

Oke Pool Fencing & Balustrades – Terms & Conditions of Trade

- 1.1 **Definitions**
- 1.2 "Contract" means the terms and conditions contained herein, together with any Quotation, order, invoice or other document or amendments expressed to be supplemental to this Contract.
- 1.3 "OKE" means Oke Pool Fencing & Balustrades Pty Ltd T/A Oke Pool Fencing & Balustrades, its successors and assigns or any person acting on behalf of and with the authority of Oke Pool Fencing & Balustrades Pty Ltd T/A Oke Pool Fencing & Balustrades.
- 1.4 "Client" means the person's, entities or any person acting on behalf of and with the authority of the Client requesting OKE 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.
- 1.5 "Works" means all Works (including consulting and/or installation services) or Materials supplied by OKE 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).
- 1.6 "Equipment" means all Equipment including any temporary fencing and accessories supplied on hire by OKE to the Client (and where the context so permits shall include any supply of Works). The Equipment shall be as described on the invoices, quotation, authority to hire, or any other work authorisation form provided by OKE to the Client.
- 1.7 "Minimum Hire Period" means the Minimum Hire Period as described on the invoices, quotation, authority to hire, or any other forms as provided by OKE to the Client.
- 1.8 Intended Use" means a building product and the use thereof, for which the building product is intended to be, or is reasonably likely to be, associated with a building.
- 1.9 "Non-conforming Building Product" means building products that are regarded as Non-conforming for an Intended Use if, when associated with a building:
 - (a) The product is not, or will not be, safe; or
 - (b) Does not, or will not, comply with the relevant regulatory provisions; or
 - (c) The product does not perform, or is not capable of performing, for the use to the standard it is represented to conform by or for a person in the chain of responsibility for the product.
- 1.10 "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 licence 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.
- 1.11 "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 provided on the website, prior to ordering Works via the website.**
- 1.12 "Price" means the Allow Price plus any GST where applicable for the Works as agreed between OKE and the Client in accordance with clause 5 below.
- 1.13 "GST" means Goods and Services Tax as defined within the 'A New Tax System (Goods and Services Tax) Act 1999' (Ch).
- 2.1 **Acceptance**
- 2.2 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.
- 2.3 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.
- 2.4 Any amendment to the terms and conditions contained in this Contract may only be amended in writing by the consent of both parties. The Client acknowledges and accepts that:
 - (a) The supply of Works on credit shall not take effect until the Client has completed a credit application with OKE 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 Client's credit limit and/or the account exceeds the payment terms, OKE 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, OKE 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 OKE will notify the Client in advance of any such substitution, and also reserves the right to place the Client's order and or Works on hold, as per clause 6.2 until such time as OKE and the Client 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 (Victoria) Act 2000 or any other applicable provisions of that Act or any Regulations referred to in that Act.
- 3.1 **Errors and Omissions**
- 3.2 The Client acknowledges and accepts that OKE 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 OKE 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 OKE in respect of the Works.
- 3.3 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 OKE, the Client shall not be entitled to treat this Contract as repudiated nor render it invalid.
- 4.1 **Change in Control**
- 4.2 The Client shall give OKE 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 OKE as a result of the Client's failure to comply with this clause.
- 5.1 **Credit Card Information**
- 5.2 OKE will:
 - (a) Keep the Client's personal details, including credit card details for only as long as is deemed necessary by OKE;
 - (b) Not disclose the Client's credit card details to any third party;
 - (c) Not unnecessarily disclose any of the Client's personal information, except as accordance with the Privacy Policy (clause 21) or where required by law.
- 5.3 The Client expressly agrees that, if pursuant to this Contract, there are:
 - (a) Any unpaid charges;
 - (b) Other amounts due and outstanding by the Client;
 - (c) Any Materials (or any part of them) supplied on hire that are lost or damaged;
 - (d) Any other additional charges are due from the Client which were not known at the time of the return of the Materials.
- 6.1 **Price and Payment**
- 6.2 At OKE's sole discretion the Price shall be either:
 - (a) as indicated on invoices provided by OKE to the Client in respect of Works performed or Materials supplied; or
 - (b) the Price at the date of delivery of the Works according to OKE's current pricelist; or
 - (c) OKE's quoted Price (subject to clause 6.2) which shall be binding upon OKE provided that the Client shall accept OKE's quotation in writing within thirty (30) days.
- 6.3 OKE 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, iron reinforcing rods in concrete, etc) which are only discovered on commencement of the Works; or
 - (d) in the event of increases to OKE in the cost of labour or materials which are beyond OKE's control.
- 6.4 Variations will be charged for on the basis of OKE's quotation, and will be detailed in writing, and shown as variations on OKE's invoice. The Client shall be required to respond to any variation submitted by OKE within ten (10) working days. Failure to do so will entitle OKE to add the cost of the variation to the Price. Payment for all variations must be made in full at the time of their completion.
- 6.5 At OKE's sole discretion a non-refundable deposit may be required.
- 6.6 Time for payment for the Works being of the essence, the Price will be payable by the Client on the date/s determined by OKE, which may be:
 - (a) on completion of the Works; or
 - (b) by way of progress payments in accordance with OKE'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 OKE.
- 6.7 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 Client and OKE.
- 6.8 OKE may in its discretion allocate any payment received from the Client towards any invoice that OKE determines and may do so at the time of receipt or at any time afterwards. On any default by the Client OKE may re-allocate any payments previously received and allocated. In the absence of any payment allocation by OKE, payment will be deemed to be allocated in such manner as preserves the maximum value of the Client's Purchase Money Security Interest (as defined in the PPSA) in the Materials.
- 6.9 OKE 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 OKE nor to withhold payment of any invoice because part of that invoice is in dispute.
- 6.10 Unless otherwise stated the Price does not include GST. In addition to the Price the Client must pay to OKE an amount equal to any GST OKE is liable to pay to the tax authorities (including but not limited to, GST) under this or any other agreement 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.
- 7.1 **Hire Period**
- 7.2 Hire charges shall commence from the time the Equipment departs from OKE's premises and will continue until the return of the Equipment to OKE's premises, the Equipment is collected by OKE, and/or until the expiry of the Minimum Hire Period, whichever last occurs.
- 7.3 The date upon which the Client advised of termination shall in all cases be treated as a full day's hire.
- 7.4 No allowance whatsoever can be made for time during which the Equipment is not in use for any reason, unless OKE confirms special prior arrangement in writing. In the event of Equipment breakdown provided the Client notifies OKE immediately, hiring charges will not be payable during the time the Equipment is in use, unless the condition is due to negligence or misuse on the part of or attributable to the Client.
- 7.5 Off-hire receipts will only be issued when the Equipment has been returned to OKE's premises or is collected by OKE.
- 8.1 **Provision of the Works**
- 8.2 Subject to clause 8.2 it is OKE's responsibility to ensure that the Works start as soon as it is reasonably possible.
- 8.3 The Works' commencement date will be put back and/or the completion date extended by whatever time is reasonable in the event that OKE claims a delay (including but not limited to, "Personal Information" such as name, address, D.O.B, occupation, driver's licence details) where completion is delayed by an event beyond OKE'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 OKE that the site is ready.
- 8.4 At OKE's sole discretion, the cost of delivery is either included in the Price or is in addition to the Price.
- 8.5 OKE may supply separate instalments. Each separate instalment shall be invoiced and paid in accordance with the provisions in these terms and conditions.
- 8.6 Any time specified by OKE for delivery of the Works is an estimate only and OKE 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 OKE is unable to supply the Works as agreed solely due to any action or inaction of the Client, then OKE 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.
- 9.1 **Risk**
- 9.2 If OKE retains ownership of the Materials under clause 12 then:
 - (i) where OKE 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 OKE's address;
 - (ii) the Materials are delivered by OKE or OKE's nominated carrier to the Client's nominated delivery address (even if the Client is not present at the address);
 - (iii) where OKE is to both supply and install Materials then OKE shall maintain a contract works insurance policy until the Works are installed and that is of suitable capacity to indemnify the Client once the Materials are installed.
 - (ii) Notwithstanding the provisions of clause 9.1 if the Client specifically requests OKE to leave Materials outside OKE'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 Client and it shall be the Client'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 Client's expense.
- 9.3 The Client 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 all of the Materials are fit for use. If, for any reason, the Client is notified of the discovery of asbestos) by OKE, or employees of OKE, reasonably form the opinion that the Client's premises is not safe for the installation of Materials to proceed then OKE shall be entitled to delay installation of the materials (in accordance with the provisions of clause 6.2 above) until OKE is satisfied that it is safe for the installation to proceed.
- 9.4 In the event that asbestos or any other toxic substances are discovered at the site, that it is the Client's responsibility to ensure the safe removal of the same. The Client further agrees to indemnify OKE against any costs incurred by OKE as a consequence of such discovery. Under no circumstances will OKE handle removal of asbestos product.
- 9.5 OKE shall be entitled to rely on the accuracy of any plans, specifications and other information provided by the Client. The Client acknowledges and agrees that in the event that any of this information provided by the Client is inaccurate, OKE accepts no responsibility for any loss, damages, or costs however resulting from these inaccurate plans, specifications or other information.
- 9.6 The Client agrees that all materials supplied by the Client or the Client's third-party sub-contractors will:
 - (a) be supplied in accordance with all legislative requirements;
 - (b) be suitable for their inclusion into the Works.
- 9.7 Where the Client has supplied materials for OKE to complete the Works, the Client acknowledges that it accepts responsibility for the suitability of purpose, quality and any faults inherent in those materials. However, if in OKE's opinion, it is believed that the materials supplied will not conform to industry regulations, then OKE shall be entitled, without prejudice, to halt the Works until the appropriate conforming materials are sourced and all costs associated with such a change to the plans will be invoiced in accordance with clause 6.2.
- 9.8 The Client acknowledges and accepts that OKE is only responsible for parts that are replaced by OKE and that in the event that other parts/Materials, subsequently fail, the Client agrees to indemnify OKE against any loss or damage to the Materials.
- 9.9 The Client acknowledges and accepts that:
 - (a) 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, glass, aluminium, paving, natural stone and stainless steel). Whilst every effort will be taken by OKE to match colour, texture and marking of such products, OKE shall not be liable for any loss, damages or costs (however arising), resulting from any variation in colour, texture and marking between batches or sale samples, and the final Materials provided; and
 - (b) 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.
- 9.10 Glass is a manufactured product and sourced from different manufacturers and as such may exhibit variations in texture, shade, colour, surface, finish, markings and contain some impurities deemed acceptable by OKE.
- 10.1 **Fencing Risks**
- 10.2 The Client must be on site to supervise the marking out of the fence line, placement of boundary pegs and during the installation of the fence. If the Client fails to comply with this clause then OKE accepts no responsibility for installation decisions that need to be made by OKE in the Client's absence.
- 10.3 The Client acknowledges that it is the Client's responsibility to remove any existing fence (including existing footings), trees, vines and shrubs to allow OKE clear access along the proposed fence line prior to commencement of work by OKE unless otherwise agreed in writing between OKE and the Client. Under no circumstances will OKE handle removal of asbestos product.
- 10.4 Where fencing is installed on a retaining wall/deck OKE 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/deck.
- 10.5 OKE shall not be responsible for digging land out under fence lines nor removal of soil from the work site.
- 10.6 OKE reserves the right to touch-up all products supplied and installed on the work site to rectify minor blemishes or damage to paintwork.
- 11.1 **Access**
- 11.2 The Client shall ensure that OKE has clear and free access to the work site at all times to enable them to undertake the works. OKE 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 OKE.
- 11.3 **Hidden Services**
- 11.4 Prior to OKE commencing any work the Client must advise OKE of the precise location of all hidden services on the site and clearly mark the same. The hidden mains & services the Client 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.
- 11.5 Whilst OKE will take all care to avoid damage to any hidden services the Client agrees to indemnify OKE in respect of all and any liability claims, loss, damage, costs and fines as a result of damage to services not precisely located and notified as per clause 11.1.
- 12.1 **Compliance Laws**
- 12.2 The Client and OKE 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.
- 12.3 The Client shall obtain (at the expense of the Client) all licenses, resource consents and approvals that may be required for the Works.
- 12.4 The Client agrees that the site will comply with any occupational health and safety laws relating to the site and any other relevant safety standard or legislation.
- 13.1 **Equipment Hire**
- 13.2 Equipment shall at all times remain the property of OKE and is returnable on demand by OKE. In the event that Equipment is not returned to OKE in the condition in which it was delivered OKE retains the right to charge the Client the full cost of repairing the Equipment. In the event that Equipment is not returned at all OKE shall have right to charge the Client the full cost of replacing the Equipment.
- 13.3 The Client shall:
 - (a) Keep the Equipment in their own possession and control and shall not assign the benefit of the Equipment nor be entitled to a lien over the Equipment;
 - (b) Not alter or make any additions to the Equipment including but without limitation altering, make any additions to, defacing or erasing any identifying mark, plate or number on or in the Equipment or in any other manner interfere with the Equipment;
 - (c) Keep the Equipment, complete with all parts and accessories, clean and in good order as delivered, and shall comply with any maintenance schedule as advised by OKE to the Client.
- 13.4 The Client accepts full responsibility for the safekeeping of the Equipment and the Client agrees to insure, or self-insure, OKE's interest in the Equipment and agrees to indemnify OKE against physical loss or damage including, but not limited to, the perils of accident, fire, theft and burglary and all other usual risks and will effect adequate Public Liability Insurance covering any loss, damage or injury to property or persons arising out of the use of the Equipment. Further the Client will not use the Equipment nor permit it to be used in such a manner as would permit an insurer to decline any claim.
- 14.1 **Title**
- 14.2 OKE and the Client agree that ownership of the Materials shall not pass until:
 - (a) the Client has paid OKE all amounts owing to OKE; and
 - (b) the Client has met all of its other obligations to OKE.
- 14.3 Receipt by OKE 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.
- 14.4 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 OKE on request.
 - (b) the Client holds the benefit of the Client's insurance of the Materials on trust for OKE and must pay to OKE 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 OKE shall be sufficient evidence of OKE's rights to receive the insurance proceeds and the Client shall be deemed to have agreed to indemnify OKE against any loss or damage to the Materials.
 - (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 OKE and must pay or deliver the proceeds to OKE 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 OKE and must sell, dispose of or return the resulting product to OKE as it so directs.
 - (f) unless the Materials have become fixtures the Client irrevocably authorises OKE to enter any premises where OKE believes the Materials are kept and recover possession of the Materials.
 - (g) OKE 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 or otherwise give away any interest in the Materials while they remain the property of OKE.
 - (i) OKE may commence proceedings to recover the Price of the Materials sold notwithstanding that ownership of the Materials has not passed to the Client.
- 15.1 **Personal Property Securities Act 2009 ("PPSA")**
- 15.2 In this clause financing statement, financing change statement, security agreement, and security interest has the meaning given to it by the PPSA.
- 15.3 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 OKE for Works - that have previously been supplied and that will be supplied in the future by OKE to the Client.
- 15.4 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 OKE 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 15.3(a)(i) or 15.3(a)(ii);
 - (b) indemnify, and upon demand reimburse, OKE 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 OKE;
 - (d) not register, or permit to be registered, a financing statement or a financing change statement in relation to the Materials in favour of a third party without the prior written consent of OKE; and
 - (e) immediately advise OKE of any material change in its business practices of selling the Materials which would result in a change in the nature of the proceeds derived from such sales.
- 15.5 OKE 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.
- 15.6 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.
- 15.7 The Client waives its rights as a grantor and/or a debtor under sections 142 and 143 of the PPSA.
- 15.8 Unless otherwise agreed to in writing by OKE, the Client waives its right to receive a verification statement in accordance with section 157 of the PPSA.
- 15.9 The Client shall unconditionally ratify any actions taken by OKE under clauses 15.3 to 15.5.
- 15.10 Subject to any express provisions to the contrary (including those contained in the 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.
- 15.11 Only to the extent that the hire of the Equipment exceeds a two (2) year hire period with the right of renewal shall clause 15 apply as a security agreement in the form of a PPS Lease in respect of Section 20 of the PPSA, in all other matters this clause 15 will apply generally for the purposes of the PPSA.
- 16.1 **Security and Charge**
- 16.2 In consideration of OKE 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).
- 16.3 The Client irrevocably appoints OKE and against all OKE's costs and disbursements including legal costs on a solicitor and own client basis including in exercising OKE's rights under this clause.
- 16.4 The Client irrevocably appoints OKE and each director of OKE 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.
- 17.1 **Defects, Warranties and Returns, Competition and Consumer Act 2010 (CCA)**
- 17.2 The Client must inspect all Materials on delivery (or the Works on completion) and must within forty-eight (48) hours of delivery notify OKE 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 OKE to inspect the Materials or to review the Works provided.
- 17.3 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**).
- 17.4 OKE acknowledges that nothing in these terms and conditions purports to modify or exclude the Non-Excluded Guarantees.

Please note that a larger print version of these terms and conditions is available from OKE on request.

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- 17.4 Except as expressly set out in these terms and conditions or in respect of the Non-Excluded Guarantees, OKE makes no warranties or other representations under these terms and conditions including but not limited to the quality or suitability of the Materials/Works. OKE's liability in respect of these warranties is limited to the fullest extent permitted by law.
- 17.5 If the Client is a consumer within the meaning of the CCA, OKE's liability is limited to the extent permitted by section 64A of Schedule 2.
- 17.6 If OKE is required to replace any Materials under this clause or the CCA, but is unable to do so, OKE may refund any money the Client has paid for the Materials.
- 17.7 If OKE 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 OKE 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.
- 17.8 If the Client is not a consumer within the meaning of the CCA, OKE'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 Client by OKE at OKE's sole discretion;
 - limited to any warranty to which OKE is entitled, if OKE did not manufacture the Materials;
 - otherwise negated absolutely.
- 17.9 Subject to this clause 17, returns will only be accepted provided that:
- the Client has complied with the provisions of clause 17.1; and
 - OKE has agreed that the Materials are defective; and
 - the Materials are returned within a reasonable time at the Client'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.
- 17.10 Notwithstanding clauses 14.1 to 17.9 but subject to the CCA, OKE shall not be liable for any defect or damage which may be caused or partly caused by or arise as a result of:
- the Client failing to properly maintain or store any Materials;
 - the Client using the Materials for any purpose other than that for which they were designed;
 - the Client 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 Client or any third party without OKE's prior approval;
 - the Client failing to follow any instructions or guidelines provided by OKE;
 - fair wear and tear, any accident, or act of God.
- 17.11 In the case of second hand Materials, unless the Client is a consumer under the CCA, the Client acknowledges that it has had full opportunity to inspect the second hand Materials prior to delivery and accepts them with all faults and that to the extent permitted by law no warranty is given by OKE as to the quality or suitability for any purpose and any implied warranty, statutory or otherwise, is expressly excluded. The Client acknowledges and agrees that OKE has agreed to provide the Client with the second hand Materials and calculated the Price of the second hand Materials in reliance of this clause 17.11.
- 17.12 OKE may in its absolute discretion accept non-defective Materials for return in which case OKE may require the Client to pay handling fees of up to thirty percent (30%) of the value of the returned Materials plus any freight costs.
- 17.13 Notwithstanding anything contained in this clause if OKE is required by a law to accept a return then OKE will only accept a return on the conditions imposed by that law.
- 18. Intellectual Property**
- 18.1 Where OKE 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 OKE, and shall only be used by the Client at OKE's discretion.
- 18.2 The Client warrants that all designs, specifications or instructions given to OKE will not cause OKE to infringe any patent, registered design or trademark in the execution of the Client's order and the Client agrees to indemnify OKE against any action taken by a third party against OKE in respect of any such infringement.
- 18.3 The Client agrees that OKE may (at no cost) use for the purposes of marketing or entry into any competition, any documents, designs, drawings, plans or products which OKE has created for the Client.
- 19. Default and Consequences of Default**
- 19.1 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 OKE's sole discretion such interest shall compound monthly at such a rate) after as well as before any judgment.
- 19.2 If the Client owes OKE any money the Client shall indemnify OKE from and against all costs and disbursements incurred by OKE in recovering the debt (including but not limited to internal administration fees, legal costs on a solicitor and own client basis, OKE's contract default fees, and bank dishonour fees).
- 19.3 Further to any other rights or remedies OKE may have under this Contract, if a Client has made payment to OKE, 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 OKE 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.
- 19.4 Without prejudice to OKE's other remedies at law OKE shall be entitled to cancel all or any part of any order of the Client which remains unfulfilled and all amounts owing to OKE shall, whether or not due for payment, become immediately payable if:
- any money payable to OKE becomes overdue, or in OKE's opinion the Client will be unable to make a payment when it falls due;
 - 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
 - a receiver, manager, liquidator (provisional or otherwise) or similar person is appointed in respect of the Client or any asset of the Client.
- (d) A receiver, manager, liquidator (provisional or otherwise) or similar person is appointed in respect of the Client or any asset of the Client.
- 20. Cancellation**
- 20.1 Without prejudice to any other remedies OKE may have, if at any time the Client is in breach of any obligation (including those relating to payment) under these terms and conditions OKE may suspend or terminate the supply of Works to the Client. Oke will not be liable to the Client for any loss or damage the Client suffers because OKE has exercised its rights under this clause.
- 20.2 OKE 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 OKE shall repay to the Client any sums paid in respect of the Price, less any amounts owing by the Client to OKE for Works already performed. OKE shall not be liable for any loss or damage whatsoever arising from such cancellation.
- 20.3 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 OKE as a direct result of the cancellation (including, but not limited to, any loss of profits).
- 20.4 Cancellation of orders for products made to the Client's specifications, or for non-stockist items, will definitely not be accepted once production has commenced, or an order has been placed.
- 21. Privacy Policy**
- 21.1 All emails, documents, images or other recorded information held or used by OKE is Personal Information, as defined and referred to in clause 18.3, and therefore considered Confidential Information. OKE 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'). Oke acknowledges that in the event it becomes aware of any data breaches and/or disclosure of the Clients Personal Information, held by OKE that may result in serious harm to the Client, OKE 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.
- 21.2 Notwithstanding clause 18.1, privacy limitations will extend to OKE in respect of Cookies where transactions for purchases/orders transpire directly from OKE's website. OKE 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:
- IP address, browser, email client type and other similar details;
 - Tracking website usage and traffic; and
 - Reports available to OKE when OKE sends an email to the Client, so OKE 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 Cookies first by selecting the option to enable/disable, provided on the website prior to proceeding with a purchase/order via OKE's website.
- 21.3 The Client agrees for OKE 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 OKE.
- 21.4 The Client agrees that OKE may exchange information about the Client with those credit providers and with related body corporates for the following purposes:
- To assess an application by the Client; and/or
 - To notify other credit providers of a default by the Client; and/or
- 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
 - To assess the creditworthiness of the Client including the Client's repayment history in the preceding two (2) years.
- 21.5 The Client consents to OKE being given a consumer credit report to collect overdue payment on commercial credit.
- 21.6 The Client agrees that personal credit information provided may be used and retained by OKE for the following purpose (and for other agreed purposes or required by):
- The provision of Works; and/or
 - Analysing, verifying and/or checking the Client's credit, payment and/or status in relation to the provision of Works; and/or
 - Processing or any payment instructions, direct debit facilities and/or credit facilities requested by the Client; and/or
 - Enabling the collection of amounts outstanding in relation to the Works.
- 21.7 OKE may give information about the Client 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 Client including credit history.
- 21.8 The information given to the CRB may include:
- Personal Information as outlined in 18.3 above;
 - Name of the credit provider and that OKE is a current credit provider to the Client;
 - Whether the credit provider is a licensee;
 - Type of consumer credit;
 - Details concerning the Client's application for 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 Client no longer has any overdue accounts and OKE has been paid or otherwise discharged and all details surrounding that discharge (e.g. dates of payments);
 - Information that, in the opinion of OKE, the Client has committed a serious credit infringement;
 - Advice that the amount of the Client's overdue payment is equal to or more than one hundred and fifty dollars (\$150).
- 21.9 The Client shall have the right to request (by email) from OKE:
- A copy of the Personal Information about the Client retained by OKE and the right to request that OKE correct any incorrect Personal Information; and
 - That OKE does not disclose any Personal Information about the Client for the purpose of direct marketing.
- 21.10 OKE will destroy Personal Information upon the Client's request (by email) or if it is no longer required unless it is required in order to fulfil the obligations of the Contract or is required to be maintained and/or stored in accordance with the law.
- 21.11 The Client can make a privacy complaint by contacting OKE via email. OKE 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.
- 22. Dispute Resolution**
- 22.1 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:
- referred to a single arbitrator to be nominated by the President of the Institute of Arbitrators Australia; and
 - conducted in accordance with the Institute of Arbitrators Australia Rules for the Conduct of Commercial Arbitration.
- 23. Building and Construction Industry Security of Payment Act 2002**
- 23.1 At OKE'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 Payment Act 2002 may apply.
- 23.2 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 Payment Act 2002 of Victoria, except to the extent permitted by the Act where applicable.
- 24. Service of Notices**
- 24.1 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.
- 24.2 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.
- 25. Trusts**
- 25.1 If the Client at any time upon subsequent to entering in to the Contract is acting in the capacity of trustee of any trust ('Trust') then whether or not OKE may have notice of the Trust, the Client covenants with OKE as follows
- The Contract extends to all rights of indemnity which the Client now or subsequently may have against the Trust and the trust fund;
 - 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;
 - The Client will not without consent in writing of OKE (OKE will not unreasonably withhold consent), cause, permit, or suffer to happen any of the following events:
 - The removal, replacement or retirement of the Client as trustee of the Trust;
 - Any alteration to or variation of the terms of the Trust;
 - Any advancement of distribution of capital of the Trust; or
 - Any resettlement of the trust property.
- 26. General**
- 26.1 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 effect 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.
- 26.2 These terms and conditions and any Contract to which they apply shall be governed by the laws of the state of Victoria in which OKE has its principal place of business and are subject to the jurisdiction of the courts of Melbourne in that state.
- 26.3 Subject to clause 14, OKE 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 OKE of these terms and conditions (alternatively OKE's liability shall be limited to damages which under no circumstances shall exceed the Price of the Works).
- 26.4 OKE may license or sub-contract all or any part of its rights and obligations under this Contract without the Client's consent.
- 26.5 The Client cannot license or assign without the written approval of OKE.
- 26.6 OKE 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 OKE's sub-contractors without the authority of OKE.
- 26.7 The Client agrees that OKE 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 OKE to provide Works to the Client.
- 26.8 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.
- 26.9 Both parties warrant that they have the power to enter into this Contract and have obtained all necessary authorisations to allow it to do so, they are not insolvent and that this Contract creates binding and valid legal obligations on them.