

## Standard terms and conditions of business

### 1. GENERAL

- 1.1. MD Tiling conducts the business of tiling, sealing and grouting various services.
- 1.2. Any services provided by MD Tiling to the Client will be provided in accordance with these Terms and Conditions.

### 2. Agreement

- 2.1. Publication of any materials by MD Tiling (including any website, promotional or marketing material) does not constitute an offer by MD Tiling to the Client to provide services.
- 2.2. Subject to these Terms and Conditions, the Client may request MD Tiling to provide certain services to the Client ('**Request**') and MD Tiling may respond by providing the Client with a Quote.
- 2.3. Subject to clause 2.5 below, the Quote remains open for acceptance by the Client in accordance with clause 2.4 below during the Acceptance Period.
- 2.4. To validly accept the Quote, the Client must, during the Acceptance Period:
  - (a) either:
    - (i) deliver written notice to MD Tiling that it accepts these Terms and Conditions (including but not limited to the Quote and all stipulations and conditions contained in the Quote); or
    - (ii) give written or verbal instructions to MD Tiling to proceed with the provision of the Services; and
  - (b) deliver the Client Material to MD Tiling; and
  - (c) deliver a certificate of currency for any required insurance policy to MD Tiling (if requested),

('Client's Acceptance').
- 2.5. Despite anything to the contrary in these Terms and Conditions, MD Tiling may withdraw the Quote by written notice given to

the Client at any time before the Client's Acceptance.

- 2.6. If the Quote is:
  - (a) withdrawn by MD Tiling pursuant to clause 2.5 above; or
  - (b) otherwise not accepted by the Client on or before 5.00pm on the date the Acceptance Period expires,

the quotation will lapse and will no longer be binding on MD Tiling.

- 2.7. Once the Client's Acceptance is received by MD Tiling, the Client may not cancel or vary the Services, Scope of Services or these Terms and Conditions (including but not limited the specifications, works completion schedule or insurance required) except in accordance with clause 21 of these Terms and Conditions.

- 2.8. The Client agrees that these Terms and Conditions set out the key trading terms:

- (a) for the supply of the Services by MD Tiling to the Client; and
- (b) subject to MD Tiling provided the client with a revised Quote (with no need to include a further copy of these Terms and Conditions), for the supply of services provided by MD Tiling to the Client in the future until MD Tiling provides the Client with written notice that these Terms and Conditions have been amended or replaced in which case the new or amended terms and conditions will supersede and replace these Terms and Conditions.

### 3. Site and Survey

- 3.1. The Client must (at the Client's cost) do all acts and provide all information or documents, including but not limited to Plans, reasonably required by MD Tiling to enable MD Tiling to provide the Services. The Client must do all acts and provide any such information or documentation within five (5) Business Days after receiving a written request from MD Tiling ('**Additional Information**').
- 3.2. If the Client does not provide the Additional Information pursuant to clause 3.1 the Client

is deemed to have requested a Variation to the Scope of the Services and:

(a) MD Tiling is entitled to obtain (at the Client's cost) such further Client Material as MD Tiling considers necessary (acting reasonably) to clarify any issues with respect to the Site; and

(b) Clause 21 of these Terms and Conditions will apply.

3.3. The parties agree that the Client Materials and any Additional Information form part of these Terms and Conditions.

3.4. All areas where the Services will be performed must be kept dry twelve (12) hours prior to and twenty-four (24) hours after the Services are carried out. If the Client does not comply with this clause 3.4 and MD Tiling is required to carry out any extra work to perform the Services, MD Tiling may request a Variation in accordance with clause 21 of these Terms and Conditions to carry out that work.

3.5. If the Services relate to a shower, it must not be used for 24 hours prior to commencement of the Services.

3.6. MD Tiling will re-grout or resurface or use a sealer where required as part of the Service, which is included in the Quote.

3.7. The Client acknowledges and agrees that:

(a) prior to application of a Product the surface of the Site may need to be prepared with a chemical tile and stone etchant in some circumstances, which may change the appearance of the tiles in some instances; and

(b) any such change in appearance will not be regarded as a defect under these Terms and Conditions or a breach of any warranty whether statutory or otherwise.

#### **4. Access**

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4.1. The Client must provide access for any Representative to carry out the Services as required during Work Hours.

4.2. The Client must remove or cause to be removed any personal property likely to impede the Services.

4.3. The Client (the Client's representatives, contractors, sub-contractors agents, employees and invitees):

(a) must not access the Site or otherwise obstruct, interfere with, prohibit or delay:

(i) MD Tiling's access or possession of the Site; or

(ii) the progress of the Services; and

(b) must not:

(i) make an inquiry of;

(ii) issue directions to; or

(iii) give instructions to,

MD Tiling's Representatives; and

(c) may only have access to the Site for the purposes of inspecting the progress of the Services under MD Tiling's supervision, at reasonable times and after giving reasonable prior written notice.

4.4. Notwithstanding any other provision of these Terms and Conditions, the Client must pay MD Tiling on demand, any additional costs MD Tiling incurs as a result of or in connection with any of the matters described in this clause 4 ('**Additional Costs**').

4.5. MD Tiling will give the Client notice in writing of any Additional Costs and provide reasonable evidence of the Additional Costs as soon as reasonably practicable after the Additional Costs become known to MD Tiling.

4.6. Without limiting any other provision of these Terms and Conditions, the Client is responsible for and indemnifies, and will keep indemnified, MD Tiling against any Liability, in respect of any injury to any person or any loss or damage to any property on the Site to the extent that such injury, loss or damage arises as a result of or in connection with a breach of this clause 4.

#### **5. Title and Risk**

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5.1. Subject to clause 18.2(d) of these Terms and Conditions, any property of the Client in the custody or control of MD Tiling (including but not limited to the Site and any improvements or goods on it) remains entirely at the Client's risk.

- 5.2. The parties agree that ownership of Products shall not pass until:
- (a) the Client has paid MD Tiling all amounts owing for the particular Product and any associated Services; and
  - (b) the Client has met all other obligations due by the Client to MD Tiling under these Terms and Conditions.
- 5.3. It is further agreed that:
- (a) where practicable Products shall be kept separate and identifiable until MD Tiling has received payment and all other obligations of the Client are met;
  - (b) until such time as ownership of the relevant Products has passed from MD Tiling to the Client MD Tiling may give notice in writing to the Client to return the Products to MD Tiling. Upon such notice the rights of the Client to obtain ownership or any other interest in the Products will cease;
  - (c) MD Tiling have the right to Products in transit whether or not delivery has been made;
  - (d) if the Client fails to return the Products to MD Tiling then MD Tiling or any agent of MD Tiling may (as the invitee of the Client) enter upon and into land and premises owned, occupied or used by the Client, or any premises where the Products are situated and take possession of the Products; and
- until such time as MD Tiling has received payment in full for the Products the Client holds any proceeds from the sale or disposal of the Products, up to and including the amount the Client owes to MD Tiling for the Products, on trust for MD Tiling.
- 6.3. On or before the Anticipated Commencement Date the Client must:
- (a) give MD Tiling access to the Site in accordance with clause 4.1 of these Terms and Conditions; and
  - (b) where applicable, deliver to MD Tiling evidence that all permissions, consents and approvals required from the Client and any relevant Government Authority to enable MD Tiling to provide the Services have been obtained ('**Necessary Permits**').
- 6.4. The Client must sign all documents and do all acts necessary to obtain the Necessary Permits.
- 6.5. If any of the conditions in clauses 6.3(a) or 6.3(b) (inclusive) are not satisfied by the Anticipated Commencement Date, MD Tiling may, by notice in writing to the Client:
- (a) terminate these Terms and Conditions, in which case MD Tiling may issue the Client with an invoice for and demand payment of MD Tiling's incurred Disbursements and any other applicable charges as at the Termination Date; or
  - (b) extend the time for the Client to satisfy the conditions in clauses 6.3(a) or 6.3(b) (inclusive) and, at the option of MD Tiling (in its sole discretion), increase the Quote for the Services pursuant to clause 20.1 of these Terms and Conditions.

## **7. Provision of Products**

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- 7.1. The failure of MD Tiling to deliver Products, regardless of how that failure impacts upon the provision of the Services, will not entitle either party to treat these Terms and Conditions as repudiated.
- 7.2. MD Tiling will not incur any Liability due to failure by MD Tiling to deliver the Products (in part or at all) promptly or at all, where such failure is due to circumstances beyond the control of MD Tiling.

## **8. Third party contractors**

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- 8.1. MD Tiling may, with the Client's prior written consent (which must not be unreasonably withheld) procure the services of any third-party contractor ('Contractor') MD Tiling

## **6. Provision of Services**

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- 6.1. Upon MD Tiling's receipt of the Client's Acceptance, the Client engages, and MD Tiling agrees to provide the Services in accordance with the Scope.
- 6.2. Subject to clause 6.4 below Commencement is to take place on the Anticipated Commencement Date.

considers necessary to assist MD Tiling in any specialist area associated with the provision of the Services.

8.2. Where a Contractor is engaged as contemplated by clause 8.1 above, the Client must pay all fees, costs and charges owed to the Contractor for the provisions of its services as and when required and the Client indemnifies, and will keep indemnified, MD Tiling with respect to all such fees, costs and charges.

8.3. The Client agrees that:

(a) the Contractor is a contractor of the Client and MD Tiling is in no way liable for:

(i) any payment due and owing to the Contractor, its employees or contractors in connection with the specialist assistance provided; or

(ii) any Liability arising out of or in connection with the Services performed or advice provided by the Contractor.

8.4. MD Tiling makes no warranty, is not liable for and does not guarantee the accuracy or quality of the services performed by the Contractor; and

8.5. MD Tiling is not liable for any Liability arising out of or in connection with the Services to the extent that such Claims or Liabilities are attributable to Services performed by or advice given by the Contractor.

## **9. Completion**

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9.1. While the Estimated Completion Date is a genuine estimate, it is given as an approximate indication only.

9.2. MD Tiling will use reasonable endeavours to achieve Completion by the Estimated Completion Date but is not liable to the Client for any Liability howsoever arising either directly or indirectly from any delay or failure to achieve Completion by the Estimated Completion Date.

9.3. The Client acknowledges and agrees that a failure on the part of MD Tiling to achieve Completion by the Estimated Completion Date does not constitute a breach of these Terms and Conditions and any such delay or failure does not relieve the Client from its

obligations under these Terms and Conditions.

## **10. Interruption to Services**

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10.1. Despite anything to the contrary in these Terms and Conditions, the Client agrees that while MD Tiling will use its best endeavours to supply the Services by the Anticipated Completion Date, MD Tiling cannot and does not warrant that the supply of the Services will be free of Interruption.

10.2. The Client indemnifies and releases MD Tiling against any Liability arising out of or in connection with an Interruption to the provision of the Services resulting from circumstances reasonably beyond MD Tiling's control.

## **11. Payment for Services**

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### **11.1. Fees**

(a) In consideration of MD Tiling providing the Services in accordance with these Terms and Conditions, the Client must pay the Fee, adjusted in accordance with these Terms and Conditions, to MD Tiling in return for a valid Tax Invoice from MD Tiling.

(b) If there is a dispute about the Fee, any other amount contemplated by these Terms and Conditions or as to whether Completion has been achieved, the Client must not withhold the amount in dispute.

### **11.2. Invoices**

(a) Except as otherwise agreed by the parties, all Tax Invoices issued by MD Tiling are due and payable within seven (7) Business Days of the Client's receipt of the Tax Invoice.

(b) Any payment referred to in these Terms and Conditions must be paid by cash, electronic funds transfer, credit card or cheque. If paid by cheque, the payment shall only be deemed received when cleared funds are received by MD Tiling.

### **11.3. Overdue amounts**

The Client must pay MD Tiling interest on all overdue payments at a rate of ten percent (10%) per annum.

#### 11.4. Deferral of performance

- (a) If the Client fails to pay the Fees as specified in these Terms and Conditions, then without limiting any other remedies available to MD Tiling, MD Tiling may defer delivery of all or part of Services, whether the subject of the relevant Quote or a separate Quote, until the outstanding Fees are paid.

#### 12. PPSA

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##### 12.1. Right to register Security Interest

- (a) Words and phrases used in these Terms and Conditions that have defined meanings in the PPSA have the corresponding meaning given to them in the PPSA.
- (b) In consideration of MD Tiling entering into these Terms and Conditions with the Client, the Client grants MD Tiling the Security Interest pursuant to the PPSA to secure the Client's obligations under these Terms and Conditions and MD Tilings's interest in the Fees.
- (c) MD Tiling agrees to discharge and release the Security Interest and cause for it to be removed from the PPSR upon the Client discharging all of its obligations under these Terms and Conditions to the satisfaction of MD Tiling.
- (d) The Client agrees to do anything (including obtaining consents, signing and producing documents, getting documents completed and signed and supplying information) which MD Tiling asks and considers necessary for the purposes of:
  - (i) ensuring that the Security Interest is enforceable, perfected and otherwise effective;
  - (ii) enabling MD Tiling to apply for any registration, complete any financing statement or give any notification, in connection with the Security Interest; and
  - (iii) enabling MD Tiling to exercise rights in connection with the Security Interest.
- (e) MD Tiling is not required to give any notice, and the Client waives its rights

to receive any notice, under the PPSA (including notice of a verification statement or financing change statement) unless the notice is required by the PPSA to be given (even though the parties have waived the right to receive notice).

#### 13. Insurance

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13.1. MD Tiling agrees to take out and maintain for the duration of the Term the following insurances in the stated amounts with respect to the Services:

- (a) public liability insurance for at least \$10,000,000 per claim;
- (b) workers' compensation insurance for all persons employed directly by MD Tiling; and
- (c) any other insurances agreed by the parties in writing.

#### 14. Warranties

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##### 14.1. Customer Warranties

The Client warrants to MD Tiling that:

- (a) the Client Material and all other documents and material supplied by the Client to MD Tiling (or its employees or agents) are true and correct and not misleading in any way (including by omission);
- (b) all matters that may affect the Site have been disclosed in the Client Material;
- (c) the use of the Client Material by MD Tiling will not infringe the Intellectual Property Rights of any third party;
- (d) the Client has not withheld from MD Tiling any document, information or other fact that may be material to the decision of MD Tiling to enter into these Terms and Conditions or agree to provide the Services.

##### 14.2. Client Acknowledgements

The Client acknowledges and agrees that:

- (a) the Client does not rely on any representations, warranties or information provided or statements about the Product or Services, other

than as expressly set out in these Terms and Conditions;

- (b) the Client has not entered into these Terms and Conditions in reliance of any inducement, representation, warranty or statement made by or on behalf of MD Tiling;
- (c) to the fullest extent permitted by Law, any and all implied conditions or warranties in relation to (or that may apply in respect of) the Products or Services imposed by Law; and
- (d) there are no collateral agreements in connection with these Terms and Conditions (except as otherwise agreed in writing between the parties).

#### 14.3. MD Tiling Warranties

- (a) MD Tiling must at all times represent itself as being independent of the Client.
- (b) MD Tiling does not provide any warranty with respect to the Services, except for:
  - (i) where the Services are residential in nature as provided for under the Building Acts, in which case the Statutory Warranties will apply; and
  - (ii) any other warranties which are implied pursuant to any Law and which may not by Law be excluded from these Terms and Conditions.

#### 14.4. Product Warranties

- (a) Ardex warrants the Products listed here against defects for the following periods:
  - (i) FS-DD Grout – ten (10) years.
- (b) Mapei warrants the Products listed here against defects for the following periods:
  - (i) Kerapoxy – ten (10) years.
- (c) The benefits of these warranty are in addition to all other rights and remedies which the Client may have under these Terms and Conditions, the Australian Consumer Law and any other law in

relation to the Product to which the warranty relates.

- (d) The warranties referred to in clause 14.4(a) and 14.4(c) above do not apply where the damage, fault or failure:
  - (i) is due to external causes, including accident, misuse, tampering or interference with the Product other than by a Representative of MD Tiling; or
  - (ii) arises in connection with the movement of the structure on which the Site is located;
  - (iii) is caused by maintenance associated with failure to perform, normal wear and tear, fire, flood or a similar occurrence; or
  - (iv) due to any attempt by any person other than a Representative of MD Tiling to adjust or repair the Product.
- (e) In the event of a defects claim the Client must follow the claims procedure outlined at clause 17 of these Terms and Conditions.

#### 14.5. Guarantees which cannot be excluded

- (a) MD Tiling's Products and Services come with guarantees that cannot be excluded under the Australian Consumer Law. For major failures with the Service, the Client is entitled:
  - (i) to cancel its service contract with us; and
  - (ii) to a refund for the unused portion, or to compensation for its reduced value.
- (b) The Client is also entitled to choose a refund or replacement for major failures with Products. If a failure with the Products or a Service does not amount to a major failure, the Client is entitled to have the failure rectified in a reasonable time. If this is not done the Client is entitled to a refund for the Products and to cancel the contract for the service and obtain a refund of any unused portion. The Client is also entitled to be compensated for any other reasonably foreseeable loss or

damage from a failure in the Products or Service.

## 15. Quality Assurance

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15.1. All Services supplied under these Terms and Conditions will comply with:

- (a) the Building Code of Australia to the extent required under the relevant State legislation.
- (b) All other relevant codes, standards and specifications that the Services are required to comply with under any law; and
- (c) The conditions of any relevant development consent or complying development certificate and any construction certificate.

15.2. Despite clause 15.1 and in addition to clause 18.2 below, the liability of MD Tiling for failure to comply with the above standards is limited to the extent that any such failure arises in connection with the Client Material or Additional Information and otherwise in accordance with clause 18.2 of these Terms and Conditions.

## 16. Latent Defects, Movement and Health and Safety, irreparable damage

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16.1. Subject to the Statutory Warranties MD Tiling will not be liable for any damage to framework, structure or tiles, faults, defects, deterioration or wear and tear in relation to the Services that were not visible or apparent at the initial inspection on Site by MD Tiling ('**Latent Defects**') but have appeared and/or deteriorated since the date of the inspection.

16.2. If MD Tiling needs to carry out any additional work arising in connection with Latent Defects MD Tiling may increase the Fee to take account of the additional work.

16.3. If the Services include a balcony repair, subject to the Statutory Warranties, MD Tiling will not be liable for any Claim arising in connection with the movement of the structure on which the Services are carried out.

16.4. MD Tiling may, at its discretion, refuse to carry out the Services and terminate these Terms and Conditions by notice in writing to the Client if:

(a) upon inspection of the Site by a Representative (whether before or after the Client's Acceptance), the Representative forms the opinion that the Services cannot be provided as required due to existing defects, damage or disrepair present at the Site; or

(b) the health and safety of any Representative is exposed on Site and will request the Client to rectify the problem at the Client's cost before the Services can be carried out or continued.

## 17. Defects

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17.1. Within seven (7) days after Completion, the Client must:

(a) inspect the Products and Services;

(b) notify MD Tiling in writing of any alleged defect or omissions in the Product or Services ('**Defect Notice**'). The Client must provide MD Tiling with access to the Site to enable MD Tiling to inspect the alleged defects within a reasonable time after the Defect Notice is issued ('**Site Inspection**').

17.2. Any dispute as to whether a Product or Service is the subject of a defect or omission is to be dealt with pursuant to clause 24 of these Terms and Conditions.

17.3. If the Client fails to comply with clause 17.1 or (b) above, the Products and Services will be deemed to be free from any Defect or damage.

17.4. MD Tiling agrees to fix any alleged defects that are due to shortages in quantity, defective materials and/or poor workmanship and which are notified to MD Tiling by the Client pursuant to clause 17.1 above ('**Agreed Defects**').

17.5. Within fourteen (14) days after the Site Inspection, MD Tiling will provide the Client with written notice:

(a) notifying the Client of the Agreed Defects; and

(b) nominating a mutually convenient date and time (which must not be later than twenty-one (21) days after the Site Inspection) for MD Tiling to rectify the Agreed Defects.

- 17.6. The Client must provide MD Tiling with access to the Site to enable it to rectify the Agreed Defects.
- 17.7. Subject to clause 14.4(d) above, for defective Products which carry a warranty, MD Tiling's liability is limited to either (at MD Tiling's discretion) replacing the Products or repairing the Products.
- 17.8. Goods will not be accepted for return other than in accordance with 17.1 above.
- (B) reperformance of the Services and/or replacement or repair of defective Products in accordance with the relevant warranty attaching to that Product.
- (ii) The limitations set out in the above clause 18.2(a)(i) are an aggregate limit for all Claims, whenever made.

## **18. Scope and limitation of Liability**

### **18.1. Pre-existing conditions**

- (a) Prior to the Client's Acceptance, the Client must notify MD Tiling of any pre-existing condition of the Site which may affect the suitability or effectiveness of the Services ('**Pre-existing Condition**').
- (b) The Client is liable for any Pre-existing Conditions of the Site (whether or not such Pre-existing Conditions have been disclosed to MD Tiling by the Client) and indemnifies, and will keep indemnified, MD Tiling in respect of any Liability arising from or in any way connected to any Pre-Existing Conditions.
- (c) MD Tiling is not liable if its Services are compromised as a result of or in connection with a Pre-Existing Condition that was not disclosed by the Client to MD Tiling prior to the Client's Acceptance.

### **(b) Consequential loss**

Subject to clause 18.2(d), MD Tiling is not liable for any Consequential Loss however caused (including but not limited to the negligence of MD Tiling), suffered or incurred by the Client in connection with these Terms and Conditions.

### **(c) Seriousness or nature**

Without limiting clauses 18.2(a) and 18.2(b) the parties agree that those clauses are to apply in connection with a breach of these Terms and Conditions, anticipated breach of these Terms and Conditions and other conduct regardless of the seriousness or nature of that breach, anticipated breach or other conduct.

### **(d) Liability for consumer guarantees**

- (i) If the Australian Consumer Law or any other legislation states that there is a guarantee or warranty in relation to any Services supplied by MD Tiling in connection with these Terms and Conditions, and MD Tiling's liability for failing to comply with that guarantee cannot be excluded but may be limited, neither clauses 18.2(a) or 18.2(b) apply to that liability and MD Tiling's liability is instead as expressed at clause 14.5 of these Terms and Conditions.
- (ii) For clarity, the provisions of the Australian Consumer Law prevails to the extent of any inconsistency between these Terms and Conditions and the Australian Consumer Law.

### **18.2. Liability limited to price or re-performance**

- (a) *Liability limited to Fees paid or re-performance*
- (i) To the extent permitted by Law and subject to clauses 18.2(b) and 18.2(d) below, any liability of MD Tiling for any Claim however caused (including but not limited to the negligent or reckless act or omission of MD Tiling or its Representatives), suffered or incurred by the Client in connection with these Terms and Conditions is limited to:
- (A) the Fees paid by the Client to MD Tiling under these Terms and Conditions; or

### **(e) Application of indemnities**



For clarity and without limiting this clause 18.2, the limitations and exclusions of liability in this clause 18.2 apply to any liability of MD Tiling under any indemnity given by MD Tiling pursuant to these Terms and Conditions.

## **19. Indemnity**

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### **19.1. Indemnities**

The Client is liable for, and indemnifies and will keep indemnified MD Tiling from and against, all Liabilities) arising from or in connection with:

- (a) a breach of these Terms and Conditions by the Client;
- (b) MD Tiling's access to and use of the Site;
- (c) personal injuries or damage to third parties or the Client, its agents, invitees, employees, contractors or subcontractors relating to the provision of the Services; and
- (d) any alleged or actual infringement of a third party's Intellectual Property or other right in connection with the Customer Material,

except where caused by the negligent or reckless act or omission of MD Tiling.

### **19.2. Continuing obligation**

The indemnities in clause 19.1 above and throughout these Terms and Conditions are continuing obligations notwithstanding:

- (a) any settlement of account; or
- (b) the occurrence of any other thing,

and the parties acknowledge and agree that it is not necessary for MD Tiling to incur expense or make payment before enforcing or making a claim under an indemnity.

## **20. Delays and extension of Time**

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20.1. MD Tiling is entitled to:

- (a) an extension of time to the Service Period in accordance with the Time Allowances specified in the Schedule; and

- (b) a reasonable extension of time to the Service Period if Commencement or the carrying out of the Services is delayed by a Claimable Delay.

20.2. MD Tiling must give the Client written notice of the extension of time to the Service Period along with written details of:

- (a) the cause of the delay; and
- (b) the extension period required,

within two (2) Business Days after MD Tiling becomes aware of the later of the cause and extent of the delay.

20.3. Nothing in clause 20.2 above shall limit or prevent MD Tiling from claiming more than one extension of time if a Claimable Delay has more than one effect on MD Tiling carrying out the Services.

20.4. MD Tiling does not require the Client's consent to extend the Service Period in accordance with this clause 20.

## **21. Variation**

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### **21.1. Requests for Variations**

- (a) Either party may request a Variation to these Terms and Conditions by submitting a Variation request to the other party.

- (b) Subject to clause 21.1(g) below, neither party shall be obliged to provide its consent to a Variation requested in accordance with clause 21.1(a) above.

- (c) For the Variation to be agreed between the parties, both parties must notify the other in writing of its agreement to the Variation Document within two (2) Business Days of receiving it. The Variation Document is to be prepared by MD Tiling and:

- (i) where the Client has requested the Variation, submitted to the Client within two (2) Business Days of MD Tiling receiving the Client's request for a Variation; or

- (ii) where MD Tiling intends to request the Variation, submitted to Client at the same time as MD Tiling submits its request for a Variation.

- (d) The Variation Document must be in writing and state:
- (i) the work required to carry out the Variation;
  - (ii) the date of the request of the Variation and by whom the Variation was requested;
  - (iii) for an increase in the Fee, the details of that increase and when that portion of the Fee becomes payable;
  - (iv) for a decrease in the Fee, the amount of the decrease and how the decrease is to be accounted for; and
  - (v) if the Variation is likely to cause a delay, a reasonable estimate of the delay.
- (e) MD Tiling must not take steps to vary the Services or the Scope of the Services until the Variation Document has been agreed to in writing by the Client.
- (f) Despite clause 21.1 above, MD Tiling is not required to provide the Client with a Variation Document before carrying out the Variation if the Variation is required to be carried out urgently and it is not reasonably practicable to provide the Variation Document in the circumstances.
- (g) The Client must not refuse a request by MD Tiling for a Variation where the Variation is required by Law.
- (h) If the Client does notify MD Tiling in writing that it agrees to the Variation Document within two (2) Business Days after receiving the Variation Document from MD Tiling, the request for a Variation will expire.
- (i) Where a Variation is requested by MD Tiling in accordance with clauses 3.2 of these Terms and Conditions and that request for a Variation lapses or is refused by the Client, then MD Tiling may terminate these Terms and Conditions and clause 25.2 will apply.

The MD Tiling Material remains the property of MD Tiling and nothing in these Terms and Conditions grants the Client any Intellectual Property Rights in or rights to use the MD Tiling Material or other Intellectual Property of MD Tiling.

## 22.2. **Licence of Client Material**

The Client grants to MD Tiling a non-exclusive, irrevocable, global licence to use the Intellectual Property in any Client Material in connection with MD Tiling providing the Services to the Client.

## 23. **Confidentiality**

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### 23.1. **Obligations of confidence**

The Client agrees to keep confidential, and not to use or disclose, other than as permitted by these Terms and Conditions or at law, any Confidential Information of MD Tiling provided to or obtained by the Client before or after entry into these Terms and Conditions.

### 23.2. **Injunctive relief**

The Client acknowledges that MD Tiling may suffer financial and other loss and damage if any unauthorised act occurs in relation to Confidential Information of MD Tiling, and that monetary damages would be an insufficient remedy. In addition to any other remedy available at Law or in equity, MD Tiling is entitled to injunctive relief to prevent a breach of, and to compel specific performance of clause 23.1 above.

## 24. **Dispute Resolution**

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24.1. If a dispute arises between the parties in relation to these Terms and Conditions, then either party may refer the dispute to an independent expert ('**Referee**') for determination.

24.2. Where a party to these Terms and Conditions has referred a dispute to a Referee in accordance with clause 24.1 above ('**Referring Party**'), the Referring Party must, within two (2) Business Days after the referral has occurred, serve upon the other party to these Terms and Conditions written notice that the dispute has been so referred.

24.3. The Referee must be a person either agreed to by the parties or appointed by the President of the Queensland Law Society Inc. at the request of either party.

## 22. **Intellectual Property**

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### 22.1. **No assignment**

24.4. Upon a dispute being referred to a Referee pursuant to clause 24.1 above, each party must use its best endeavours to:

- (a) make available to the Referee all facts and circumstances necessary to determine the dispute;
- (b) ensure that employees, agents and other parties are available to appear at any hearing or enquiry called for by the Referee; and
- (c) make written submissions if required and provide those submissions to the other party and the Referee.

24.5. The Referee must decide the dispute and inform the parties of the result within thirty (30) days after the date the dispute was submitted for determination, or within any longer period with the Referee reasonably determines.

24.6. The Referee is not to act as an arbitrator.

24.7. Upon determining the dispute, the Referee will provide a written statement of reasons for the decision.

24.8. In the absence of manifest error the decision determined by the Referee will be final and binding on the parties.

24.9. The Referee may decide matters including the payment of its costs. If the Referee does not make a decision about its costs, then each party must pay one half of the costs.

24.10. Subject to clause 11.4 of these Terms and Conditions, during the period in which the Referee is deciding the dispute, the parties are to comply with their respective obligations under these Terms and Conditions.

## **25. Breach & Termination**

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### **25.1. Termination for breach**

- (a) If MD Tiling breaches an Essential Term of these Terms and Conditions in a material respect and either fails to:
  - (i) rectify that breach within fourteen (14) Business Days after a written notice is given to MD Tiling by the Client specifying the breach and requesting that MD Tiling remedy that breach; or

- (ii) refer the issue to a Referee and give the Client a dispute notice under clause 24.2 above,

then, without limiting or otherwise effecting the provisions contained at clause 18 of this Agreement, the Client may:

- (A) terminate these Terms and Conditions; or
- (B) sue MD Tiling for damages; or
- (C) affirm these Terms and Conditions and compel MD Tiling to specifically perform the terms of these Terms and Conditions and to pay the Client any associated costs in doing so.

- (b) If the Client breaches an Essential Term of these Terms and Conditions in a material respect and fails to rectify that breach within fourteen (14) Business Days after a written notice is given to the Client by MD Tiling specifying the breach and requesting that the Client remedy that breach, then MD Tiling may:

- (i) terminate these Terms and Conditions and sue the Client for damage; or
- (ii) affirm these Terms and Conditions and compel the Client to specifically perform the terms of these Terms and Conditions and to pay MD Tiling any associated costs in doing so.

### **25.2. Insolvency**

- (a) MD Tiling may immediately terminate these Terms and Conditions by written notice to the Client where the Client:
  - (i) becomes insolvent or unable to pay their debts;
  - (ii) assigns assets for the benefit of creditors generally;
  - (iii) makes a composition or other arrangement with creditors;
  - (iv) goes into liquidation or receivership;

- (v) becomes or is bankrupt or seeks to take advantage of the laws relating to bankruptcy; or
- (vi) has a court order made for the winding up of the party or a resolution for its winding up is passed.

### 25.3. Payments upon termination

If these Terms and Conditions are terminated prior to Completion and without limiting MD Tiling's other remedies at Law, the Client must pay MD Tiling a pro rata amount of the Fee reflective of the Services completed and Products provided by MD Tiling up to and including the time of termination including but not limited to reasonable preparatory and organisational work ahead of the provision of the Services and Products being provided.

### 25.4. Effect of termination

On termination of these Terms and Conditions:

- (a) accrued rights or remedies of a party are not affected; and
- (b) the Client must give to MD Tiling any of the MD Tilings's Confidential Information or other property in the Client's care, custody or control.

### 25.5. Survival

Termination of these Terms and Conditions will not affect clauses 13, 12, 15, 16, 21 and 23.

### 26. Term of Agreement

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- 26.1. These Terms and Conditions commence on the date of the Client's Acceptance and continue for the Term.

### 27. Taxation

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#### 27.1. GST

Any words capitalised in this clause 27.1 which are not already defined in these Terms and Conditions have the meaning given to those words in the GST Act.

#### 27.2. Taxable supply

- (a) If the provision of the Services made under or in connection with these Terms

and Conditions is a Taxable Supply, then at or before the time any part of the consideration for the Taxable Supply is payable:

- (i) MD Tiling may recover from the Client an amount equal to the GST payable on the supply ('**GST Amount**'); and

- (ii) The Client must pay the GST Amount to MD Tiling on the date the relevant portion of the Fee is due or in exchange for a valid Tax Invoice.

- (b) For clarity, the GST payable under clause 27.2 is correspondingly increased or decreased by any subsequent adjustment to the amount of GST owed in respect of the Services, howsoever caused.

### 28. Authority

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- 28.1. The Client's agent, employee or contractor who accepts the Quote and these Terms and Conditions on behalf of the Client ('**Client's Signatory**') warrants that it has authority to enter into these Terms and Conditions on behalf of the Client.

- 28.2. The Client's Signatory acknowledges and agrees that MD Tiling has relied upon the warranty contained in clause 28.1 above in choosing to enter into these Terms and Conditions and provide the Services to the Client.

- 28.3. The Client's Signatory will indemnify MD Tiling against all Liability MD Tiling may suffer arising in connection with a breach of the warranty set out in clause 28.1 above.

### 29. Assignment

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- 29.4. MD Tiling may assign or subcontract the whole or any part of the Services without the prior written approval of the Client.

- 29.5. The Client is not permitted to assign the whole or any part of the Terms and Conditions or any payment, right, benefit or interest under the Terms and Conditions without the prior written consent of MD Tiling (which may be given or refused at the sole discretion of MD Tiling).

### 30. Miscellaneous

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### 30.1. Time

Except as otherwise provided for under these Terms and Conditions, time is not of the essence of these Terms and Conditions.

### 30.2. Assurances

Each party shall take all steps, execute all documents and do everything reasonably required by the other party to give effect to any of the transactions contemplated by these Terms and Conditions.

### 30.3. Severance

Any provision of these Terms and Conditions which is prohibited or unenforceable in the jurisdiction specified in clause 30.6 will be ineffective in that jurisdiction to the extent of the prohibition or unenforceability. That will not invalidate the remaining provisions of these Terms and Conditions nor affect the validity or enforceability of that provision in any other jurisdiction.

### 30.4. Amendment

Unless specified otherwise, these Terms and Conditions may be amended only by another agreement executed by all parties.

### 30.5. Waivers, Remedies Cumulative

- (a) No failure to exercise and no delay in exercising any right, power or remedy under these Terms and Conditions by MD Tiling operates as a waiver. Nor does any single or partial exercise of any right, power or remedy preclude any other or further exercise of that or any other right, power or remedy.
- (b) The rights, powers and remedies given to MD Tiling under these Terms and Conditions are in addition to, and do not exclude or limit, any right, power or remedy provided by Law.

### 30.6. Governing Law

These Terms and Conditions are governed by the laws of New South Wales. The parties submit to the non-exclusive jurisdiction of courts exercising jurisdiction there.

### 30.7. Counterparts

- (a) These Terms and Conditions may be executed in any number of counterparts. All counterparts taken

together shall be taken to constitute one agreement.

- (b) The parties agree that a facsimile or email copy of a counterpart received from a party shall be regarded as, and deemed to be, an original copy of that counterpart received from that party.

### 30.8. Survival

Any indemnity or any obligation of confidence under these Terms and Conditions are independent and survive termination of these Terms and Conditions. Any other term by its nature intended to survive termination of these Terms and Conditions survives termination of these Terms and Conditions.

### 30.9. No merger

The rights and obligations of the parties under these Terms and Conditions do not merge on completion of any transaction contemplated by these Terms and Conditions.

### 30.10. Relationship

Except where these Terms and Conditions expressly states otherwise, it does not create a relationship of employment, trust, agency or partnership between the parties.

### 30.11. Entire Agreement

These Terms and Conditions contains all the contractual arrangements of the parties with respect to the items to which it relates and supersedes all earlier conduct (including any agreements in relation thereto) by the parties with respect to those items.

### 30.12. Facsimile

Both parties acknowledge that the original of these Terms and Conditions may be in facsimile or email form and agree to accept the facsimile or email as an original which is binding on the parties.

### 30.13. *Electronic Transactions (Queensland) Act 2001 (Qld) ('ETA')*

- (a) The parties acknowledge that their representatives may communicate utilising electronic communication.
- (b) The parties acknowledge that Ch 2 Part 2 of the ETA applies.

- (c) The parties acknowledge the method of determining the time and place of dispatch and receipt shall be determined pursuant to Ch2 Part 3 of the ETA.
- Anticipated Commencement Date** means the date stated in Item [redacted] of the Schedule;
- Ardex** means Ardex Australia Pty. Limited ACN 000 550 005;

### 30.14. Force Majeure

- (a) Neither party will be in breach of these Terms and Conditions because of or liable for any failure or delay in the performance of its obligations under these Terms and Conditions to the extent that the failure or delay is wholly or partially caused, directly or indirectly, by a Force Majeure Event or any act or omission of the other party.
- (b) If these Terms and Conditions are no longer capable of being performed due to circumstances beyond the reasonable control of the parties, whether by force majeure or otherwise:
- (i) these Terms and Conditions will be at an end;
- (ii) both parties must immediately discharge all of their financial and other obligations under these Terms and Conditions up to the date of expiration or termination of these Terms and Conditions; and
- (iii) MD Tiling shall be entitled to remove all its property from the Site.
- Australian Consumer Law** means Schedule 2 of the *Competition and Consumer Act 2010* (Cth);
- Building Acts** means the *Home Building Act 1989* (NSW) and the *Queensland Building and Construction Commission Act 1991* (Qld);
- Building Code** means the Building Code of Australia;
- Business Day** means a day on which banks are open for business in the town of Byron Bay in the State of New South Wales, other than a Saturday, Sunday or public holiday;
- Claimable Delay** means a cause beyond MD Tiling's sole control that was not reasonably foreseeable at the time MD Tiling entered into these Terms and Conditions, which includes but is not limited to:
- (a) a Variation requested by the Client or a request by the Client for a variation;
- (b) a Variation requested by MD Tiling if the need for the Variation could not have been reasonably foreseen at the date of the Client's Acceptance;
- (c) a Time Allowance in excess of the allowance for that cause of delay stated at Item [redacted] of the Schedule;
- (d) an act of God, fire, explosion, earthquake or civil commotion;
- (e) an industrial dispute;
- (f) a dispute with adjoining or neighbouring residents or owners;
- (g) anything done or not done by the Client;
- (h) delays in getting any Necessary Permits;
- (i) the need for a survey of or other report in relation to the Site; or
- (j) the industry shutdown being a three (3) week period commencing on or about 22 December in each year, if the performance of Services during the Christmas period could not have been reasonably foreseen at the date of the Client's Acceptance;

### 31. Definitions

In these Terms and Conditions unless the contrary intention appears:

**Acceptance Date** means:

- (a) the date stated in the Quote; or
- (b) if no date of acceptance is stated, the date that is fourteen (14) days after the date of the Quote;

**Acceptance Period** means the date commencing on the date of the Quote and ending on the earlier of:

- (a) the Acceptance Date; or
- (b) the date the Quote is withdrawn by MD Tiling;

**Claims** means, in relation to a party, any claim, action, cause of action, legal proceeding, suit or demand made against the party concerned however it arises and whether it is present or future, fixed or unascertained, actual or contingent;

**Client** means the client particularised within the Quote;

**Client's Acceptance** has the meaning given to it in clause 2.4 of these Terms and Conditions;

**Client Material** means:

(a) where the Quote is accepted by an agent of the Client, an authority from the Client confirming that the agent is authorised to engage the services of MD Tiling on behalf of the Client and that the Client consents to the provision of the Services;

(b) all plans, drawings, documents and information (including but not limited to all title documents, searches, survey plans, drawings) in the Client's possession or control) necessary for MD Tiling to:

(i) identify the location, boundaries and particulars of the Site;

(ii) identify the location and extent of any existing works or improvements on the Site;

(iii) satisfy itself as to the nature, proposed location and extent of any Services;

(iv) carry out the Services; and

(v) all information and material identified in the Quote or otherwise reasonably required and requested by MD Tiling to enable MD Tiling to proceed with the Services;

**Commencement** means when MD Tiling has taken physical possession of the Site and commences the provision of the Services or is in a position where it is able to commence the provision of the Services;

**Commencement Date** means the date upon which MD Tiling takes possession of the Site to carry out the Services;

**Completion** means the date that MD Tiling notifies the Client in writing that provisions of the Services is complete;

**Confidential Information** of a party includes (but is not limited to) any information:

(a) any information:

(i) about the business and affairs, customers, clients, employees, sub-contractors or other persons doing business with that party;

(ii) which is by nature confidential;

(iii) which is designated as confidential by that party;

(iv) which the other party knows or ought to know is confidential; and

(b) all trade secrets, knowhow, financial information and other commercially valuable information of that party, and in the case of MD Tiling, includes the MD Tiling Material;

**Consequential Loss** means one or more of the following (without limitation):

(a) Loss of bargain;

(b) Loss of revenues;

(c) Loss of reputation;

(d) Indirect loss;

(e) Loss of profits;

(f) Loss of actual or anticipated savings;

(g) Lost opportunities, including opportunities to enter into arrangements with third parties;

(h) Loss or damage in connection with Claims against the Client by third parties; or

(i) Loss or corruption of data;

**Disbursement** means any direct cost incurred by or likely to be incurred by MD Tiling on behalf of the Client and arising out of or in connection with the Services;

**Essential Term** means:

(a) with respect to MD Tiling, clauses 6.1, 12.1(c), 13.1, 14.3 and 23;

(b) with respect to the Client, clauses 3.1, 4.1, 4.4, 6.3, 8.2, 11.1, 11.3, 12.1(d), 14.1, 21.1(g) and 23;

**Estimated Completion Date** means the date indicated in the Quote;

**Exclusions** means:

- (a) plumbing services;
  - (b) painting or decorating services;
  - (c) the provision of plans;
  - (d) the location or detection of reinforcement, cables and pipes within slabs and structures;
  - (c) a person (whether anonymous or not) who is charged with the administration of the Law;
- GST** has the meaning given to that term in the GST Act;
- GST Act** means *A New Tax System (Goods and Services) Tax Act 1999 (Cth)*;

and all other matters which are specifically excluded from the Scope of the Services as detailed within the Quote;

**Fee** means the fee identified in the Quote and includes any other amounts owing pursuant to these Terms and Conditions;

**Force Majeure Event** means any occurrence or omission outside of a party's reasonable control, as a direct or indirect result of which the party relying on the event is prevented from or delayed in performing its obligations under these Terms and Conditions (other than a payment obligation), and includes:

- (a) a physical natural disaster including fire, flood, lightning or earthquake;
- (b) war or other state of armed hostilities (whether war is declared or not), insurrection, riot, civil commotion, act of public enemies, national emergency (whether in fact or in law) or declaration of martial law;
- (c) epidemic or quarantine restriction;
- (d) ionising radiation or contamination by radioactivity from any nuclear waste or from combustion of nuclear fuel;
- (e) confiscation, nationalisation, requisition, expropriation, prohibition, embargo, restraint or damage to property by or under the order of any government agency;
- (f) Law taking effect after the date of these Terms and Conditions; and
- (g) strike, lock out, stoppage, labour dispute or shortage including industrial disputes that are specific to a party or the party's subcontractors;

**Government Authority** means:

- (a) a government or government department or other body;
- (b) a government, semi-government or judicial person; or

**Intellectual Property** means all intellectual property and proprietary rights (whether registered or unregistered) owned or used by the relevant party including without limitation trade marks, logos, Confidential Information, all patents, patent applications, drawings, discoveries, inventions, improvements, trade secrets, technical data, formulae, software and computer programs, know-how, logos, registered designs, design rights, copyright and similar industrial or Intellectual Property Rights;

**Intellectual Property Right** means any and all beneficial and legal ownership and intellectual and industrial protection rights throughout the world, both present and future, including rights in respect of or in connection with any Confidential Information, copyright (including future copyright and rights in the nature of or analogous to copyright), moral rights, inventions (including patents), trade marks, service marks, designs, circuit layouts and performance protection (whether or not now existing and whether or not registered or registrable) and includes any affairs; right to apply for the registration of such right and all renewals and extensions;

**Interruption** means events which are out of the reasonable control of MD Tiling and include but are not limited to:

- (a) weather conditions;
- (b) power failure;
- (c) technical failure;
- (d) unforeseen maintenance requirements;
- (e) inability to access the Site (if required); and
- (f) acts or omissions of the Client or third parties;

**Law** means any law, whether statute or common law (including the laws of negligence and nuisance), ordinance, regulation, by-law, order or other determination of any Government Authority;

**Liability** means Claims, losses, liabilities, costs (including but not limited to legal costs), damage or expenses of any kind and however arising, including penalties, fines and interest and including those



which are prospective or contingent and those the amount of which for the time being is not ascertained or ascertainable;

**Limitation** means all limitations to the Services specifically outlined within the Quote;

**Mapei** means Mapei Australia Pty. Ltd. ACN 059 838 765;

**MD Tiling** means MD Tiling Solutions Pty Ltd ACN 635 123 867 trading as Northern Rivers Shower Seal of '3' 45 Belongil Crescent Byron Bay in the State of New South Wales;

**MD Tiling Material** means any material provided by MD Tiling or for which access is given by MD Tiling to the Client for the purposes of these Terms and Conditions;

**PPSA** means the *Personal Property Securities Act 2009* (Cth);

**PPSR** means the Personal Property Security Register under the PPSA;

**Product** means a product used by MD Tiling in the provision of the Services;

**Quote** means the quote issued by MD Tiling to the Client for the Services requested, as annexed to these Terms and Conditions (unless these Terms and Conditions have been provided to the Client and the Client has accepted these Terms and Conditions previously). The Quote may (but is not required to) set out the key components of the Services, which may include (but is not limited to) any of the following:

- (a) a reference number;
- (b) a description of the Services and the Scope of those Services;
- (c) Exclusions from or Limitations to the Services;
- (d) the proposed Fee for the Services;
- (e) any proposed Disbursements associated with the Services;
- (f) any insurance policy required to be taken out on the part of the Client; and
- (g) the proposed Service Period and Estimated Completion Date for the delivery of the Services;

**Representative** means any director, officer, employee, contractor, subcontractor or agent of MD Tiling;

**Schedule** means the schedule/s attached to and forming part of these Terms and Conditions;

**Scope** means the scope of the Services as outlined in the Quote;

**Security Interest** means a right, interest or power:

- (a) giving rise to a security interest under the PPSA;
- (b) reserved in or over an interest in any asset including any retention of title;
- (c) created or otherwise arising in or over any interest in any asset under a bill of sale, mortgage, charge, lien, pledge, trust, power;
- (d) given by way of security for the payment of a debt or any other monetary obligation or the performance of any other obligation; and
- (e) includes, but is not limited to, any agreement to grant or create any of the above;

**Services** means the provision of services relating to tiling, sealing or grouting (as the case may be) as further particularised within the Quote and all other work identified in the Quote;

**Service Period** means the provisional period stated in the Quote and commencing on the Commencement Date;

**Site** means the site particularised by the Client within the Client Material;

**Statutory Warranties** means:

- (a) in the context of the *Home Building Act 1989* (NSW) those warranties contained at Section 18B of that act; and
- (b) in the context of the *Queensland Building and Construction Commission Act 1991* (Qld) those warranties contained at Part 3 of Schedule 1B of the QBCC that act;

**Tax Invoice** has the meaning given to that term in the GST Act;

**Taxable Supply** has the meaning given to that term in the GST Act;

**Termination Date** means the date upon which these Terms and Conditions are terminated in accordance with clauses 25.1 and 25.2 of these Terms and Conditions;

**Terms and Conditions** means the Quote, these standard terms and conditions and any deed,

contract, agreement, arrangement or understanding (as amended, varied or replaced from time to time) made between the parties;

**Time Allowances** means a delay to the carrying out of the Services caused by any one of the causes particularised at Item \_\_\_\_\_ of the Schedule and for which a description is also set out at Item \_\_\_\_\_ of the Schedule;

**Variation** means:

- (a) an omission, addition or charge to the Services; or
- (b) a change in the manner of carrying out the Services;

**Variation Document** means a document which complies with clause 21.1(d) of these Terms and Conditions; and

**Work Hours** means those hours during which the services can be carried out as stipulated by a relevant Government Authority from time to time.