

Terms and condition of trade

- 1. Definitions**
- 1.1. "Contractor" shall mean Action Bricklaying A.B.N: 54 085 346 803 its successors and assigns or any person acting on behalf of and with the authority of Permacture Consultancy A.B.N: 54 085 346 803 including but not limited to subcontractors.
- 1.2. "Client" shall mean the Client (or any person acting on behalf of and with the authority of the Client) as described on any quotation, work authorisation or other form as provided by the Contractor to the Client.
- 1.3. "Guarantor" means that person (or persons), or entity, who agrees to be liable for the debts of the Client on a principal debtor basis.
- 1.4. "Works" shall mean all Works (and where the context so permits shall include any supply of Goods as hereinafter defined) supplied by the Contractor to the Client (and includes any advice or recommendations) and are as described on the invoices, quotation, work authorisation or any other forms as provided by the Contractor to the Client.
- 1.5. "Goods" shall mean all Goods supplied by the Contractor to the Client (and where the context so permits shall include any supply of Works as defined above).
- 1.6. "Price" shall mean the price payable for the Works as agreed between the Contractor and the Client in accordance with clause 4 of this contract.
- 1.7. "Party" shall mean the contractor set out in clause 1.1 for the client set out in clause 1.2.
- 1.8. "Parties" shall mean the Contractor set out in clause 1.1 and Client set out in clause 1.2.
- 1.9. Unless the contrary intention appears in this Contract, words in this Contract shall have their normal meaning.
- 1.10. Headings are inserted for convenience and do not affect the interpretation of this Contract.
- 1.11. References to the singular include the plural and vice versa.
- 2. Jurisdiction**
- 2.1. The Parties agree that the applicable law of the Contract is Queensland, Australia.
- 3. The Commonwealth Trade Practices Act 1974 ("TPA") and Fair Trading Acts ("FTA")**
- 3.1. Nothing in this agreement is intended to have the effect of contracting out of any applicable provisions of the TPA or the FTA in each of the States and Territories of Australia, except to the extent permitted by those Acts where applicable.
- 4. Acceptance**
- 4.1. Any instructions received by the Contractor from the Client for the supply of Works and/or the Client's acceptance of Works supplied by the Contractor shall constitute acceptance of the terms and conditions contained herein.
- 4.2. Where more than one Client has entered into this agreement, the Clients shall be jointly and severally liable for all payments of the Price.
- 4.3. Upon acceptance of these terms and conditions by the Client the terms and conditions are binding and can only be amended with the written consent of the Contractor.
- 4.4. The Client shall give the Contractor not less than fourteen (14) days prior written notice of any proposed change of ownership of the Client or any change in the Client's name and/or any other change in the Client's details (including but not limited to, changes in the Client's address, facsimile number, or business practice). The Client shall be liable for any loss incurred by the Contractor as a result of the Client's failure to comply with this clause.
- 4.5. Works are supplied by the Contractor only on the terms and conditions of trade herein to the exclusion of anything to the contrary in the terms of the Client's order notwithstanding that any such order is placed on terms that purport to override these terms and conditions of trade.
- 5. Price And Payment**
- 5.1. At the Contractor's sole discretion the Price shall be either:
- (a) as indicated on invoices provided by the Contractor to the Client in respect of Works supplied; or
- (b) the Contractor's current price at the date of delivery of the Works according to the Contractor's current Price list; or
- (c) the Contractor's quoted Price (subject to clause 4.2 and 4.3) which shall be binding upon the Contractor provided that the Client shall accept the Contractor's quotation in writing within thirty (30) days.
- 5.2. The Contractor reserves the right to change the Price in the event of a variation to the Contractor's quotation.
- 5.3. Any variation from the plan of scheduled Works or specifications (including, but not limited to, any variation as a result of additional works required due to hidden or unidentifiable difficulties beyond the reasonable control of the Contractor such as hard rock barriers below the surface or iron reinforcing rods in concrete) will be detailed in writing and charged for on the basis of the Contractor's quotation and will be shown as variations on the invoice. Payment for all variations must be made in full at their time of completion.
- 5.4. At the Contractor's sole discretion a deposit may be required.
- 5.5. Time for payment for the Works shall be of the essence and will be stated on the invoice or any other forms. If no time is stated then payment for domestic/residential Client's shall be due seven (7) days following the date of the invoice, or thirty (30) days following the date of the invoice for commercial Client's.
- 5.6. At the Contractor's sole discretion:
- (a) payment shall be due on completion of the Works; or
- (b) payment shall be due before completion of the Works; or
- (c) payment for approved Client's shall be made by instalments in accordance with the Contractor's payment schedule.
- 5.7. The Contractor may submit a detailed payment claim at intervals not less than one month for Works performed up to the end of each month. The value of Works so performed shall include the reasonable value of authorised variations and the value of Works delivered to the site but not yet installed.
- 5.8. Payment will be made by cheque, or by bank cheque, or by credit card (plus a surcharge of up to two and one half percent (2.5%) of the Price), or by direct credit, or by any other method as agreed to between the Client and the Contractor.
- 5.9. GST and other taxes and duties that may be applicable shall be added to the Price except when they are expressly included in the Price.
- 6. Underground Locations**
- 6.1. Prior to the Contractor commencing any Works the Client must advise the Contractor of the precise location of all underground services on the site and clearly mark the same. The underground 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, Telstra cables, fibre optic cables, oil pumping mains, and any other services that may be on site.
- 6.2. Whilst the Contractor will take all care to avoid damage to any underground services the Client agrees to indemnify the Contractor 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 5.1.
- 7. Relationship**
- 7.1. The Consultant will provide the Services as an independent contractor and nothing in this Contract will be construed so to constitute: At the Contractor's sole discretion:
- (a) the Consultant as an employee of the Contractor; or
- (b) a partnership between the Parties; or
- (c) either Party as the agent or legal representative of the other Party.
- 8. Delivery Of Works**
- 8.1. At the Contractor's sole discretion delivery of the Works shall take place when the Client takes receives the Works at the Client's nominated address. The costs of delivery are included in the Price.
- 8.2. The Client shall make all arrangements necessary to take delivery of the Works whenever they are tendered for delivery. In the event that the Client is unable to take delivery of the Works as arranged then the Contractor shall be entitled to charge a reasonable fee for redelivery.
- 8.3. The Contractor shall not be liable for any loss or damage caused in accessing the work site beyond reasonable control of the Contractor (including, without limitation, damage to pathways, driveways and concrete or paved or grassed areas).
- 8.4. Delivery of the Works to a third party nominated by the Client is deemed to be delivery to the Client for the purposes of this agreement.
- 8.5. The Contractor may deliver the Works by separate installments. Each separate installment shall be invoiced and paid in accordance with the provisions in these terms and conditions.
- 8.6. The Client shall take delivery of the Works tendered notwithstanding that the quantity so delivered shall be either greater or lesser than the quantity purchased provided that:
- (a) such discrepancy in quantity shall not exceed five percent (5%); and
- (b) the Price shall be adjusted pro rata to the discrepancy.
- 8.7. The failure of the Contractor to deliver shall not entitle either party to treat this contract as repudiated.
- 8.8. The Contractor shall not be liable for any loss or damage whatever due to failure by the Contractor to deliver the Works (or any of them) promptly or at all, where due to circumstances beyond the control of the Contractor.
- 8.9. The Client may require the Contractor to suspend provision of the Services (or any part) at any time and for any reason. The Contractor shall notify the Contractor when it may resume provision of the Services affected and the Contractor shall resume as soon as reasonably practicable after being given such notice. The Client will be liable for any costs whilst the Contractor is under suspension.
- 8.10. Should the Contractor be required to suspend the Services (or any part) then the Client is not liable for the associated costs until the services are resumed. The Client has no claim to breach for this period.
- 9. Risk**
- 9.1. If the Contractor retains ownership of the Works nonetheless, all risk for the Works passes to the Client on delivery.
- 9.2. If any of the Works are damaged or destroyed following delivery but prior to ownership passing to the Client, the Contractor is entitled to receive all insurance proceeds payable for the Works. The production of these terms and conditions by the Contractor is sufficient evidence of the Contractor's rights to receive the insurance proceeds without the need for any person dealing with the Contractor to make further enquiries.
- 10. Insurance**
- 10.1. At the Client's own expense the Client must take out the following insurances:
- (a) For projects with public interaction only, (it is highly recommended); A public risk policy for any single accident or event for not less than \$10MAUD; and
- (b) All insurances required by law to be effected by the Client; and
- (c) Any other insurances which the Contractor notifies the Client is required; and
- (d) If the Client is to engage the Contractor for works to be done outside of Contractor country of residence, then the Client is to provide the Contractor with insurance (which covers medical expenses) to the Contractor for the locations, time, and length outside of that country for the required works; And upon request from the Contractor the Client is to provide a copy of the current insurance policies to the Contractor.
- 11. Title**
- 11.1. The Contractor and Client agree that ownership of the Works shall not pass until:
- (a) the Client has paid the Contractor all amounts owing for the particular Works; and
- (b) the Client has met all other obligations due by the Client to the Contractor in respect of all contracts between the Contractor and the Client.
- 11.2. Receipt by the Contractor 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 and until then the Contractor's ownership or rights in respect of the Works shall remain the same.
- 11.3. The Works agreed shall:
- (a) where practicable the Works shall be kept separate and identifiable until the Contractor shall have received payment and all other obligations of the Client are met; and
- (b) until such time as ownership of the Works shall pass from the Contractor to the Client the Contractor may give notice in writing to the Client to return the Works or any of them to the Contractor. Upon such notice the rights of the Client to obtain ownership or any other interest in the Works shall cease; and
- (c) the Contractor shall have the right of stopping the Works in transit whether or not delivery has been made; and
- (d) if the Client fails to return the Works to the Contractor then the Contractor or the Contractor's agent may enter upon and into land and premises owned, occupied or used by the Client, or any premises as the invitee of the Client, where the Works are situated and take possession of the Works; and
- (e) the Client is only a bailee of the Works and until such time as the Contractor has received payment in full for the Works then the Client shall hold any proceeds from the sale or disposal of the Works, up to and including the amount the Client owes to the Contractor for the Works, on trust for the Contractor; and
- (f) the Client shall not deal with the money of the Contractor in any way which may be adverse to the Contractor; and
- (g) the Client shall not charge the Works in any way nor grant nor otherwise give any interest in the Works while they remain the property of the Contractor; and
- (h) the Contractor can issue proceedings to recover the Price of the Works sold notwithstanding that ownership of the Works may not have passed to the Client; and
- (i) until such time that ownership in the Works passes to the Client, if the Works are converted into other products, the parties agree that the Contractor will be the owner of the end products.
- 12. Defects**
- 12.1. The Client shall inspect the Works on delivery and shall within two (2) days of delivery (time being of the essence) notify the Contractor of any alleged defect, shortage in quantity, damage or failure to comply with the description or quote. The Client shall afford the Contractor an opportunity to inspect the Works within a reasonable time following delivery if the Client believes the Works are defective in any way. If the Client shall fail to comply with these provisions the Works shall be presumed to be free from any defect or damage. For defective Works, which the Contractor has agreed in writing that the Client is entitled to reject, the Contractor's liability is limited to either (at the Contractor's discretion) replacing the Works or repairing the Works except where the Client has acquired Works as a consumer within the meaning of the Trade Practices Act 1974 (Cwlth) or the Fair Trading Acts of the relevant state or territories of Australia, and is therefore also entitled to, at the consumer's discretion either a refund of the purchase price of the Works, or repair of the Works, or replacement of the Works.
- 12.2. Works will not be accepted for return other than in accordance with 9.1 above.
- 13. Warranty**
- 13.1. Subject to the conditions of warranty set out in clause 13.2 the Contractor warrants that if any defect in any workmanship of the Contractor becomes apparent and is reported to the Contractor within twelve (12) months of the date of delivery (time being of the essence) then the Contractor will either (at the Contractor's sole discretion) replace or remedy the workmanship.
- 13.2. The conditions applicable to the warranty given by clause 13.1 are:
- (a) the warranty shall not cover any defect or damage which may be caused or partly caused by or arise through:
- (i) failure on the part of the Client to properly maintain any Works; or
- (ii) failure on the part of the Client to follow any instructions or guidelines provided by the Contractor; or
- (iii) any use of any Works otherwise than for any application specified on a quote or order form; or
- (iv) the continued use of any Works after any defect becomes apparent or would have become apparent to a reasonably prudent operator or user; or
- (v) fire wear and tear, any accident or act of God;
- (b) the warranty shall cease and the Contractor shall thereafter in no circumstances be liable under the terms of the warranty if the workmanship is repaired, altered or overhauled without the Contractor's consent.
- (c) in respect of all claims the Contractor shall not be liable to compensate the Client for any delay in either replacing or remedying the workmanship or in properly assessing the Client's claim.
- 13.3. For Works not manufactured by the Contractor, the warranty shall be the current warranty provided by the manufacturer of the Works. The Contractor shall not be bound by nor be responsible for any term, condition, representation or warranty other than that which is given by the manufacturer of the Works.
- 14. Intellectual Property**
- 14.1. Where the Contractor has designed, drawn or written Works for the Client, then the copyright in those designs and drawings and documents shall remain vested in the Contractor, and shall only be used by the Client at the Contractor's discretion.
- 15. Default & Consequences of Default**
- 15.1. 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 one half percent (2.5%) per calendar month (and at the Contractor's sole discretion such interest shall compound monthly at such a rate) after as well as before any judgment.
- 15.2. In the event that the Client's payment is dishonored for any reason the Client shall be liable for any dishonor fees incurred by the Contractor.
- 15.3. If the Client defaults in payment of an invoice when due, the Client shall indemnify the Contractor from and against all costs and disbursements incurred by the Contractor in pursuing the debt including legal costs on a solicitor and own client basis and the Contractor's collection agency costs.
- 15.4. Without prejudice to any other remedies the Contractor may have, if at any time the Client is in breach of any obligation (including those relating to payment), the Contractor may suspend or terminate the supply of Works to the Client and any of its other obligations under the terms and conditions. The Contractor will not be liable to the Client for any loss or damage the Client suffers because the Contractor has exercised its rights under this clause.
- 15.5. If any account remains overdue after thirty (30) days then an amount of the greater of twenty dollars (\$20.00) or ten percent (10.00%) of the amount overdue (up to a maximum of two hundred dollars (\$200.00)) shall be levied for administration fees which sum shall become immediately due and payable.
- 15.6. Without prejudice to the Contractor's other remedies at law the Contractor shall be entitled to cancel all or any part of any order of the Client which remains unfulfilled and all amounts owing to the Contractor shall, whether or not due for payment, become immediately payable in the event that:
- (a) any money payable to the Contractor becomes overdue, or in the Contractor's opinion the Client will be unable to meet its payments as they fall due; or
- (b) the Client becomes insolvent, 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
- (c) a receiver, manager, liquidator (provisional or otherwise) or similar person is appointed in respect of the Client or any asset of the Client.
- 16. Security And Charge**
- 16.1. Despite anything to the contrary contained herein or any other rights which the Contractor may have however:
- (a) where the Client and/or the Guarantor (if any) is the owner of land, realty or any other asset capable of being charged, both the Client and/or the Guarantor agree to mortgage and/or charge all of their joint and/or several interest in the said land, realty or any other asset to the Contractor or the Contractor's nominee to secure all amounts and other monetary obligations payable under these terms and conditions. The Client and/or the Guarantor acknowledge and agree that the Contractor (or the Contractor's nominee) shall be entitled to lodge where appropriate a caveat, which caveat shall be withdrawn once all payments and other monetary obligations payable hereunder have been met.
- (b) should the Contractor elect to proceed in any manner in accordance with this clause and/or its sub-clauses, the Client and/or Guarantor shall indemnify the Contractor from and against all the Contractor's costs and disbursements including legal costs on a solicitor and own client basis.
- (c) the Client and/or the Guarantor (if any) agree to irrevocably nominate the Client and appoint the Contractor or the Contractor's nominee as the Client's and/or Guarantor's true and lawful attorney to perform all necessary acts to give effect to the provisions of this clause 14.1.
- 17. Cancellation**
- 17.1. The Contractor may cancel any contract to which these terms and conditions apply or cancel delivery of Works at any time before the Works are delivered by giving written notice to the Client. On giving such notice the Contractor shall repay to the Client any sums paid in respect of the Price. The Contractor shall not be liable for any loss or damage whatever arising from such cancellation.
- 17.2. In the event that the Client cancels delivery of Works the Client shall be liable for any loss incurred by the Contractor (including, but not limited to, any loss of profits) up to the time of cancellation.
- 18. Privacy Act 1988**
- 18.1. The Client and/or the Guarantor/s agree for the Contractor to obtain from a credit reporting agency a credit report containing personal credit information about the Client and Guarantor/s in relation to credit provided by the Contractor.
- 18.2. The Client and/or the Guarantor/s agree that the Contractor may exchange information about the Client and the Guarantor/s with those credit providers either named as trade referees by the Client or named in a consumer credit report issued by a credit reporting agency for the following purposes:
- (a) to assess an application by Client; and/or
- (b) to notify other credit providers of a default by the Client; and/or
- (c) to exchange information with other credit providers as to the status of this credit account, where the Client is in default with other credit providers; and/or
- (d) to assess the credit worthiness of Client and/or Guarantor/s.
- 18.3. The Client consents to the Contractor being given a consumer credit report to collect overdue payment on commercial credit (Section 18K(1)(h) Privacy Act 1988).
- 18.4. The Client agrees that personal credit information provided may be used and retained by the Contractor for the following purposes and for other purposes as shall be agreed between the Client and Contractor or required by law from time to time:
- (a) provision of Works; and/or
- (b) marketing of Works by the Contractor, its agents or distributors in relation to the Works; and/or
- (c) analysing, verifying and/or checking the Client's credit, payment and/or status in relation to provision of Works; and/or
- (d) processing of any payment instructions, direct debit facilities and/or credit facilities requested by Client; and/or
- (e) enabling the daily operation of Client's account and/or the collection of amounts outstanding in the Client's account in relation to the Works.
- 18.5. The Contractor may give information about the Client to a credit reporting agency for the following purposes:
- (a) to obtain a consumer credit report about the Client; and/or
- (b) allow the credit reporting agency to create or maintain a credit information file containing information about the Client.
- 19. Building and Construction Industry Payments Act 2004 (where applicable)**
- 19.1. At the Contractor's sole discretion, if there are any disputes or claims for unpaid Goods and/or Works then the provisions of the Building and Construction Industry Payments Act 2004 may apply.
- 19.2. Nothing in this agreement is intended to have the effect of contracting out of any applicable provisions of the Building and Construction Industry Payments Act 2004 (of Queensland, except to the extent permitted by the Act where applicable).
- 20. Building and Construction Industry Security of Payments Act 1999 (where applicable)**
- 20.1. At the Contractor's sole discretion, if there are any disputes or claims for unpaid Goods and/or Works then the provisions of the Building and Construction Industry Security of Payments Act 1999 may apply.
- 20.2. 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 Payments Act 1999 of New South Wales, except to the extent permitted by the Act where applicable.
- 21. General**
- 21.1. 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.
- 21.2. These terms and conditions and any contract to which they apply shall be governed by the laws of the State in which the sale is made and are subject to the jurisdiction of the courts of that State.
- 21.3. The Contractor shall be under no liability whatever to the Client for any indirect loss and/or expense (including loss of profit) suffered by the Client arising out of a breach by the Contractor of these terms and conditions.
- 21.4. In the event of any breach of this contract by the Contractor the remedies of the Client shall be limited to damages which under no circumstances shall exceed the Price of the Works.
- 21.5. The Client shall not be entitled to set off against or deduct from the Price any sums owed or claimed to be owed to the Client by the Contractor.
- 21.6. The Contractor may license or sub-contract all or any part of its rights and obligations without the Client's consent.
- 21.7. The Client agrees that the Contractor may review these terms and conditions at any time. If, following any such review, there is to be any change to these terms and conditions, then that change will take effect from the date on which the Contractor notifies the Client of such change.
- 21.8. 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.
- 21.9. The failure by the Contractor to enforce any provision of these terms and conditions shall not be treated as a waiver of that provision, nor shall it affect the Contractor's right to subsequently enforce that provision.