its successors and assigns or any person acting on behalf of and with the authority of Sydney Smart Gates Pty Ltd T/A Sydney Smart Gates & Automatic Driveway Gates.
- 1.3 "Customer" means the persons, entities or any person acting on behalf of and with the authority of the Customer requesting the Supplier 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.
- 1.4 "Works" means all Works (including consultation, manufacturing and/or installation services) or Materials supplied by the Supplier 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).
- 1.5 "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.
- 1.6 "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 ordering from the 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 ordering Works via the website.
- 1.7 "Price" means the Price payable (plus any GST where applicable) for the Works as agreed between the Supplier and the Customer in accordance with clause 5.6 below.
- 1.8 "GST" means Goods and Services Tax as defined within the A New Tax System (Goods and Services Tax) Act 1999 (Cth).
2. **Acceptance**
- 2.1 The Customer is taken to have exclusively accepted and is immediately bound, jointly and severally, by these terms and conditions if the Customer places an order for or accepts delivery of any 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:
- (a) the supply of Works on credit shall not take effect until the Customer has completed a credit application with the Supplier and it has been approved with a credit limit established for the account; and
- (b) in the event that the supply of Works request exceeds the Customer's credit limit and/or the account exceeds the payment terms, the Supplier reserves the right to refuse delivery; and
- (c) the supply of Materials for accepted orders may be subject to availability and if, for any reason, Materials are not or cease to be available, the Supplier reserves the right to substitute comparable Materials (or components of the Materials) and vary the Price as per clause 5.2. In all such cases the Supplier will notify the Customer in advance of any such substitution, and also reserves the right to place the Customer's order and/or Works on hold, as per clause 6.2 until such time as the Supplier and the Customer agree to such changes.
- 2.5 Electronic signatures shall be deemed to be accepted by either party providing that the parties have complied with Section 9 of the Electronic Transactions Act 2000 or any other applicable provisions of that Act or any Regulations referred to in that Act.
3. **Errors and Omissions**
- 3.1 The Customer acknowledges and accepts that the Supplier 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 the Supplier 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 the Supplier in respect of the Works.
- 3.2 In the event such an error and/or omission occurs in accordance with clause 3.1, and is not attributable to the negligence and/or willful misconduct of the Supplier; the Customer shall not be entitled to treat this Contract as repudiated nor render it invalid.
4. **Change in Control**
- 4.1 The Customer shall give the Supplier 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 the Supplier as a result of the Customer's failure to comply with this clause.
5. **Price and Payment**
- 5.1 At the Supplier's sole discretion the Price shall be either:
- (a) as indicated on invoices provided by the Supplier to the Customer in respect of Works performed or Materials supplied; or
- (b) the Supplier's quoted Price (subject to clause 5.2) which shall be binding upon the Supplier provided that the Customer shall accept the Supplier's quotation in writing within thirty (30) days.
- 5.2 The Supplier 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 conditions, limitations to accessing the site, availability of machinery, safety considerations, prerequisite work by any third party not being completed, obscured building defects, asbestos or other hazardous substances, change of design, hard rock barriers below the surface or iron reinforcing rods in concrete, etc.) which are only discovered on commencement of the Works; or
- (d) in the event of increases to the Supplier in the cost of labour or Materials which are beyond the Supplier's control.
- 5.3 Variations will be charged for on the basis of the Supplier's quotation, and will be detailed in writing, and shown as variations on the Supplier's invoice. The Customer shall be required to respond to any variation submitted by the Supplier within ten (10) working days. Failure to do so will entitle the Supplier 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.
- 5.4 At the Supplier's sole discretion a non-refundable deposit may be required.
- 5.5 Time for payment for the Works being of the essence, the Price will be payable by the Customer on the date/s determined by the Supplier, which may be:
- (a) on completion of the Works; or
- (b) before commencement of the Works; or
- (c) by way of progress payments in accordance with the Supplier's specified progress payment schedule. Such progress payment claims may include the reasonable value of authorised variations and the value of any Materials delivered to the site but not yet installed; or
- (d) the date specified on any invoice or other form as being the date for payment; or
- (e) failing any notice to the contrary, the date which is seven (7) days following the date of any invoice given to the Customer by the Supplier.
- 5.6 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 the Supplier.
- 5.7 The Supplier may in its discretion allocate any payment received from the Customer towards any invoice that the Supplier determines and may do so at the time of receipt or at any time afterwards. On any default by the Customer the Supplier may re-allocate any payments previously received and allocated. In the absence of any payment allocation by the Supplier, payment will be deemed to be allocated in such manner as preserves the maximum value of the Supplier's Purchase Money Security Interest (as defined in the PPSA) in the Materials.
- 5.8 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 the Supplier nor to withhold payment of any invoice because part of that invoice is in dispute.
- 5.9 Unless otherwise stated the Price does not include GST. In addition to the Price, the Customer must pay to the Supplier an amount equal to any GST the Supplier must pay for any supply by the Supplier 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.
6. **Provision of the Works**
- 6.1 Subject to clause 6.2 it is the Supplier's responsibility to ensure that the Works start as soon as it is reasonably possible.
- 6.2 The Works' commencement date will be put back and/or the completion date extended by whatever time is reasonable in the event that the Supplier claims an extension of time (by giving the Customer written notice) where completion is delayed by an event beyond the Supplier's control, including but not limited to any failure by the Customer to:
- (a) make a selection; or
- (b) have the site ready for the Works; or
- (c) notify the Supplier that the site is ready.
- 6.3 At the Supplier's sole discretion, the cost of delivery is either included in the Price or is in addition to the Price.
- 6.4 The Supplier 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.
- 6.5 Any time specified by the Supplier for delivery of the Works is an estimate only and the Supplier 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 the Supplier is unable to supply the Works as agreed solely due to any action or inaction of the Customer, then the Supplier 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.
- 6.6 **Risk**
- 6.7 If the Supplier retains ownership of the Materials under clause 12 then:
- (a) where the Supplier 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. 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 the Supplier's address; or
- (ii) the Materials are delivered by the Supplier or the Supplier's nominated carrier to the Customer's nominated delivery address (even if the Customer is not present at the address);
- (b) where the Supplier is to both supply and install Materials then the Supplier 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.
- 6.8 Notwithstanding the provisions of clause 7.1 if the Customer specifically requests the Supplier to leave Materials outside the Supplier'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.
- 6.9 The Customer warrants that any structures (where applicable) to which the Materials are to be affixed are able to withstand the installation of the Materials and that are of suitable capacity to handle the Materials once installed. If for any reason (including the discovery of asbestos) that the Supplier, or employees of the Supplier, reasonably form the opinion that the Customer's premises is not safe for the installation of Materials to proceed then the Supplier shall be entitled to delay installation of the Materials (in accordance with the provisions of clause 6.2 above) until the Supplier is satisfied that it is safe for the installation to proceed.
- 6.10 The Supplier 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, the Supplier accepts no responsibility for any loss, damages, or costs however resulting from these inaccurate plans, specifications or other information.
- 6.11 The Customer acknowledges and accepts that:
- (a) where the Customer has supplied materials for the Supplier to complete the Works, or existing materials are in place, the Customer acknowledges and accepts responsibility for the suitability of purpose, quality and any faults inherent in the materials. The Supplier shall not be responsible for any defects in the Works, any loss or damage to the materials (or any part thereof), howsoever arising from the use of materials supplied by the Customer; and
- (b) the Supplier is only responsible for parts that are replaced by the Supplier and that in the event that other parts/materials, subsequently fail, the Customer agrees to indemnify the Supplier against any loss or damage to the materials.
- 6.12 Where the Supplier gives advice or recommendations to the Customer, or the Customer's agent, regarding any aspect of the scope of the Works (including but not limited to, a particular course of action, adherence to council bylaws, required resource consents, product selection or the condition of the materials supplied by the Customer being inferior), and such advice or recommendations are not acted upon then the Supplier shall require the Customer or their agent to authorize commencement of the Works in writing. The Supplier shall not be liable in any way whatsoever for any damages or losses that occur after any subsequent commencement of the Works nor will such losses or damages be deemed a defect. If the Customer instructs the Supplier to rectify any damage or defects in the materials supplied, this will become a variation to the original quotation and will be charged at the Supplier's normal hourly rate.
- 6.13 The Customer acknowledges and agrees that in the event the Supplier requires access, in order to undertake the Works, to an adjoining or adjacent property or land to the nominated job site, that is not owned by the Customer, then it is the Customer's responsibility to gain permission from the land owner to use the above mentioned property throughout the process of delivering the Works. In the event the land owner denies access or use of the land or property, the Customer shall be liable for all costs incurred by the Supplier in gaining permission to access and/or use the property through any legal process that may be deemed necessary.
- 6.14 The Customer must be at the site to supervise the marking out of the fence line, placement of boundary pegs and during the installation of the fence. If the Customer fails to comply with this clause, then the Supplier accepts no responsibility for installation decisions that need to be made by the Supplier in the Customer's absence.
- 6.15 The Customer acknowledges that it is the Customer's responsibility to remove any existing fence (including existing footings), trees, vines and shrubs to allow the Supplier clear access along the proposed fence line prior to commencement of work by the Supplier unless otherwise agreed in writing between the Supplier and the Customer. Under no circumstances will the Supplier handle removal of asbestos products.
- 6.16 Where fencing is installed on a retaining wall the Supplier shall not be liable for any movement in the fence due to consolidation, or the movement of soil or any other component of the retaining wall.
- 6.17 The Supplier shall not be responsible for digging land out under fence lines nor removal of soil from the site.
- 6.18 The Supplier reserves the right to touch-up all products supplied and installed on the work site to rectify minor blemishes or damage to paintwork.
- 6.19 The Customer acknowledges and accepts that:
- (a) all descriptive specifications, illustrations, drawings, data, dimensions, ratings and weights stated in the Supplier's or manufacturer'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 the Supplier; and
- (b) any information or figures provided by the Supplier regarding the performance of the Materials are given in good faith. The information provided is based on industry prescribed estimates of Materials working under optimal operating conditions; and
- (c) variations of colour, texture, marking and weathering may occur due to the Materials being man-made or natural products (including, but not limited to, timber, timber composite, paving and natural stone products). Whilst every effort will be taken by the Supplier to match colour, texture and marking of such natural products, the Supplier shall not be liable for any loss, damages or costs (howsoever arising), resulting from any variation in colour, texture and marking between batches, or sale samples, and the final Materials provided; and
- (d) the Materials may slowly fade or change colour over time, expand, contract or distort as a result of exposure, heat, cold weather and with natural weathering over time or be damaged or disfigured by bird or animal faecal matter, impact or scratching, especially when positioned outdoors.
7. **Automated Gates & Doors Risks**
- 7.1 The Customer acknowledges that under certain circumstances automated gates may fail to operate in an effective manner at no fault of the Supplier, such circumstances may include:
- (a) failure of the power supply and back-up power supply; and/or
- (b) interference of the radio signal due to obstructions including but not limited to trees, walls, buildings, retaining walls or other shading; and/or
- (c) poor maintenance, inadequate testing; and/or
- (d) interference by a third party contractor or any unqualified or unauthorised persons.
- 7.2 Where the Supplier is required to remedy such issues, this shall be charged as a variation under clause 5.2.
- 7.3 The Supplier shall accept no liability for any loss or damage to persons or property due to a malfunction of any automated system installed by the Supplier unless caused directly as a result of any negligence by the Supplier.
- 7.4 **Access**
- 7.5 The Customer shall ensure that the Supplier has clear and free access to the site at all times to enable them to undertake the Works. The Supplier shall not be liable for any loss or damage to the worksite (including, without limitation, damage to pathways, driveways and concrete or paved or grassed areas) unless due to the negligence of the Supplier.
- 7.6 **Hidden Services**
- 7.7 Prior to the Supplier commencing any work the Customer must advise the Supplier of the precise location of all hidden services on the site and clearly mark the same. The hidden mains & 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 site.
- 7.8 Whilst the Supplier will take all care to avoid damage to any hidden services the Customer agrees to indemnify the Supplier 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 10.1.
- 7.9 **Compliance with Laws**
- 7.10 The Customer and the Supplier shall comply with the provisions of all statutes, regulations and bylaws of government, local and other public authorities that may be applicable to the Works.
- 7.11 The Customer shall obtain (at the expense of the Customer) all licenses, resource consents and approvals that may be required for the Works.
- 7.12 The Customer agrees that the site will comply with any work health and safety (WHS) laws relating to the site and any other relevant safety standards or legislation.
- 7.13 **Title**
- 7.14 The Supplier and the Customer agree that ownership of the Materials shall not pass until:
- (a) the Customer has paid the Supplier all amounts owing to the Supplier; and
- (b) the Customer has met all of its other obligations to the Supplier.
- 7.15 Receipt by the Supplier 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.
- 7.16 It is further agreed that until ownership of the Materials passes to the Customer in accordance with clause 12.1:
- (a) the Customer is only a bailee of the Materials and unless the Materials have become fixtures must return the Materials to the Supplier on request;
- (b) the Customer holds the benefit of the Customer's insurance of the Materials on trust for the Supplier and must pay to the Supplier 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 the Supplier shall be sufficient evidence of the Supplier's rights to receive the insurance proceeds direct from the insurer without the need for any person dealing with the Supplier 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 the Supplier and must pay or deliver the proceeds to the Supplier 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 the Supplier and must sell, dispose of or return the resulting product to the Supplier as it so directs;
- (f) unless the Materials have become fixtures the Customer irrevocably authorises the Supplier to enter any premises where the Supplier believes the Materials are kept and recover possession of the Materials;
- (g) the Supplier 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 the Supplier;
- (i) the Supplier may commence proceedings to recover the Price of the Materials sold notwithstanding that ownership of the Materials has not passed to the Customer.
- 7.17 **Personal Property Securities Act 2009 ("PPSA")**
- 7.18 In this clause financing statement, financing charge statement, security agreement, and security interest has the meaning given to it by the PPSA.

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- 13.2 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 the Supplier for Works – that have previously been supplied and that will be supplied in the future by the Supplier to the Customer.
- 13.3 The Customer undertakes to:
- 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 the Supplier may reasonably require to:
 - register a financing statement or financing change statement in relation to a security interest on the Personal Property Securities Register;
 - register any other document required to be registered by the PPSA, or
 - correct a defect in a statement referred to in clause 13.3(a)(i) or 13.3(a)(ii);
 - indemnify, and upon demand reimburse, the Supplier 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;
 - not register a financing change statement in respect of a security interest without the prior written consent of the Supplier;
 - 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 the Supplier;
 - immediately advise the Supplier 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.
- 13.4 The Supplier 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.
- 13.5 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.
- 13.6 The Customer waives its rights as a grantor and/or a debtor under sections 142 and 143 of the PPSA.
- 13.7 Unless otherwise agreed to in writing by the Supplier, the Customer waives its right to receive a verification statement in accordance with section 157 of the PPSA.
- 13.8 The Customer shall unconditionally ratify any actions taken by the Supplier under clauses 13.3 to 13.5.
- 13.9 Subject to any express provisions to the contrary (including those contained in this clause 13), nothing in these terms and conditions is intended to have the effect of contracting out of any of the provisions of the PPSA.
- 14. Security and Charge**
- 14.1 In consideration of the Supplier agreeing to supply the Materials, the Customer charges all of its rights, title and interest (whether joint or several) in any land, realty or other assets capable of being charged, owned by the Customer either now or in the future, to secure the performance by the Customer of its obligations under these terms and conditions (including, but not limited to, the payment of any money).
- 14.2 The Customer indemnifies the Supplier from and against all the Supplier's costs and disbursements including legal costs on a solicitor and own client basis incurred in exercising the Supplier's rights under this clause.
- 14.3 The Customer irrevocably appoints the Supplier and each director of the Supplier as the Customer's true and lawful attorneys to perform all necessary acts to give effect to the provisions of this clause 14 including, but not limited to, signing any document on the Customer's behalf.
- 15. Defects, Warranties and Returns, Competition and Consumer Act 2010 (CCA)**
- 15.1 The Customer must inspect all Materials immediately on delivery (or the Works on completion) and must within seven-two (72) hours of delivery notify the Supplier 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 the Supplier to inspect the Materials or to review the Works provided.
- 15.2 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**).
- 15.3 The Supplier acknowledges that nothing in these terms and conditions purports to modify or exclude the Non-Excluded Guarantees.
- 15.4 Except as expressly set out in these terms and conditions or in respect of the Non-Excluded Guarantees, the Supplier makes no warranties or other representations under these terms and conditions including but not limited to the quality or suitability of the Materials/Works. The Supplier's liability in respect of these warranties is limited to the fullest extent permitted by law.
- 15.5 If the Customer is a consumer within the meaning of the CCA, the Supplier's liability is limited to the extent permitted by section 64A of Schedule 2.
- 15.6 If the Supplier is required to replace any Materials under this clause or the CCA, but is unable to do so, the Supplier may refund any money the Customer has paid for the Materials.
- 15.7 If the Supplier 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 the Supplier 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.
- 15.8 If the Customer is not a consumer within the meaning of the CCA, the Supplier's liability for any defect or damage in the Materials is:
- limited to the value of any express warranty or warranty card provided to the Customer by the Supplier at the Supplier's sole discretion;
 - limited to any warranty to which the Supplier is entitled, if the Supplier did not manufacture the Materials;
 - otherwise negated absolutely.
- 15.9 Subject to this clause 15, returns will only be accepted provided that:
- the Customer has complied with the provisions of clause 15.1; and
 - the Supplier has agreed that the Materials are defective; and
 - the Materials are returned within a reasonable time at the Customer's cost (if that cost is not significant); and
 - the Materials are returned in as close a condition to that in which they were delivered as is possible.
- 15.10 Notwithstanding clauses 15.1 to 15.9 but subject to the CCA, the Supplier shall not be liable for any defect or damage which may be caused or partly caused by or arise as a result of:
- the Customer failing to properly maintain or store any Materials;
 - the Customer using the Materials for any purpose other than that for which they were designed;
 - the Customer continuing to use any Materials after any defect became apparent or should have become apparent to a reasonably prudent operator or user;
 - interference with the Works by the Customer or any third party without the Supplier's prior approval;
 - the Customer failing to follow any instructions or guidelines provided by the Supplier;
 - fire wear and tear, any accident, or act of God.
- 15.11 Notwithstanding anything contained in this clause if the Supplier is required by a law to accept a return then the Supplier will only accept a return on the conditions imposed by that law.
- 15.12 Subject to clause 15.1, customised, or non-stockist items or Materials made or ordered to the Customer's specifications are not acceptable for credit or return.
- 16. Intellectual Property**
- 16.1 Where the Supplier 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 the Supplier, and shall only be used by the Customer at the Supplier's discretion. Under no circumstances may such designs, drawings and documents be used without the express written approval of the Supplier.
- 16.2 The Customer warrants that all designs, specifications or instructions given to the Supplier will not cause the Supplier to infringe any patent, registered design or trademark in the execution of the Customer's order and the Customer agrees to indemnify the Supplier against any action taken by a third party against the Supplier in respect of any such infringement.
- 16.3 The Customer agrees that the Supplier may (at no cost) use for the purposes of marketing or entry into any competition, any documents, designs, drawings, plans or products which the Supplier has created for the Customer.
- 17. Default and Consequences of Default**
- 17.1 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 the Supplier's sole discretion such interest shall compound monthly at such a rate) after as well as before any judgment.
- 17.2 If the Customer owes the Supplier any money the Customer shall indemnify the Supplier from and against all costs and disbursements incurred by the Supplier in recovering the debt (including but not limited to internal administration fees, legal costs on a solicitor and own client basis, the Supplier's contract default fee, and bank disbursement fees).
- 17.3 Further to any other rights or remedies the Supplier may have under this Contract, if a Customer has made payment to the Supplier, 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 the Supplier under this clause 17 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.
- 17.4 Without prejudice to the Supplier's other remedies at law the Supplier shall be entitled to cancel all or any part of any order of the Customer which remains unfulfilled and all amounts owing to the Supplier shall, whether or not due for payment, become immediately payable if:
- any money payable to the Supplier becomes overdue, or in the Supplier's opinion the Customer will be unable to make a payment when it falls due;
 - the Customer has exceeded any applicable credit limit provided by the Supplier;
 - 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
 - a receiver, manager, liquidator (provisional or otherwise) or similar person is appointed in respect of the Customer or any asset of the Customer.
- 18. Cancellation**
- 18.1 Without prejudice to any other remedies the Supplier may have, if at any time the Customer is in breach of any obligation (including those relating to payment) under these terms and conditions the Supplier may suspend or terminate the supply of Works to the Customer. The Supplier will not be liable to the Customer for any loss or damage the Customer suffers because the Supplier has exercised its rights under this clause.
- 18.2 The Supplier may cancel any contract to which these terms and conditions apply or cancel delivery of Works at any time before the Works are commenced by giving written notice to the Customer. On giving such notice the Supplier shall repay to the Customer any sums paid in respect of the Price, less any amounts owing by the Customer to the Supplier for Works already performed. The Supplier shall not be liable for any loss or damage whatsoever arising from such cancellation.
- 18.3 In the event that the Customer cancels the delivery of Works the Customer shall be liable for any and all loss incurred (whether direct or indirect) by the Supplier as a direct result of the cancellation (including, but not limited to, any loss of profits).
- 18.4 Cancellation of orders for products made to the Customer's specifications, or for non-stockist items, will
- definitely not be accepted once production has commenced, or an order has been placed.
- 19. Privacy Policy**
- All emails, documents, images or other recorded information held or used by the Supplier is Personal Information, as defined and referred to in clause 19.3, and therefore considered Confidential Information. The Supplier 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 IIC 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"). The Supplier acknowledges that in the event it becomes aware of any data breaches and/or disclosure of the Clients Personal Information, held by the Supplier that may result in serious harm to the Customer, the Supplier 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.
- Notwithstanding clause 19.1, privacy limitations will extend to the Supplier in respect of Cookies where transactions for purchases/orders transpire directly from the Supplier's website. The Supplier 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:
- IP address, browser, email client type and other similar details;
 - tracking website usage and traffic; and
 - reports are available to the Supplier when the Supplier sends an email to the Customer, so the Supplier may collect and review that information ("collectively Personal Information")
- In order to enable / disable the collection of Personal Information by way of Cookies, 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 proceeding with a purchase/order via the Supplier's website.
- The Customer agrees for the Supplier 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 the Supplier.
- The Customer agrees that the Supplier may exchange information about the Customer with those credit providers and with related body corporates for the following purposes:
- to assess an application by the Customer; and/or
 - to notify other credit providers of a default by the Customer; and/or
 - 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
 - to assess the creditworthiness of the Customer including the Customer's repayment history in the preceding two (2) years.
- The Customer consents to the Supplier being given a consumer credit report to collect overdue payment on commercial credit.
- The Customer agrees that personal credit information provided may be used and retained by the Supplier for the following purposes (and for other agreed purposes or required by):
- the provision of Works; and/or
 - analysing, verifying and/or checking the Customer's credit, payment and/or status in relation to the provision of Works; and/or
 - processing of any payment instructions, direct debit facilities and/or credit facilities requested by the Customer; and/or
 - enabling the collection of amounts outstanding in relation to the Works.
- The Supplier may give information about the Customer to a CRB for the following purposes:
- to obtain a consumer credit report;
 - allow the CRB to create or maintain a credit information file about the Customer including credit history.
- The information given to the CRB may include:
- Personal Information as outlined in 19.3 above;
 - name of the credit provider and that the Supplier is a current credit provider to the Customer;
 - whether the credit provider is a licensee;
 - type of consumer credit;
 - 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);
 - advice of consumer credit defaults, overdue accounts, loan repayments or outstanding monies which are overdue by more than sixty (60) days and for which written notice for request of payment has been made and debt recovery action commenced or alternatively that the Customer no longer has any overdue accounts and the Supplier has been paid or otherwise discharged and all details surrounding that discharge (e.g. dates of payments);
 - information that, in the opinion of the Supplier, the Customer has committed a serious credit infringement;
 - advice that the amount of the Customer's overdue payment is equal to or more than one hundred and fifty dollars (\$150).
- The Customer shall have the right to request (by e-mail) from the Supplier:
- a copy of the Personal Information about the Customer retained by the Supplier and the right to request that the Supplier correct any incorrect Personal Information; and
 - that the Supplier does not disclose any Personal Information about the Customer for the purpose of direct marketing.
- The Supplier 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.
- The Customer can make a privacy complaint by contacting the Supplier via e-mail. The Supplier 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.
- 20. Building and Construction Industry Security of Payments Act 1999**
- At the Supplier's sole discretion, if there are any disputes or claims for unpaid Materials and/or Works then the provisions of the Building and Construction Industry Security of Payments Act 1999 may apply.
- Nothing in this agreement is intended to have the effect of contracting out of any applicable provisions of the Building and Construction Industry Security of Payments Act 1999 of New South Wales, except to the extent permitted by the Act where applicable.
- 21. Service of Notices**
- Any written notice given under this Contract shall be deemed to have been given and received:
- by handing the notice to the other party, in person;
 - by leaving it at the address of the other party as stated in this Contract;
 - by sending it by registered post to the address of the other party as stated in this Contract;
 - 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;
 - if sent by email to the other party's last known email address.
- 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.
- 22. Trusts**
- If the Customer at any time upon or subsequent to entering into the Contract is acting in the capacity of trustee of any trust ("Trust") then whether or not the Supplier may have notice of the Trust, the Customer covenants with the Supplier as follows:
- the Contract extends to all rights of indemnity which the Customer now or subsequently may have against the Trust and the trust fund;
 - the Customer has full and complete power and authority under the Trust 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 or 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;
 - the Customer will not without consent in writing of the Supplier (the Supplier will not unreasonably withhold consent), cause, permit, or suffer to happen any of the following events:
 - the removal, replacement or retirement of the Customer as trustee of the Trust;
 - any alteration to or variation of the terms of the Trust;
 - any advancement or distribution of capital of the Trust; or
 - any resettlement of the trust property.
- 23. General**
- 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 the validity, existence, legality and enforceability of the remaining provisions shall not be affected, prejudiced or impaired.
- These terms and conditions and any contract to which they apply shall be governed by the laws of New South Wales, the state in which the Supplier has its principal place of business, and are subject to the jurisdiction of the Sydney Courts in that state.
- Subject to clause 15, the Supplier shall be under no liability whatsoever to the Customer for any indirect and/or consequential loss and/or expense (including loss of profit) suffered by the Customer arising out of a breach by the Supplier of these terms and conditions (alternatively the Supplier's liability shall be limited to damages which under no circumstances shall exceed the Price of the Works).
- The Supplier may licence and/or assign all or any part of its rights and/or obligations under this Contract without the Customer's consent.
- The Customer cannot licence or assign without the written approval of the Supplier.
- The Supplier 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 the Supplier's sub-contractors without the authority of the Supplier.
- The Customer agrees that the Supplier 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 the Supplier to provide Works to the Customer.
- Neither party shall be liable for any default due to any act of God, war, terrorism, strike, lock-out, industrial action, fire, flood, storm or other event beyond the reasonable control of either party.
- 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.