

## Top Shelf Cabinets & Woodworking Pty Ltd – 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 “TSCW” means Top Shelf Cabinets & Woodworking Pty Ltd ATF The DJ & CJ Norton Family Trust T/A Top Shelf Cabinets & Woodworking Pty Ltd, its successors and assigns or any person acting on behalf of and with the authority of Top Shelf Cabinets & Woodworking Pty Ltd ATF The DJ & CJ Norton Family Trust T/A Top Shelf Cabinets & Woodworking Pty Ltd.
- 1.3 “Client” means the person/s, entities or any person acting on behalf of and with the authority of the Client requesting TSCW to provide the Works as specified in any proposal, quotation, order, invoice or other documentation, and:
- (a) if there is more than one Client, is a reference to each Client jointly and severally; and
  - (b) if the Client is a partnership, it shall bind each partner jointly and severally; and
  - (c) if the Client is a part of a Trust, shall be bound in their capacity as a trustee; and
  - (d) includes the Client’s executors, administrators, successors and permitted assigns.
- 1.4 “Works” means all Works (including consultation, manufacturing and/or installation services) or Materials supplied by TSCW to the Client at the Client’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 Client does not wish to allow Cookies to operate in the background when ordering from the website, then the Client 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 TSCW and the Client in accordance with clause 5 below.
- 1.8 “GST” means Goods and Services Tax (GST) as defined within the “A New Tax System (Goods and Services Tax) Act 1999” Cth.

### 2. Acceptance

- 2.1 The Client is taken to have exclusively accepted and is immediately bound, jointly and severally, by these terms and conditions if the Client places an order for or accepts 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 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 2003 or any other applicable provisions of that Act or any Regulations referred to in that Act.
- 2.5 Any advice, recommendation, information, assistance or service provided by TSCW in relation to Materials or Works supplied is given in good faith, is based on TSCW own knowledge and experience and shall be accepted without liability on the part of TSCW and it shall be the responsibility of the Client to confirm the accuracy and reliability of the same in light of the use to which the Client makes or intends to make of the Materials or Works.

### 3. Errors and Omissions

- 3.1 The Client acknowledges and accepts that TSCW 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 TSCW 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 TSCW 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 wilful misconduct of TSCW; the Client shall not be entitled to treat this Contract as repudiated nor render it invalid.

### 4. Change in Control

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

### 5. Price and Payment

- 5.1 At TSCW’s sole discretion the Price shall be either:
- (a) as indicated on invoices provided by TSCW to the Client in respect of Works performed or Materials supplied; or
  - (b) TSCW’s quoted Price (subject to clause 5.2) which shall be binding upon TSCW provided that the Client shall accept TSCW’s quotation in writing within thirty (30) days.
- 5.2 TSCW 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, limited access to the site, poor weather conditions, obscured site/building defects which require remedial work, health hazards and safety considerations (such as the discovery of asbestos), inaccurate structural measurements provided by the Client, prerequisite work by any

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third party not being completed, site and/or Client requirements, change of design, or hidden pipes and/or wiring/cabling in walls etc.) which are only discovered on commencement of the Works; or

(d) in the event of increases to TSCW in the cost of labour or materials which are beyond TSCW's control.

5.3 Variations will be charged for on the basis of TSCW's quotation, and will be detailed in writing, and shown as variations on TSCW's invoice. The Client shall be required to respond to any variation submitted by TSCW within ten (10) working days. Failure to do so will entitle TSCW 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 TSCW'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 Client on the date/s determined by TSCW, which may be:

(a) on completion of the Works; or

(b) by way of progress payments in accordance with TSCW'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

(c) the date specified on any invoice or other form as being the date for payment; or

(d) failing any notice to the contrary, the date which is seven (7) days following the date of any invoice given to the Client by TSCW.

5.6 Payment may be made by cash, cheque, bank cheque, electronic/on-line banking, or by any other method as agreed to between the Client and TSCW.

5.7 The Client shall not be entitled to set off against, or deduct from the Price, any sums owed or claimed to be owed to the Client by TSCW nor to withhold payment of any invoice because part of that invoice is in dispute.

5.8 Unless otherwise stated the Price does not include GST. In addition to the Price the Client must pay to TSCW an amount equal to any GST TSCW must pay for any supply by TSCW under this or any other Contract for the sale of the Materials. The Client must pay GST, without deduction or set off of any other amounts, at the same time and on the same basis as the Client pays the Price. In addition the Client must pay any other taxes and duties that may be applicable in addition to the Price except where they are expressly included in the Price.

### 6. Provision of the Works

6.1 At TSCW's sole discretion the cost of delivery is either included in the Price or is in addition to the Price.

6.2 Subject to clause 6.3 it is TSCW's responsibility to ensure that the Works start as soon as it is reasonably possible.

6.3 The Works' commencement date will be put back and/or the completion date extended by whatever time is reasonable in the event that TSCW claims an extension of time (by giving the Client written notice) where completion is delayed by an event beyond TSCW's control, including but not limited to any failure by the Client to:

(a) make a selection; or

(b) have the site ready for the Works; or

(c) notify TSCW that the site is ready.

6.4 TSCW 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 TSCW for delivery of the Works is an estimate only and TSCW will not be liable for any loss or damage incurred by the Client as a result of delivery being late. However both parties agree that they shall make every endeavour to enable the Works to be supplied at the time and place as was arranged between both parties. In the event that TSCW is unable to supply the Works as agreed solely due to any action or inaction of the Client, then TSCW shall be entitled to charge a reasonable fee for re-supplying the Works at a later time and date.

### 7. Client's Responsibilities

7.1 It is the Client's responsibility to:

(a) make the premises available on the agreed date/s and time/s to ensure TSCW has clear and free access to the site at all times in order to undertake the Works. If installation is interrupted by the failure of the Client to adhere to the installation schedule agreed to between TSCW and the Client, any additional costs will be invoiced to the Client as a variation in accordance with clause 5.2. TSCW shall not be liable for any loss or damage to the site (including, without limitation, damage to pathways, driveways and concreted or paved or grassed areas) unless due to the negligence of TSCW; and

(b) fully disclose any information that may affect TSCW installation procedures; and

(c) remove any furniture, personal items and all fragile items (such as glassware, crockery, pot plants, furniture and ornaments) from the vicinity of the Works (and provide adequate protective dust sheets where necessary), and agrees that TSCW shall not be liable for any damage caused to those items through the Client's failure to comply with this clause. Breakages and damages are the responsibility of the Client. All care taken but no responsibility accepted by TSCW in this regard; and

(d) provide TSCW with a suitable free power source and access to water and toilet facilities if so required.

7.2 TSCW is not insured to remove furniture or fittings and will not do so.

7.3 TSCW is not responsible for the removal of rubbish from or clean-up of the building/constructions site/s. This is the responsibility of the Client or the Client's agent. Under no circumstances will TSCW handle removal of asbestos product.

### 8. Risk

8.1 If TSCW retains ownership of the Materials under clause 11 then:

(a) where TSCW is supplying Materials only, all risk for the Materials shall immediately pass to the Client on delivery and the Client 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 Client or the Client's nominated carrier takes possession of the Materials at TSCW's address; or

(ii) the Materials are delivered by TSCW or TSCW's nominated carrier to the Client's nominated delivery address (even if the Client is not present at the address).

(b) where TSCW is to both supply and install Materials then TSCW 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 Client.

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- 8.2 The Client warrants that any structures to which the Materials are to be affixed are able to withstand the installation thereof and are of suitable capacity to handle the Materials once installed. If for any reason (including the discovery of asbestos) that TSCW, or TSCW's employees, reasonably form the opinion that the Client's premises is not safe for the Works to proceed then TSCW shall be entitled to delay the provision of the Works (in accordance with clause 6.3) until TSCW is satisfied that it is safe for the installation to proceed.
- 8.3 The Client acknowledges and accepts that Materials supplied (including, but not limited to stone and timber) are natural products and therefore may exhibit variation in texture, shade, colour, surface, finish, markings, veining and may fade or change colour over time. Whilst TSCW will make every effort to match batches/ samples of the Materials supplied in order to minimise such variation, but shall not be liability whatsoever where such variations occur.
- 8.4 Timber is a hygroscopic material subject to expansion and contraction, therefore TSCW will accept no responsibility for gaps that may appear during prolonged dry periods.
- 8.5 The Client acknowledges that Materials supplied may:
- (a) exhibit variations in shade, colour, texture, surface, finish, markings and may contain natural fissures, occlusions, lines, indentations and may fade or change colour over time; and
  - (b) expand, contract or distort as a result of exposure to heat, cold, weather; and
  - (c) mark or stain if exposed to certain substances; and
  - (d) be damaged or disfigured by impact or scratching.
- 8.6 The Client acknowledges and agrees that whilst TSCW shall take all reasonable care during the performance of the Works, the Client agrees that TSCW shall not be held liable for any loss, damages, or costs howsoever resulting from drilling or fixing the Materials into any masonry or rendered surfaces during the installation process.
- 8.7 TSCW shall not be liable whatsoever for:
- (a) any loss or damage to the Works caused by any other tradesmen;
  - (b) incorrect or faulty installation carried out by any other third party;
  - (c) damage caused by contact with chemicals, solvents, oils or any other substances.

### 9. Dimensions, Plans and Specifications

- 9.1 All customary industry tolerances shall apply to the dimensions and measurements of the Materials, unless TSCW and the Client agree otherwise in writing.
- 9.2 In the event the Client gives information relating to the Materials (including plans, specifications, measurements, quantities and other information provided by the Client):
- (a) it is the Client's responsibility to verify the accuracy of the information before the Client or TSCW places an order based on the information. TSCW accepts no responsibility for any loss, damages, or costs however resulting from the Client's failure to comply with this clause;
  - (b) TSCW shall be entitled to rely on the accuracy of such information. The Client acknowledges and agrees that in the event that any of this information provided by the Client is inaccurate, TSCW accepts no responsibility for any loss, damages, or costs however resulting therefrom.
- 9.3 Whilst TSCW shall use their best endeavours to provide the Works based upon the instructions supplied by the Client, the Client agrees to release and indemnify TSCW, their, directors, agents, and employees from any and all liabilities arising out of any damage, loss or injury caused by Materials made to the Client's designs/specifications where an unknown design fault may be present.

### 10. Compliance and Consents

- 10.1 The Client and TSCW 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, including any occupational health and safety laws relating to building/construction sites and any other relevant safety standards or legislation.
- 10.2 The Client shall obtain (at the expense of the Client) all licenses and approvals that may be required for the Materials.

### 11. Title

- 11.1 TSCW and the Client agree that ownership of the Materials shall not pass until:
- (a) the Client has paid TSCW all amounts owing to TSCW; and
  - (b) the Client has met all of its other obligations to TSCW.
- 11.2 Receipt by TSCW 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.
- 11.3 It is further agreed that until ownership of the Materials passes to the Client in accordance with clause 11.1:
- (a) the Client is only a bailee of the Materials and unless the Materials have become fixtures must return the Materials to TSCW on request.
  - (b) the Client holds the benefit of the Client's insurance of the Materials on trust for TSCW and must pay to TSCW 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 TSCW shall be sufficient evidence of TSCW's rights to receive the insurance proceeds direct from the insurer without the need for any person dealing with TSCW to make further enquiries.
  - (d) the Client 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 Client sells, disposes or parts with possession of the Materials then the Client must hold the proceeds of any such act on trust for TSCW and must pay or deliver the proceeds to TSCW on demand.
  - (e) the Client should not convert or process the Materials or intermix them with other goods but if the Client does so then the Client holds the resulting product on trust for the benefit of TSCW and must sell, dispose of or return the resulting product to TSCW as it so directs.
  - (f) unless the Materials have become fixtures the Client irrevocably authorises TSCW to enter any premises where TSCW believes the Materials are kept and recover possession of the Materials.
  - (g) TSCW may recover possession of any Materials in transit whether or not delivery has occurred.
  - (h) the Client 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 TSCW.

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- (i) TSCW may commence proceedings to recover the Price of the Materials sold notwithstanding that ownership of the Materials has not passed to the Client.
- 12. Personal Property Securities Act 2009 (“PPSA”)**
- 12.1 In this clause financing statement, financing change statement, security agreement, and security interest has the meaning given to it by the PPSA.
- 12.2 Upon assenting to these terms and conditions in writing the Client acknowledges and agrees that these terms and conditions constitute a security agreement for the purposes of the PPSA and creates a security interest in all Materials and/or collateral (account) – being a monetary obligation of the Client to TSCW for Works – that have previously been supplied and that will be supplied in the future by TSCW to the Client.
- 12.3 The Client undertakes to:
- (a) promptly sign any further documents and/or provide any further information (such information to be complete, accurate and up-to-date in all respects) which TSCW may reasonably require to:
- (i) register a financing statement or financing change statement in relation to a security interest on the Personal Property Securities Register;
- (ii) register any other document required to be registered by the PPSA; or
- (iii) correct a defect in a statement referred to in clause 12.3(a)(i) or 12.3(a)(ii);
- (b) indemnify, and upon demand reimburse, TSCW for all expenses incurred in registering a financing statement or financing change statement on the Personal Property Securities Register established by the PPSA or releasing any Materials charged thereby;
- (c) not register a financing change statement in respect of a security interest without the prior written consent of TSCW;
- (d) not register, or permit to be registered, a financing statement or a financing change statement in relation to the Materials and/or collateral (account) in favour of a third party without the prior written consent of TSCW;
- (e) immediately advise TSCW 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.
- 12.4 TSCW and the Client agree that sections 96, 115 and 125 of the PPSA do not apply to the security agreement created by these terms and conditions.
- 12.5 The Client hereby waives its rights to receive notices under sections 95, 118, 121(4), 130, 132(3)(d) and 132(4) of the PPSA.
- 12.6 The Client waives its rights as a grantor and/or a debtor under sections 142 and 143 of the PPSA.
- 12.7 Unless otherwise agreed to in writing by TSCW, the Client waives its right to receive a verification statement in accordance with section 157 of the PPSA.
- 12.8 The Client shall unconditionally ratify any actions taken by TSCW under clauses 12.3 to 12.5.
- 12.9 Subject to any express provisions to the contrary (including those contained in this clause 12) nothing in these terms and conditions is intended to have the effect of contracting out of any of the provisions of the PPSA.
- 13. Security and Charge**
- 13.1 In consideration of TSCW agreeing to supply the Materials, the Client charges all of its rights, title and interest (whether joint or several) in any land, realty or other assets capable of being charged, owned by the Client either now or in the future, to secure the performance by the Client of its obligations under these terms and conditions (including, but not limited to, the payment of any money).
- 13.2 The Client indemnifies TSCW from and against all TSCW's costs and disbursements including legal costs on a solicitor and own client basis incurred in exercising TSCW's rights under this clause.
- 13.3 The Client irrevocably appoints TSCW and each director of TSCW as the Client's true and lawful attorney/s to perform all necessary acts to give effect to the provisions of this clause 13 including, but not limited to, signing any document on the Client's behalf.
- 14. Defects, Warranties and Returns, Competition and Consumer Act 2010 (CCA)**
- 14.1 The Client must inspect all Materials on delivery (or the Works on completion) and must within seven (7) days of delivery notify TSCW in writing of any evident defect/damage, shortage in quantity, or failure to comply with the description or quote. The Client 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 Client must allow TSCW to inspect the Materials or to review the Works provided.
- 14.2 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**).
- 14.3 TSCW acknowledges that nothing in these terms and conditions purports to modify or exclude the Non-Excluded Guarantees.
- 14.4 Except as expressly set out in these terms and conditions or in respect of the Non-Excluded Guarantees, TSCW makes no warranties or other representations under these terms and conditions including but not limited to the quality or suitability of the Materials/Works. TSCW's liability in respect of these warranties is limited to the fullest extent permitted by law.
- 14.5 If the Client is a consumer within the meaning of the CCA, TSCW's liability is limited to the extent permitted by section 64A of Schedule 2.
- 14.6 If TSCW is required to replace any Materials under this clause or the CCA, but is unable to do so, TSCW may refund any money the Client has paid for the Materials.
- 14.7 If TSCW 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 TSCW may refund any money the Client 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 Client which were not defective.
- 14.8 If the Client is not a consumer within the meaning of the CCA, TSCW's liability for any defect or damage in the Materials is:
- (a) limited to the value of any express warranty or warranty card provided to the Client by TSCW at TSCW's sole discretion;
- (b) limited to any warranty to which TSCW is entitled, if TSCW did not manufacture the Materials;
- (c) otherwise negated absolutely.
- 14.9 Subject to this clause 14, returns will only be accepted provided that:
- (a) the Client has complied with the provisions of clause 14.1; and

- (b) TSCW has agreed that the Materials are defective; and
  - (c) the Materials are returned within a reasonable time at the Client's cost (if that cost is not significant); and
  - (d) the Materials are returned in as close a condition to that in which they were delivered as is possible.
- 14.10 Notwithstanding clauses 14.1 to 14.9 but subject to the CCA, TSCW shall not be liable for any defect or damage which may be caused or partly caused by or arise as a result of:
- (a) the Client failing to properly maintain or store any Materials;
  - (b) the Client using the Materials for any purpose other than that for which they were designed;
  - (c) the Client continuing to use any Materials after any defect became apparent or should have become apparent to a reasonably prudent operator or user;
  - (d) interference with the Works by the Client or any third party without TSCW's prior approval;
  - (e) the Client failing to follow any instructions or guidelines provided by TSCW;
  - (f) fair wear and tear, any accident, or act of God.
- 14.11 TSCW may in its absolute discretion accept non-defective Materials for return in which case TSCW may require the Client to pay handling fees of up to fifteen percent (15%) of the value of the returned Materials plus any freight costs.
- 14.12 Notwithstanding anything contained in this clause if TSCW is required by a law to accept a return then TSCW will only accept a return on the conditions imposed by that law.

## **15. Intellectual Property**

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

## **16. Default and Consequences of Default**

- 16.1 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 TSCW's sole discretion such interest shall compound monthly at such a rate) after as well as before any judgment.
- 16.2 If the Client owes TSCW any money the Client shall indemnify TSCW from and against all costs and disbursements incurred by TSCW in recovering the debt (including but not limited to internal administration fees, legal costs on a solicitor and own client basis, TSCW's contract default fee, and bank dishonour fees).
- 16.3 Further to any other rights or remedies TSCW may have under this Contract, if a Client has made payment to TSCW, and the transaction is subsequently reversed, the Client shall be liable for the amount of the reversed transaction, in addition to any further costs incurred by TSCW under this clause 16 where it can be proven that such reversal is found to be illegal, fraudulent or in contravention to the Client's obligations under this Contract.
- 16.4 Without prejudice to TSCW's other remedies at law TSCW shall be entitled to cancel all or any part of any order of the Client which remains unfulfilled and all amounts owing to TSCW shall, whether or not due for payment, become immediately payable if:
- (a) any money payable to TSCW becomes overdue, or in TSCW's opinion the Client will be unable to make a payment when it falls due;
  - (b) the Client has exceeded any applicable credit limit provided by TSCW;
  - (c) the Client becomes insolvent or bankrupt, convenes a meeting with its creditors or proposes or enters into an arrangement with creditors, or makes an assignment for the benefit of its creditors; or
  - (d) a receiver, manager, liquidator (provisional or otherwise) or similar person is appointed in respect of the Client or any asset of the Client.

## **17. Dispute Resolution**

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

## **18. Cancellation**

- 18.1 Without prejudice to any other remedies TSCW may have, if at any time the Client is in breach of any obligation (including those relating to payment) under these terms and conditions TSCW may suspend or terminate the supply of Works to the Client. TSCW will not be liable to the Client for any loss or damage the Client suffers because TSCW has exercised its rights under this clause.
- 18.2 TSCW 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 Client. On giving such notice TSCW shall repay to the Client any sums paid in respect of the Price, less any amounts owing by the Client to TSCW for Works already performed. TSCW shall not be liable for any loss or damage whatsoever arising from such cancellation.
- 18.3 In the event that the Client cancels the delivery of Works the Client shall be liable for any and all loss incurred (whether direct or indirect) by TSCW as a direct result of the cancellation (including, but not limited to, any loss of profits).

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- 18.4 Cancellation of orders for products made to the Client's specifications, or for non-stocklist items, will definitely not be accepted once production has commenced, or an order has been placed.
- 19. Privacy Policy**
- 19.1 All emails, documents, images or other recorded information held or used by TSCW is Personal Information, as defined and referred to in clause 19.3, and therefore considered Confidential Information. TSCW 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 III C 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"). TSCW acknowledges that in the event it becomes aware of any data breaches and/or disclosure of the Client's Personal Information, held by TSCW that may result in serious harm to the Client, TSCW will notify the Client 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 Client by written consent, unless subject to an operation of law.
- 19.2 Notwithstanding clause 19.1, privacy limitations will extend to TSCW in respect of Cookies where transactions for purchases/orders transpire directly from TSCW's website. TSCW 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 Client's:
- (a) IP address, browser, email client type and other similar details;
  - (b) tracking website usage and traffic; and
  - (c) reports are available to TSCW when TSCW sends an email to the Client, so TSCW may collect and review that information ("collectively Personal Information")
- In order to enable / disable the collection of Personal Information by way of Cookies, the Client 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 TSCW's website.
- 19.3 The Client agrees for TSCW 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 Client in relation to credit provided by TSCW.
- 19.4 The Client agrees that TSCW may exchange information about the Client with those credit providers and with related body corporates for the following purposes:
- (a) to assess an application by the Client; and/or
  - (b) to notify other credit providers of a default by the Client; and/or
  - (c) to exchange information with other credit providers as to the status of this credit account, where the Client is in default with other credit providers; and/or
  - (d) to assess the creditworthiness of the Client including the Client's repayment history in the preceding two (2) years.
- 19.5 The Client consents to TSCW being given a consumer credit report to collect overdue payment on commercial credit.
- 19.6 The Client agrees that personal credit information provided may be used and retained by TSCW for the following purposes (and for other agreed purposes or required by):
- (a) the provision of Works; and/or
  - (b) analysing, verifying and/or checking the Client's credit, payment and/or status in relation to the provision of Works; and/or
  - (c) processing of any payment instructions, direct debit facilities and/or credit facilities requested by the Client; and/or
  - (d) enabling the collection of amounts outstanding in relation to the Works.
- 19.7 TSCW may give information about the Client to a CRB for the following purposes:
- (a) to obtain a consumer credit report;
  - (b) allow the CRB to create or maintain a credit information file about the Client including credit history.
- 19.8 The information given to the CRB may include:
- (a) Personal Information as outlined in 19.3 above;
  - (b) name of the credit provider and that TSCW is a current credit provider to the Client;
  - (c) whether the credit provider is a licensee;
  - (d) type of consumer credit;
  - (e) details concerning the Client's application for credit or commercial credit (e.g. date of commencement/termination of the credit account and the amount requested);
  - (f) advice of consumer credit defaults, overdue accounts, loan repayments or outstanding monies which are overdue by more than sixty (60) days and for which written notice for request of payment has been made and debt recovery action commenced or alternatively that the Client no longer has any overdue accounts and TSCW has been paid or otherwise discharged and all details surrounding that discharge (e.g. dates of payments);
  - (g) information that, in the opinion of TSCW, the Client has committed a serious credit infringement;
  - (h) advice that the amount of the Client's overdue payment is equal to or more than one hundred and fifty dollars (\$150).
- 19.9 The Client shall have the right to request (by e-mail) from TSCW:
- (a) a copy of the Personal Information about the Client retained by TSCW and the right to request that TSCW correct any incorrect Personal Information; and
  - (b) that TSCW does not disclose any Personal Information about the Client for the purpose of direct marketing.
- 19.10 TSCW will destroy Personal Information upon the Client's request (by e-mail) or if it is no longer required unless it is required in order to fulfil the obligations of this Contract or is required to be maintained and/or stored in accordance with the law.
- 19.11 The Client can make a privacy complaint by contacting TSCW via e-mail. TSCW will respond to that complaint within seven (7) days of receipt and will take all reasonable steps to make a decision as to the complaint within thirty (30) days of receipt of the complaint. In the event that the Client is not satisfied with the resolution provided, the Client can make a complaint to the Information Commissioner at [www.oaic.gov.au](http://www.oaic.gov.au).

**20. Construction Contracts Act 2004**

- 20.1 At TSCW's sole discretion, if there are any disputes or claims for unpaid Works and/or Materials then the provisions of the Construction Contracts Act 2004 may apply.
- 20.2 Nothing in this Contract is intended to have the effect of contracting out of any provisions of the Construction Contracts Act 2004 of Western Australia, except to the extent permitted by the Act where applicable.

**21. Unpaid Seller's Rights**

- 21.1 Where the Client has left any item with TSCW for repair, modification, exchange or for TSCW to perform any other service in relation to the item and TSCW has not received or been tendered the whole of any monies owing to it by the Client, TSCW shall have, until all monies owing to TSCW are paid:
- (a) a lien on the item; and
  - (b) the right to retain or sell the item, such sale to be undertaken in accordance with any legislation applicable to the sale or disposal of uncollected goods.
- 21.2 The lien of TSCW shall continue despite the commencement of proceedings, or judgment for any monies owing to TSCW having been obtained against the Client.

**22. Service of Notices**

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

**23. Trusts**

- 23.1 If the Client at any time upon or subsequent to entering in to the Contract is acting in the capacity of trustee of any trust ("Trust") then whether or not TSCW may have notice of the Trust, the Client covenants with TSCW as follows:
- (a) the Contract extends to all rights of indemnity which the Client now or subsequently may have against the Trust and the trust fund;
  - (b) the Client 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 Client against the Trust or the trust fund. The Client will not release the right of indemnity or commit any breach of trust or be a party to any other action which might prejudice that right of indemnity;
  - (c) the Client will not without consent in writing of TSCW (TSCW will not unreasonably withhold consent), cause, permit, or suffer to happen any of the following events:
    - (i) the removal, replacement or retirement of the Client as trustee of the Trust;
    - (ii) any alteration to or variation of the terms of the Trust;
    - (iii) any advancement or distribution of capital of the Trust; or
    - (iv) any resettlement of the trust property.

**24. General**

- 24.1 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.
- 24.2 These terms and conditions and any contract to which they apply shall be governed by the laws of Western Australia in which TSCW has its principal place of business, and are subject to the jurisdiction of the Perth Courts in that state.
- 24.3 Subject to clause 14 TSCW shall be under no liability whatsoever to the Client for any indirect and/or consequential loss and/or expense (including loss of profit) suffered by the Client arising out of a breach by TSCW of these terms and conditions (alternatively TSCW's liability shall be limited to damages which under no circumstances shall exceed the Price of the Works).
- 24.4 TSCW may licence and/or assign all or any part of its rights and/or obligations under this Contract without the Client's consent.
- 24.5 The Client cannot licence or assign without the written approval of TSCW.
- 24.6 TSCW 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 Client agrees and understands that they have no authority to give any instruction to any of TSCW's sub-contractors without the authority of TSCW.
- 24.7 The Client agrees that TSCW may amend their general terms and conditions for subsequent future contracts with the Client by disclosing such to the Client in writing. These changes shall be deemed to take effect from the date on which the Client accepts such changes, or otherwise at such time as the Client makes a further request for TSCW to provide Works to the Client.
- 24.8 Neither party shall be liable for any default due to any act of God, war, terrorism, strike, lock-out, industrial action, fire, flood, storm or other event beyond the reasonable control of either party.
- 24.9 Both parties warrant that they have the power to enter into this Contract and have obtained all necessary authorisations to allow them to do so, they are not insolvent and that this Contract creates binding and valid legal obligations on them.