

Terms of Service

These Terms of Service (**Terms**) govern the performance of the Services by Aluminium Window Estimating Services Pty Ltd ABN 87 141 508 376 (the **Company**) to you (the **Client** or **you**) to. By clicking a box that states you agree to these Terms during the signup process, you agree to be bound by these Terms. Please carefully read and understand these Terms before signing up for an Account on the Website (as defined below) or requested Services. If you don't agree to be bound by these Terms, you must not sign up for an account or request Services.

The Company may update these Terms at any time by providing you with prior written notice.

1. DEFINITIONS

- 1.1 In these Terms unless inconsistent with the context or subject matter the following terms have the corresponding definitions:
- (a) **"Account"** means an account to access and use the Website.
 - (b) **"ACL"** means the Australian Consumer Law (as set out in Schedule 2 to the *Competition and Consumer Act 2010* (Cth));
 - (c) **"Applicable Laws"** any laws governing or affecting the arrangements contemplated by these Terms;
 - (d) **"Claim"** means any claim, action, demand or proceeding however arising (including under contract, statute, common law or equity);
 - (e) **"Client's Address for Service"** means the email address or address of the Client set out in the application form;
 - (f) **"Commencement Date"** the date these Terms become binding on the Client.
 - (g) **"Company's Address for Service"** means the email address as specified on the Website;
 - (h) **"Contract Materials"**: all things, materials and information, created, conceived, developed or generated by the Company (whether alone or with the Client, its employees, agents or contractors) in supplying the Services under these Terms.
 - (i) **"Corporations Act"** means the Corporations Act 2001 (Cth);
 - (j) **"Force Majeure"** means an act, omission or circumstance over which the Company could not reasonably have exercised control;
 - (k) **"GST"** has the meaning given to it in the GST Act;
 - (l) **"GST Act"** means the A New Tax System (Goods and Services Tax) Act 1999 (Cth);
 - (m) **"Insolvency Event"** means:
 - i) a controller (as defined in section 9 of the Corporations Act), administrator or similar officer is appointed in respect of a person or any asset of a person;
 - ii) a liquidator or provisional liquidator is appointed in respect of a person;
 - iii) any application (that is not withdrawn or dismissed within seven days is made to a court for an order, or an order is made, or a meeting is convened or a resolution is passed, for the purpose of (i) appointing a person referred to in paragraph i) or ii) of this definition; (ii) winding up or deregistering a person; or (iii) proposing or implementing a scheme of arrangement of a person, other than with the prior approval of the Agent under a scheme of arrangement pursuant to Part 5.1 of the Corporations Act;
 - iv) any action, proceedings, procedure or step is taken for the purpose of implementing or agreeing (i) a moratorium of any indebtedness of a person; (ii) any other composition, compromise, assignment or arrangement with any creditor or creditors of a person; or (iii) any similar proceeding or arrangement by which the assets of a person are subjected conditionally or unconditionally to the control of its creditors or a trustee;
 - v) any event occurs in relation to a person in any jurisdiction that is analogous, or has a substantially similar effect, to those set out in paragraphs i) to iv) of this definition (inclusive); or
 - vi) a person is or admits in writing that it is, or is declared to be, or is taken under any applicable law to be (for any purpose), insolvent or unable to pay its debts
 - (n) **"Intellectual Property Rights"**: all intellectual property (IP) rights of any kind, in any jurisdiction, subsisting now or in the future (including business, company or trade names, domain names, patents, inventions, copyright, design rights, know-how, trade marks, the right to sue for passing off and rights to use, and protect the confidentiality of, confidential information), whether registered or unregistered, and including the rights to apply for or renew the registration of any such rights and any rights the subject of any lapsed application or registration.
 - (o) **"Loss"** any loss, liability, cost, charge, expense, tax, duty or damage of any nature whatsoever, including special, incidental, or consequential damages, losses or expenses (howsoever arising or caused, including, without limitation, negligence);
 - (p) **"Personnel"** means the directors, officers, employees, contractors, suppliers, advisers or agents of a party (and in the case of the Client, includes without limitation any other

trade person engaged by them and any of their Personnel);

- (q) **"Plans"** means any drawings, structural or other plans, specifications, documents, instructions or information provided by the Client (or its Personnel) to the Company or otherwise provided by the Company to the Client, including verbally;
- (r) **"Pre-existing IP Rights"**: Intellectual Property Rights in all materials owned by the Client or the Company (as the case may be) prior to the date of these Terms or which was developed independently of the Services.
- (s) **"Quote"** means a quote provided by the Company to the Client;
- (t) **"Services"** means any services supplied by the Company to the Client, from time to time;
- (u) **"State"** means Queensland, Australia; and
- (v) **"Tax Invoice"** has the same meaning as in the GST Act.

1.2 In these Terms unless inconsistent with the context or subject matter:

- (a) References to a party to any agreement or document include that party's permitted assignees and successors, including executors and administrators and legal representatives.
- (b) Words denoting the singular include the plural and words denoting the plural include the singular.
- (c) Words denoting any gender include all genders.
- (d) The word 'person' includes any individual, corporation or other body corporate, partnership, joint venture, trust, association and any Government Agency.
- (e) Any promise, agreement, representation or warranty given or entered into on the part of two or more persons binds them jointly and each of them severally.
- (f) Any promise, agreement, representation or warranty given or entered into on the part of two or more persons is for the benefit of them jointly and each of them severally.
- (g) No provision of these Terms will be construed adversely to a party because that party was responsible for the preparation of that provision or these Terms.
- (h) If a period of time begins on a given day or the day of an act or event, it is to be calculated exclusive of that day.
- (i) A reference to time is a reference to time in the capital city of the State.
- (j) A reference to a day is a reference to a day in the capital city of the State.
- (k) A reference to a day is to be interpreted as the period of time commencing at midnight and ending 24 hours later.

- (l) If any act is required to be performed under these Terms on or by a specified day and that day is not a business day, the act must be performed on or by the next business day.
- (m) A reference to an amount of dollars, Australian dollars, \$ or A\$ is a reference to the lawful currency of the Commonwealth of Australia, unless the amount is specifically denominated in another currency.
- (n) Where these Terms are executed for a party by an attorney, the attorney by executing it declares that the attorney has no notice of revocation of the power of attorney.
- (o) A reference to writing or written includes email.
- (p) Where a word or phrase is defined, other parts of speech and grammatical forms of that word or phrase have corresponding meanings.

2. ACCOUNT

- 2.1 To request the performance of Services by the Company, the Client must have an Account. Having an Account will provide the Client with access to the Website to be able to request Services and upload projects and documents.
- 2.2 The Company may in its sole discretion accept or reject an application for an Account, without any obligation to provide reasons. If the Client's application for an Account is accepted, the Client will be granted a non-exclusive revocable licence to access and use the Website for the performance of the Services.
- 2.3 To access and use the Account, the Client will need to set up an Account with their email address and a password. The Client is solely responsible for maintaining the confidentiality of their password and are liable for all activities that happen under the Account, even if they do not authorise such activities. The Client must keep secret and secure all usernames and passwords in relation to the Account and not allow any other person to have access to the Account

3. QUOTES

- 3.1 During the Term, the Client may request Services by following the prompts on the Website and submitting a project request to the Company (or such other method as approved by the Company, such as via email or phone) (each referred to as a **Project Request**). The Company may accept or reject any Project Request in its discretion.
- 3.2 The Company will review Project Requests provided by the Client, and at its discretion provide a Quote in return, setting out the Services and fees applicable.
- 3.3 Unless otherwise agreed all Quotes are valid for 7 days from the date of the quotation, and will only become binding on the Company when the Company expressly acknowledges acceptance. Any fees stated in a Quote are provided on the basis of the information current to the Company

at the date of the Quote. The Company reserves the right to increase the fees set out in a Quote where applicable in accordance with the terms of these Terms. Any accepted Quote will form part of and be governed by these Terms.

3.4 The Client acknowledges and agrees that the supply of Services remains subject to availability and if, for any reason, the Company is unable to proceed with the supply, the Company reserves the right to cancel the Services (and issue a refund in respect of the fees paid by the Client for that part of the Services which is cancelled if applicable). This is the Client's only remedy in these circumstances and the Company will not be liable to pay any other amount to the Client.

3.5 No invoice, terms or other document issued by or on behalf of the Client (including the terms on any warranty or other agreement given to the Company) will vary or form part of these Terms unless otherwise agreed by the Company in writing. These Terms replace and supersede any invoice, terms or other document given by the Client to the Company whether before or after the time that these Terms are supplied to the Client.

4. PROVISION OF SERVICES

4.1 The Company will provide the Services to the Client on the terms and conditions contained in these Terms.

4.2 Subject to the other terms of this document, the scope of the Services being provided will be as agreed upon by the parties in a Quote. Changes will be dealt with under the change policy set out in clause 8. The scope as set out in a Quote is based on the information current to the Company.

4.3 The Quote may contain additional terms which form part of these Terms. In the event of any inconsistency between these Terms and any Quote, the terms contained in the Quote will prevail to the extent of such inconsistency.

4.4 The Company may subcontract, delegate or perform the Services through any person without the prior written consent of the Client.

4.5 The provision of Services to a third party nominated by the Client shall be deemed to be provision of the Services to the Client for the purpose of these Terms.

5. FEES

5.1 The fees payable by the Client to the Company for the Services are the amount either specified in a Quote or where no Quote is provided, is an amount determined in accordance with the Company's then current standard hourly rates (as at the date of performance of the Services) which is available upon request.

5.2 The Company reserves the right to increase the fees payable by the Client for the Services, even after the Client has accepted a Quote or instructed the Company to proceed with the Services, in the event of:

(a) variations to the Services requested, in which case Such variations will be charged for on the basis of the Company's revised Quote or then current price list as applicable, and will be shown as variations on the invoice; and/or

(b) any variation to the Company's cost of labour or software materials, or fluctuations in currency exchange rates, or where additional Services are required due to unforeseen circumstances which are beyond the Company's control (such as inaccurate Plans provided by the Client).

5.3 Unless expressly stated otherwise, the consideration for any supply under or in connection with these Terms is exclusive of GST and the Client must pay GST on the fees at the same time as payment of the fees is due.

6. PAYMENT

6.1 The Company will provide a Tax Invoice to the Client for the fees weekly in arrears (for Services performed during the previous week). Unless otherwise stated in the Quote, payment of each Tax Invoice is due within 7 days of the date of the Tax Invoice.

6.2 At the Company's sole discretion a non-refundable deposit may be required. If a deposit is set out in the Quote, the Client must pay the deposit immediately upon accepting a Quote, and the Client acknowledges that the Company will not commence the performance of the Services until payment is received.

6.3 Payment may be made by any other method as agreed to between the Company and the Client. All fees are non-refundable to the extent permitted by law.

6.4 The Client will also pay to the Company, on demand, on a full indemnity basis, all amounts that the Company may, at its absolute discretion, expend or incur (including legal costs on a solicitor and own client basis and any debt collection agency costs/commissions) as a result of the Client defaulting on any of the terms of these Terms.

6.5 If payment is not made in accordance with this clause 6, the Company may (without limitation to its other rights):

(a) require the Client to pay the Company interest on all outstanding monies from the due date until the date of payment at the rate of 12% per annum accruing daily;

(b) demand payment and all money payable under these Terms or any Quote to the Company shall immediately become due and payable;

(c) refuse to supply any further part of the Services to the Client until all outstanding monies, including any accrued interest, is paid in full; or

(d) terminate these Terms whereupon the full price for the Services then supplied, whether or not the time for payment under these Terms has arrived, will be immediately due and payable.

6.6 The Client may not withhold payment or make any deduction from any amount owing without the Company's prior written consent, irrespective of any claim the Client may have against the Company.

7. PERFORMANCE OF SERVICES

7.1 The Services will be performed in the manner as set out in the Quote and on and from the date as specified in the Quote, or where no date is specified, then from a date as agreed between the parties.

7.2 Although the parties may have agreed on the delivery schedule, the parties acknowledge and agree that:

(a) any times provided by the Company to the Client in respect of the provision of the Services are variable and estimates only and are non-binding on the Company. Whilst the Company attempts to provide all Services at the agreed times, such times are estimates only and sometimes delays are inevitable and the Company will not be responsible for any Losses suffered by the Client in the event of delay; and

(b) failure of the Company to meet any delivery date will not constitute a breach of these Terms by the Company or entitle the Client to any damages or other remedy.

7.3 The Company will rely on the accuracy of any Plans and other information the Client provides. In the event that the Plans are defective or inaccurate, the Company will not be liable to the Client for any Loss that they suffer and the Client will still be liable to pay the entirety of the fees even if the Company is unable to properly or fully provide the Services.

7.4 The Client is solely responsible for reviewing the Plans and ensuring that they are fit and suitable for the Client's purposes. The Company will not be liable for any defect in the Plans, except to the extent the defect is directly caused by the Company's negligence or breach of these Terms.

7.5 Despite this, the Company shall be under no obligation to vary the Services set out in a Quote even if the Company becomes aware of the requirement for additional Services or a defect or error in the Plans..

8. VARIATIONS AND AMENDMENTS

8.1 The Client may propose changes to the scope or execution of the Services but no changes shall come into effect until agreed by the Company. Variations may result in additional fees, delays and an extension may be required.

8.2 If the Company determines that additional or varied Services are required to be carried out, or

if for any reason there is an issue that occurs that extends the scope of the Services required to be carried out, or the Services requested by the Client which formed the basis for the Quote are incorrect or not ultimately suitable (for example as a result of inaccurate Plans), then the Company reserves the right to provide an additional Quote to the Client setting out the additional/varied scope and fees required to be paid by the Client.

8.3 Where clause 8.2 applies and the Client does not accept the revised additional Quote then the Company may in its discretion cease providing the Services and the Client must pay the Company for all Services already provided.

8.4 Any Services outside of the scope set out in a Quote or otherwise contemplated by the Company based on the Plans and other information known to the Company at the date of the Quote, will incur additional costs.

9. CLIENT OBLIGATIONS

9.1 The Client must provide the Company with all documentation, information and assistance reasonably required for the Company to perform the Services.

9.2 The Client agrees to liaise with the Company as it reasonably requests for the purpose of enabling the Company to provide the Services.

9.3 The Client agrees that it will not, by receiving or requesting the Services:

(a) breach any applicable laws, rules or regulations (including any applicable privacy laws); or

(b) infringe the intellectual property rights or other rights of any third party or breach any duty of confidentiality.

10. THIRD PARTY SOFTWARE

10.1 With the provision of the Services, the Company may use third party software. The Client may have the option to provide the Company with access to such software.

10.2 Where the Client provides the Company with such access:

(a) the Client must have an account set up with that third-party supplier and the Client is solely responsible for ensuring that it maintains its account at its own cost (including subscription fees); and

(b) the Client grants access to the relevant accounts to the Company and authorises and directs the Company to transmit the Client's data as required to and from such third-party services in order for the Company to provide the Services.

10.3 The Client acknowledges that such third-party services are beyond the Company's reasonable control, and in the event that:

(a) a third-party service is experiencing issues or downtime; or

(b) the Client is required to maintain an account with that third-party service and fails to do so, this may also cause the Services to be delayed or not able to be performed properly and the Company accepts no responsibility for any Losses or notification in this regard.

10.4 Where information is transferred to or from a third-party service, the Company will not be liable for any Loss arising from the use of that information by that third-party service. As the Services may pull data from third-party dependencies (including data inputted by the Client on that third-party service) the Company provides no warranties if the information displayed is incorrect due to an error of the data being pulled (for example if the third-party dependency pulls incorrect data).

11. ACCEPTANCE AND DEFECTIVE SERVICES

11.1 Acceptance and defective Services

- (a) The Client must provide written notice of any defective Services as soon as possible upon becoming aware of them and being no later than 7 days after completion of the provision of the Services. The Company may also require the Client to provide evidence of any defect in any Services supplied.
- (b) The Company will decide in its sole discretion if the Services are defective (acting reasonably).
- (c) Except as required by law, for each Service that is deemed defective in accordance with this clause, the Company's liability will be limited to the supplying of the relevant Services again or the payment of the cost of having the relevant Services supplied again (to remedy such defect) and such replacement Services will not be carried out until the Client's account is paid in full. If any works are required outside the 7-day period, it will be deemed a new scope and a new Quote will be agreed between the parties.

11.2 Exclusion of liability

- (a) Notwithstanding any other clause in these Terms, to the extent permitted by law the Company will not be liable for or required to provide any remedy for any defect or damage where such defect or damage is caused or partly caused by or arises as a result of:
 - i) the Client's acts or omissions, including the Client failing to take reasonable steps to prevent them from becoming defective or the Client failing to follow the Company's instructions;
 - ii) the Company following any instructions supplied by the Client (including any Plans); or
 - iii) any event, accident or circumstance outside the reasonable control of the Company.

(b) The Client is solely responsible for ensuring that the provision of the Services are suitable or adequate for its purposes.

11.3 Australian Consumer Law

Our services come with guarantees that cannot be excluded under the ACL. For major failures with the service, you are entitled:

- (a) to cancel your service contract with us; and
- (b) to a refund for the unused portion, or to compensation for its reduced value.

You are also entitled to be compensated for any other reasonably foreseeable loss or damage. If the failure does not amount to a major failure, you are entitled to have problems with the service rectified in a reasonable time and, if this is not done, to cancel your contract and obtain a refund for the unused portion of the contract.

11.4 Third party goods and services

Notwithstanding any other clause in these Terms, the Company will only be responsible for defects in the Services that the Company supplies. To the extent permitted by law the Company will not be liable for or required to provide any remedy for:

- (a) any software supplied by the Client;
- (b) any services carried out by third parties.

12. WARRANTIES

- (a) The warranties contained in clause 12(b) are additional to warranties implied by law. Each of the warranties will be read and construed as a separate and independent warranty and will not be limited by reference to each other. All warranties will be valid at all times during the term of these Terms and will be continuing warranties which will survive the termination or expiration of these Terms.
- (b) The Client warrants to the Company that as at the date of these Terms and for the duration of these Terms:
 - i) the Plans are true and correct and do not contain errors or defects and contain all information that any reasonable person in the Company's position would need to know in order to quote and supply the Services;
 - ii) the information contained in these Terms are true and correct and it has disclosed all relevant information to the Company to assess the credit-worthiness of the Client;
 - iii) it has the legal right and power to enter into these Terms;
 - iv) the execution, delivery and performance of these Terms by the Client has been duly and validly authorised by all necessary corporate action on its part;
 - v) these Terms are a valid and binding agreement on the Client, enforceable in accordance with its terms;

- vi) the Client is not suffering an Insolvency Event and no Insolvency Event is imminent; and
- vii) it has the capacity to make the payment in accordance with these Terms.

13. INDEMNITY

- 13.1 Except to the extent caused or contributed to by the breach of these Terms by the Company, the Client indemnifies the Company against, and holds the Company harmless from, any Losses (including any direct, indirect, special or consequential Losses) and all interest, penalties and legal costs (calculated on a full indemnity basis) and all other professional costs and expenses suffered or incurred by the Company arising out of or in connection with:
- (a) the Client's breach or negligent performance or non-performance of these Terms, including any failure to pay any fees on time;
 - (b) any claim made against the Company or the Client by a third party arising out of or in connection with:
 - i) the provision of the Services or these Terms;
 - ii) the reliance by the Client or a third party on the Services; or
 - iii) defective Services,
 to the extent that such claim arises out of the breach, negligent performance or failure or delay in performance of these Terms by, or is attributable to the acts or omissions of, the Client or the Client's Personnel;
 - (c) the Client's use of the Services;
 - (d) the Client's violation of any Applicable Law;
 - (e) any event or cause, beyond the reasonable control of the Company;
 - (f) any reliance by the Client or a third party on the Services or any advice, information or deliverable provided in connection with the provision of the Services and/or these Terms;
 - (g) the enforcement of these Terms; and
 - (h) any act, omission or wilful misconduct of the Client or the Client's Personnel (including any negligent act or omission).
- 13.2 The Client must make payments under this clause:
- (a) in full without set-off or counterclaim, and without any deduction in respect of taxes unless prohibited by law; and
 - (b) in the currency in which the payment is due, and otherwise in Australian dollars, in immediately available funds.
- 13.3 If a payment due from the Client under this clause is subject to tax (whether by way of direct assessment or withholding at its source), the Company will be entitled to receive from the Client such amounts as will ensure that the net receipt,

after tax, to the Company in respect of the payment is the same as it would have been were the payment not subject to tax.

- 13.4 Except where expressly stated to the contrary in these Terms, the rights of a party under this clause are in addition to any other rights available to that party whether those rights are provided for under these Terms or by law.
- 13.5 It is not necessary for the Company to incur expense or make payment before enforcing a right of indemnity under this clause.
- 13.6 The indemnities in this clause:
- (a) are continuing obligations of the Client, independent from its other obligations under these Terms and survive termination or expiry of these Terms; and
 - (b) are absolute and unconditional and unaffected by anything which otherwise might have the effect of prejudicing, releasing, discharging or affecting the liability of the Client.
- 13.7 The Company's liability under this indemnity is limited under clause 15.

14. DISCLAIMER

- 14.1 Subject to the other terms of this clause, the Company provides the Services on an "as is" basis and without any warranties, representations, or conditions of any kind, whether express, implied or statutory, to the extent permitted by law. The Client relies on the Services at its own risk.
- 14.2 Without limiting the other terms of this clause, the Client acknowledges and agrees that:
- (a) any advice, recommendation, information, assistance or service provided by the Company in relation to the Services supplied is given in good faith, is based on the Company's own knowledge and experience 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 Services. Such advice, recommendations, information and assistance is followed or acted upon entirely at the Client's own risk, and accordingly the Company shall not be liable for any such advice or recommendation;
 - (b) the Company reserves the right to make any changes in the specification of the Plans which are required to conform with any applicable safety or other statutory or regulatory requirements or, where the Plans are to be supplied to the Company's specification, which do not materially affect their quality or performance.

15. EXCLUSION AND LIMITATION OF LIABILITY

- 15.1 The Company excludes all rights, representations, guarantees, conditions, warranties, undertakings, remedies or other terms in relation to the Services that are not

- expressly set out in these Terms to the maximum extent permitted by law.
- 15.2 Without limiting the generality of clause 15.1, the Company expressly excludes any liability in contract, tort or otherwise for any injury, damage, Loss, delay or inconvenience caused directly or indirectly by:
- (a) any act or omission of the Client or its Personnel, including any delay caused by the Client or its Personnel;
 - (b) any problem caused by misuse, abuse, wear and tear or abnormal movement; and
 - (c) any defect in, or problem caused by, materials or goods supplied by the Client or its Personnel.
- 15.3 Subject to the other terms of this clause, the Company's total maximum aggregate liability to the Client for any Loss or damage or injury arising out of or in connection with the supply of services under these Terms, including any breach by the Company of these Terms however arising, under any indemnity, in tort (including negligence), under any statute, custom, law or on any other basis, is limited to the actual charges paid by the Client to the Company under these Terms in the 1-month period preceding the matter or event giving rise to the claim.
- 15.4 Nothing in these Terms are intended to have the effect of excluding, restricting or modifying the application of all or any of the provisions of Part 5-4 of the ACL, or the exercise of a right conferred by such a provision, or any liability of the Company in relation to a failure to comply with a guarantee that applies under Division 1 of Part 3-2 of the ACL to a supply of goods or services.
- 15.5 If the Company is liable to the Client in relation to a failure to comply with a guarantee that applies under Division 1 of Part 3-2 of the ACL that cannot be excluded, or is otherwise liable for any matter that cannot be excluded, the Company's total liability to the Client for that failure is limited to, at the option of the Company the costs of the resupply of the relevant Services to which the liability relates or the payment of the costs of resupply of the relevant Services.
- 15.6 Without limitation to the other terms of these Terms, the Company excludes any liability to the Client, whether in contract, tort (including negligence) or otherwise, for any special, indirect or consequential Loss arising under or in connection with these Terms.
- 15.7 Notwithstanding anything else in this clause, the Company's liability will be reduced to the extent the loss or damage is caused by or contributed to by the Client, or the Client's Personnel.
- 15.8 Where the Client is or may be entitled to recover from a third party any sum in respect of any matter or event that could give rise to a claim under these Terms, the Client must:
- (a) use its best endeavours to recover that sum before making the claim;

- (b) keep the Company at all times fully and promptly informed of the conduct of such recovery; and
 - (c) reduce the amount of the claim to the extent that sums are recovered.
- 15.9 The Company will not be liable for any claim under or in relation to or arising out of these Terms including a breach of any warranty unless:
- (a) the Client has first made a claim under any insurance policy held by the Client that may cover that claim; and
 - (b) that claim has been denied in whole or partly by the relevant insurer.
- 15.10 If the Client recovers any amount under an insurance policy in respect of a claim under or in relation to or arising out of these Terms and that amount is less than the loss or damage incurred by the Client, the amount of the shortfall will be the amount of the Client's loss for the purposes of these Terms.
- 15.11 The Company is not liable in respect of a claim unless the Client has notified the Company of the claim as soon as practicable after it becomes aware of it.

16. CANCELLATION & TERMINATION

- 16.1 Subject to the other terms of this clause, either party may cancel all or part of any order to which these Terms apply or cancel delivery of Services at any time, and without cause by giving written notice to the other party.
- 16.2 Upon termination of these Terms the Client shall be liable to pay to the Company for all Services supplied by the Company up until the date of termination, and such amounts shall be a debt immediately due and owing.
- 16.3 The termination of a Quote does not affect any other Quote/s which shall continue.
- 16.4 The rights and remedies of the parties contained in this clause are in addition to any other rights and remedies by law, in equity or under these Terms.

17. INTELLECTUAL PROPERTY

17.1 Pre-Existing IP

- (a) Each party acknowledges that all Pre-existing IP Rights remain the sole property of the owner. Ownership of Pre-existing IP Rights remains unchanged by these Terms, other than as expressly set out in these Terms.
- (b) The Client warrants it has the rights to all Pre-existing IP Rights and the grant of licence of such to the Company will not violate or infringe upon the Intellectual Property Rights or any other rights whatsoever of any person, form, corporation or other entity.

17.2 Contract Materials

- (a) The parties agree that to the extent that the Company owns the Contract Materials, the

Company will assign to the Client all title, interest and rights (including all Intellectual Property Rights) to such Contract Materials that are created specifically for the Client, on and from the date that all fees payable under these Terms for the relevant Contract Materials are paid in cleared funds. The Company will provide the Client with a copy of the Contract Materials once it becomes the Client's property in accordance with this clause, subject to any other rights that the Company may have in these Terms. In the event that these Terms is terminated prior to the completion of the relevant Services, the Company will retain ownership of all Contract Materials and is not obliged to provide it to the Client, even if the Client has paid part of the fees.

- (b) The Client grants the Company a royalty free licence to use the Intellectual Property Rights in the Contract Materials which the Client receives title to hereunder (if any) solely as required to perform its obligations under these Terms or to obtain the benefit of a right during the Term.

17.3 Client supplied Plans

- (a) Where the Client has supplied, designed, drawn or developed the Plans by itself then the Client shall remain the owner of such Plans, and grants the Company the right to use such Plans for the purposes of providing the Services under these Terms.
- (b) The Client warrants that all Plans given to the Company will not cause the Company to infringe any intellectual property rights or third party rights of any third party and the Client agrees to indemnify the Company against any action taken by a third party against the Company in respect of any such infringement.

17.4 Acknowledgement

The Client acknowledges and agrees that:

- (a) at all times, the Company shall retain ownership of the strategies and know-how used by it to provide the Services;
- (b) the Company may use templates, other third party intellectual property and open source code in providing the Services, and the owner of such other property retains all copyright and ownership in that property. In that case, the Company grants the Client a non-exclusive licence to use the other property to obtain the full benefit of the Services; and
- (c) the Company may develop other designs and assets that have a similar look and feel to any deliverables delivered through the Services, and provide others with services that are similar to the Services that the Company provides to the Client, and the Client must not object to this.

18. PROTECTION OF BUSINESS INTERESTS

18.1 Restraint on staff

In order to reasonably protect the Company, the Client agrees with the Company that it will not (and will procure its Personnel do not), whether directly or indirectly (including through a Related Entity), for each of the Restraint Periods:

- (a) canvass, solicit, interfere, or entice away, or attempt to canvass, solicit, interfere, or entice away, Restricted Staff, to leave their employment or engagement with the Company or with a view to engage such Restricted Staff in a Restricted Business;
- (b) interfere in any way with the relationship between the Company and its Restricted Staff; or
- (c) engage in any combination of the above.

18.2 Definitions

For purposes of this clause:

- (a) "Restraint Period" means during the Term of these Terms and for a period of:
 - i) 12 months;
 - ii) 6 months;
 - iii) 3 months,after the expiry or termination of the Term.
- (b) "Restricted Business" means:
 - i) a business or operation similar to, or competitive with the Company;
 - ii) any business that competes with the Company;
 - iii) any business that operates in the industry of the Company; or
 - iv) any business or operation similar to that carried on by the Client in which the Restricted Staff was engaged with.
- (c) "Restricted Staff" means an employee, contractor, officer or agent of the Company:
 - i) with whom the Client has had dealings with during the 12 month period prior to the event that gives rise to this clause; or
 - ii) who was an employee, contractor, officer or agent of the Company in the 12 month period prior to termination of these Terms.

18.3 Interpretation

This clause has effect as if it consisted of several separate covenants and restraints consisting of each separate covenant and restraint set out in clause 21.1 combined with each separate Restraint Period (as appropriate) and each separate limb of "Restricted Business" and "Restricted Staff" ("Restraint Covenants") and if any of the Restraint Covenants are or become invalid or unenforceable for any reason then the invalidity or unenforceability does not affect the validity or enforceability of any of the other Restraint Covenants.

18.4 Acknowledgements

The Client acknowledges and agrees that:

- (a) the Client has received substantial and valuable consideration for the Restraint Covenants;
- (b) disclosing Confidential Information, or using Confidential Information to the Client's benefit or the benefit of a competitor of the Company, could materially harm the Company's business;
- (c) the Restraint Covenants contained in these Terms are reasonable in scope, duration and time, and reasonably necessary to protect the Company's goodwill and legitimate interests;
- (d) the Company may apply for injunctive relief if the Client breaches or threatens to breach this clause.

18.5 Permitted activities

This clause will not apply in circumstances where the activity has been expressly agreed to in writing from time to time by the Company

19. FORCE MAJEURE

- 19.1 The Company will not be in breach of these Terms or liable to the Client for any Loss incurred by the Client as a direct result of the Company failing or being prevented, hindered or delayed in the performance of its obligations under these Terms where such prevention, hindrance or delay results from a Force Majeure Event..
- 19.2 If a Force Majeure Event occurs, the Company must notify the Client in writing as soon as practicable and that notice must state the particulars of the Force Majeure Event and the anticipated delay.
- 19.3 On providing the notice in clause 19.2, the Company will have the time for performance of the affected obligations extended for a period equivalent to the period during which performance has been delayed, hindered or prevented, however, the Company must continue to use all reasonable endeavours to perform those obligations.
- 19.4 The performance of the affected obligations must be resumed as soon as practicable after such Force Majeure Event is removed or has ceased.

20. NO ASSIGNMENT

- 20.1 The Client must not transfer or assign its rights under these Terms to anyone else, without the prior written consent of the Company, which may be granted or withheld by the Company in its discretion. The Client must provide any information the Company requires to consider whether to grant its consent.

21. NOTICES

- 21.1 All notices authorised or required under these Terms to be given by a party to the other shall be in writing sent by email or delivered personally or sent by pre-paid registered post and in each case addressed to the other party at that party's

Address for Service or as the case may be at such other address as a party may from time to time notify to the other.

- 21.2 The following shall constitute proof of receipt:
 - (a) proof by posting by registered post; or
 - (b) proof of dispatch by email.
- 21.3 Receipt of a notice given under these Terms will be deemed to occur:
 - (a) in the case of a communication sent by pre-paid registered post, on the third business day after posting;
 - (b) in the case of an email, on the business day immediately following the day of dispatch.
- 21.4 If a notice is sent via post, it must also be sent via email.

22. SPECIAL CONDITIONS

- 22.1 The special conditions set out in the Quote (if any) (**Special Conditions**) form part of these Terms. To the extent of any inconsistency or conflict between the Special Conditions and the general conditions of these Terms, the Special Conditions shall prevail.

23. GENERAL

23.1 No Waiver

- (a) No party may rely on the words or conduct of any other party as being a waiver of any right, power or remedy arising under or in connection with these Terms unless the other party or parties expressly grant a waiver of the right, power or remedy. Any waiver must be in writing, signed by the party granting the waiver and is only effective to the extent set out in that waiver.
- (b) Words or conduct referred to in clause 23.1(a) include any delay in exercising a right, any election between rights and remedies and any conduct that might otherwise give rise to an estoppel.

23.2 Counterparts

These Terms may be executed in any number of counterparts. All counterparts taken together constitute one instrument. A party may execute these Terms by signing any counterpart. The date on which the last counterpart is executed is the date of these Terms. Communication of the fact of execution to the other parties may be made by sending evidence of execution by email. The parties consent to the execution of these Terms by electronic means.

23.3 Costs

The parties must bear their own costs of and incidental to the negotiation, preparation and execution of these Terms.

23.4 Severability

- (a) If the whole or any part of a provision of these Terms are or becomes invalid or unenforceable under the law of any jurisdiction, it is severed in that jurisdiction to

the extent that it is invalid or unenforceable and whether it is in severable terms or not.

- (b) Clause 23.4(a) does not apply if the severance of a provision of these Terms in accordance with that clause would materially affect or alter the nature or effect of the parties' obligations under these Terms.

23.5 No Merger

On completion or termination of these Terms, the rights and obligations of the parties set out in these Terms will not merge and any provision that has not been fulfilled remains in force.

23.6 Survival

Any clause which by its nature is intended to survive termination or expiry of these Terms will survive such termination or expiry.

23.7 Further Action

Each party must do all things (including completing and signing all documents) reasonably requested by the other party that are necessary to give full effect to these Terms and the transactions contemplated by these Terms.

23.8 Time of the Essence

Time is of the essence in these Terms in respect of any date or time period and any obligation to pay money.

23.9 Relationship of the Parties

Nothing in these Terms gives a party authority to bind any other party in any way. Nothing in these Terms imposes any fiduciary duties on a party in relation to any other party.

23.10 Remedies Cumulative

Except as provided in these Terms and permitted by law, the rights, powers and remedies provided in these Terms are cumulative with and not exclusive to the rights, powers or remedies provided by law independently of these Terms.

23.11 Entire Agreement

These Terms states all the express terms agreed by the parties about its subject matter. It supersedes all prior agreements, understandings, negotiations and discussions in respect of its subject matter.

23.12 No Reliance

No party has relied on any statement, representation, assurance or warranty made or given by any other party, except as expressly set out in these Terms.

23.13 Governing Law and Jurisdiction

These Terms is governed by the law in force in the State. Each party irrevocably submits to the exclusive jurisdiction of courts exercising jurisdiction in the State and courts of appeal from them in respect of any proceedings arising out of or in connection with these Terms.