

## Standard Terms and Conditions of Trade

### 1. DEFINITIONS & INTERPRETATION

- 1.1 "ADI" means authorised deposit-taking institution and has the same meaning as in the Banking Act 1959;
- 1.2 "Agreement" means the agreement or contract to which these Terms and Conditions attach to and form part of which may include a Quotation or rates sheet.
- 1.3 "Business Day" means a day that is not a Saturday, Sunday or public holiday in Western Australia.
- 1.4 "Confidential Information" means all information acquired or created by either Party relating to each Party's business or Intellectual Property that is not in the public domain (or, if in the public domain, is not in the public domain by reason of a breach of this Agreement), including but not limited to:
- (i) information about products, processes, systems, equipment, dealings, transactions, policies, finances, organisation or personnel, or about clients or customers or anyone associated with either Party;
  - (ii) any information regarding the Parties' business methods, business policies, product designs, stock information, related suppliers, procedures, techniques, research or development, projects or results, sales information of any kind, financial information of any kind, intellectual knowledge, Intellectual Property, know-how, trade secrets, customer lists or other customer information, sales strategy, tactics or methods, marketing research strategy, information pertaining to products or services under development, marketing, advertising, artwork ideas, concepts, promotions or strategies, supplier information, hardware types, product lists and ranges, items purchased or under consideration of purchase, prices, passwords, purchasing agreements, and security; and
  - (iii) information relating to any and all of the Parties' involvement with each other under the Agreement.
- 1.5 "Customer" means the Customer (or any person acting on behalf of and with the authority of the Customer) as described on any quotation, work authorisation or other form as provided by the Seller to the Customer and in all cases must include an individual in their own capacity;
- 1.6 "Customer's Vessel" means the vessel, motor or equipment of the Customer related to any Services requested, which the Seller is to perform Services on and/or install Goods;
- 1.7 "Fee(s)" means the price payable for the Services by the Customer to the Seller in accordance with clauses 3 and 5 of the Agreement;
- 1.8 "Goods" mean goods or products supplied by the Seller to the Customer described on the Invoice(s), which includes goods, which are installed, attached or otherwise placed in or on the Customer's Vessel or requested by the Customer;
- 1.9 "Guarantor" means that person (or persons) or entity who agrees to be liable for the debts of the Customer on a principal debtor basis pursuant to the Agreement;



- 1.10 "Intellectual Property" includes but is not limited to all trade marks, patents, copyright, designs, marks, processes, know-how, methodology, concepts, models, specifications, statements, formulae, trade secrets, manner of new manufacture, drawings, artwork and data or other like property or rights owned or held by the Seller. These rights include but are not limited to:
- (i) marks, logos, images, service marks, trade names, business names, internet domain names, slogans, symbols, brand names, copyright or other trade indicia; and
  - (ii) all rights in information, know-how, processes, procedures, compositions, devices, methods, formulae, protocols, techniques, software, designs, drawings, programs, source code, dynamic link libraries, graphical user interfaces, trade secrets or data whether or not protectable by patent application design registration, copyright, circuit layouts or otherwise, whether unregistered, registered or registrable.
- 1.11 "Intellectual Property Rights" means all present and future rights conferred by statute, common law or equity anywhere in the world in or in relation to copyright, trade marks, designs, patents, methodology, concepts, models, business and domain names, inventions and confidential information, and other results of intellectual activity in the industrial, commercial, scientific, literary or artistic fields whether or not registrable, registered or patentable. These rights include:
- (i) all rights in all applications to register these rights including all rights to claim Paris Convention priority;
  - (ii) all renewals and extensions of these rights; and
  - (iii) all rights in the nature of these rights, such as moral rights.
- 1.12 "Invoice" means a taxation invoice for Goods and/or Services supplied by the Seller to the Customer;
- 1.13 "Loss" means
- (i) loss, including but not limited to direct loss, consequential loss, special loss, loss of anticipated profits and/or loss of business opportunity;
  - (ii) liability;
  - (iii) damage including but not limited to any damages or compensation and/or any damage to reputation; and/or
  - (iv) cost or expense including legal costs on a full indemnity basis.
- 1.14 "Party(ies)" means the parties to the Agreement including but not limited to the Seller and the Customer;
- 1.15 "Personal Property Securities Act" means the Personal Property Securities Act (Cth) 2009, as amended from time to time;
- 1.16 "Price" means the price payable for the Goods and/or Services specified in the Invoice in accordance with Clause 5 of this Agreement;
- 1.17 "Quotation" means any quotation or estimate provided by the Seller to the Customer in relation to the Customer's Vessel, Goods and/or Services;
- 1.18 "Scope of Services" means the scope of services as specified in the Quotation and includes the service of the Customer's Vessel and the installation, modification, alteration or movement of any

of the Customers Vessel and/or Goods;

- 1.19 "Security Agreement", "Commingled Goods", "Financing Statement", "Financing Change Statement", "Personal Property", "After Acquired Property", "Purchase Money Security Interest", "Registration" and "Security Interest" have the meanings given to them in the Personal Property Securities Act;
- 1.20 "Seller" means S2S Marine Services Pty Ltd (ACN 164 277 767) and include without limitation its officers, agents, sub-contractors, successors and assigns or any person acting on behalf of and with the authority of S2S Marine Services Pty Ltd;
- 1.21 "Services" means all services requested and/or supplied by the Seller to the Customer, including any advice or recommendations (and where the context so permits shall include any supply of Goods as defined above) and as specified in the Quotation, Invoice(s) or in any other written communications;
- 1.22 "Supply" means supply of the Goods and/or Services by the Seller and may include installation where applicable to the Agreement;
- 1.23 "Terms and Condition" means these terms and conditions of the Seller's supply of Goods and Services to the Customer pursuant to the Agreement; and
- 1.24 In interpreting these Terms and Conditions:
- (a) the clause headings are for convenient reference only and have no effect in limiting or extending the language of the provisions to which they refer;
  - (b) any obligation on the part of two (2) or more persons or entities binds them jointly and severally;
  - (c) words in the singular number include the plural and vice versa;
  - (d) words importing a gender include any other gender;
  - (e) a reference to a person includes a partnership and a body, whether corporate or otherwise;
  - (f) where a word or phrase is given a particular meaning, other parts of speech and grammatical forms of that word or phrase have corresponding meanings;
  - (g) a reference to a Schedule includes a reference to any part of that Schedule which is not physically annexed to these Terms and Conditions but which is incorporated by reference;
  - (h) monetary references are references to Australian dollar currency ("AUD");
  - (i) the term "including" or any other grammatical structure is not to be interpreted by way of limitation; and
  - (j) in the interpretation of these Terms and Condition, no rule of contract interpretation applies to the disadvantage of a Party on the basis that it put forward these Terms and Conditions or any part of them.

## **2. APPLICATION OF TERMS AND CONDITIONS**

- 2.1 The Customer wishes to engage the Seller for the purposes of supplying the Customer with the Goods and/or Services in accordance to these Terms and Conditions.

### **3. QUOTATION**

- 3.1 Upon receipt of an order or request from the Customer, the Seller will provide a Quotation to the Customer which may include an automatic electronic confirmation of an order.
- 3.2 The Quotation is an estimate only and may be revised by the Seller upon inspection of the Vessel or site of the Services.
- 3.3 All prices are estimated based on the Customer's requirements, which have been made known to the Seller and the agreed Scope of Services. If the Customer wishes to change or revise its requirements or Scope of Services at any stage, the Seller may revise the original Quotation including the pricing. If the Customer does not accept the revised quotation, the Seller is only obliged to provide the Services as agreed and particularised in the original Scope of Services.

### **4. ACCEPTANCE OF THE TERMS AND CONDITIONS**

- 4.1 Any instructions received by the Seller from the Customer in relation to the following:
- (a) acceptance of the Quotation;
  - (b) supply of the Goods and/or Services;
  - (c) the Customer and the Seller enters into a formal agreement; or
  - (d) the Customer's acceptance of the Goods supplied by the Seller,
- will constitute acceptance of these Terms and Conditions and create a contract between the Parties.
- 4.2 Where more than one Customer has entered into this Agreement, the Customers shall be jointly and severally liable for all payments of the Price.
- 4.3 The Seller may at any time refuse to provide any further Goods, perform further Services or extend any credit, despite the acceptance of any offer or any application for credit.
- 4.4 The Customer shall give the Seller not less than ten (10) Business Days prior written notice of any proposed change of ownership of the Customer or any change in the Customer's name and/or any other change in the Customer's details (including but not limited to, changes in the Customer's address, facsimile number, or business practice). The Customer shall be liable for any loss incurred by the Seller as a result of the Customer's failure to comply with this clause.

### **5. PRICE AND PAYMENT**

- 5.1 At the Seller's sole discretion the Price is either:
- (a) as indicated on Invoices provided by the Seller to the Customer in respect of Goods supplied; or
  - (b) as indicated in the Quotation (subject to clause 5.2) which shall only be binding upon the Seller if specifically stated therein.
- 5.2 The Seller reserves the right to change the Price in the event of a variation to the Seller's Quotation, provided that the Seller provides the Customer with reasonable notice of the change in the Price. The costs of variations are to be borne by the Customer, unless otherwise agreed by the Seller.



- 5.3 The Customer must make payment for the Goods supplied and or Scope of Services to the Seller by way of cleared funds on or before the date specified in the Invoice provided to the Customer for such Goods supplied or the Scope of Services performed. Time is of the essence in relation to payment.
- 5.4 If no time for payment is specified, the Customer must make payment at the time of collection of Goods, completion of Services, or on demand whichever is the earlier.
- 5.5 Payment can be made by cash, or by EFT transfer to the Seller's account (Westpac Banking Corporation, BSB: 036-019 Account Number: 198023). If payment is made by EFT, the Customer must provide a reference (name, Quotation number or delivery or Customer Vessel details). The Seller may apply payments received to any outstanding amount at its sole discretion.
- 5.6 GST and other taxes and duties that may be applicable are included in the Price unless otherwise stated in the Quotation.
- 5.7 The Customer must reimburse the Seller for any expenses (including but not limited to administrative, storage or delivery costs) incurred by the Seller as a result of any termination of any part of the Services or Agreement for whatever reason.
- 5.8 Where the Customer is a trustee:
- (a) The Customer warrants that it has full power and authority for the benefit, purposes and objects of the trust to enter into this Agreement on behalf of the trust and that the trustee is bound by the Terms and Conditions both personally and as trustee; and
  - (b) The Customer agrees that the trustee is liable for any debt owing to the Seller pursuant to the Agreement and in addition, the trust assets are available to satisfy the debt.

## **6. SUPPLY OF GOODS/SERVICES**

- 6.1 All Services/Goods specified in the Scope of Services and/or obtain Goods for sale are estimated to be completed or Supplied:
- (a) within the estimated timeframe specified in the Quotation or as agreed between the Parties; or
  - (b) if clause 6.1(a) is unreasonable or impossible, as mutually agreed between the Parties or within a reasonable time.
- 6.2 The Seller will notify the Customer as soon as reasonably practicable if the Seller becomes aware of any:
- (a) delay in the provision of the Goods or Services pursuant to the Quotation;
  - (b) emergency or ancillary Services which are, in the opinion of the Seller at its sole discretion, necessary to ensure the buoyancy, immediate seaworthiness, compliance with environmental impact requirements or safety of or related to the Customer's Vessel.
- 6.3 The Seller is accepts no responsibility and the Customer is not entitled to compensation or to bring any claim if the Services are not compete or the Goods are not available within the time specified in clauses 6.1(a) or (b) above regardless of the cause of the delay.
- 6.4 Where emergency or ancillary Services set out in clause 6.2(b) are required, the Customer will be liable for and unconditionally and irrevocably indemnifies the Seller against all costs and



expenses incurred in providing such Services notwithstanding that the Customer's may not have specifically approved such Services.

- 6.5 Any Services performed to that date or Goods supplied to that date must be paid for by the Customer. This is the Customers only remedy.
- 6.6 Where the Seller completes the Services at a location other than the Customer's Vessel's location the Customer will be notified when the Goods and/or the Customer's Vessel is ready for collection/delivery.
- 6.7 If the Customer refuses or is unable to, or not take delivery of the Goods or the Customer's Vessel within three (3) days of being notified by the Seller, the Seller may charge a storage fee until the Goods or Customers Vessel is collected.
- 6.8 The Customer Acknowledges that the Seller has a mechanics lien over the Customer's Vessel and may retain and deal with the Customer's Vessel in accordance with its rights under this lien without further notice to the Customer. The Customer waives its rights to notification or other reporting obligations of the Seller in dealing with the Customer's Vessel to the extent allowed at law.
- 6.9 The Seller will not be liable for any loss or damage to the Customer or the Customer's Vessel resulting from late delivery of the Goods or Services for any reason (including but not limited to changes to the Customer's requirements or variations to the Agreement).
- 6.10 The Seller reserves the right to withhold delivery of the Goods or Services until the Customer has fully paid all outstanding amounts due to the Seller.
- 6.11 A certificate signed by the Seller in respect of the provision of any Goods or Services shall be prima facie evidence of such provision.

## **7. INVOICES**

- 7.1 The Seller will provide the Customer with an Invoice when Services performed and/or Goods supplied by the Seller to the Customer.

## **8. RISK, TITLE AND THE PERSONAL PROPERTY SECURITIES ACT**

- 8.1 Goods supplied by the Seller to the Customer will be at the Customer's risk upon
  - (a) notification by the Seller that the Goods are read for delivery; or
  - (b) if at a later time as prescribed by the laws of Western Australiawhichever is the sooner.
- 8.2 Ownership of the Goods remains with the Seller until all the amounts owing by the Customer to the Seller (including without limitation to the purchase price of the Goods and other debts owing to the Seller) have been paid in full.
- 8.3 The Customer agrees that if they use the Goods in the manufacturing or building process (which includes using Goods to manufacture other goods or by incorporating the goods in or with other goods) then the Customer holds such part of the proceeds of sale as relates to the Goods on trust for and as bailee and agent of the Seller, who will be entitled to payment on demand. Such part shall be deemed to equal in dollar terms the total of all amounts owing by the Customer to the Seller at the time the Goods become intermingled.



- 8.4 The Customer must hold the sale proceeds it receives from any sale of the Goods or Customer's Vessel on which the Services have been performed as trustee and agent for the Seller. All such sale proceeds must be placed in an ADI account separate from its own monies and the Customer must not allow any person to have control of, or grant a security interest over the proceeds or the accounts in which they are held. The Customer must make immediate payment to the Seller from the accounts in which the sale proceeds are held of all amounts which may be owing by the Customer to the Seller upon demand. Upon request the Customer must assign its rights to receive the sale price in respect of the Goods purchased to the Seller.
- 8.5 Until all amounts owing by the Customer have been paid in full, the Customer will hold the Goods as trustee and agent for the Seller. The Customer must ensure that the Goods and where applicable the Customer's Vessel are:
- (a) readily distinguishable from other goods held by the Customer so they clearly show that they are the property of the Seller;
  - (b) kept in good and serviceable condition;
  - (c) secure from risk, damage and theft; and
  - (d) fully insured.
- 8.6 The Customer acknowledges that these Terms and Conditions constitute a Security Agreement which creates a Purchase Money Security Interest in favour of the Seller in the Goods including Comingled Goods, a specific Security Interest over the Customer's Vessel, and a general Security Interest in all of the Customers present and After Acquired Property to secure all amounts due by the Customer to the Seller.
- 8.7 The Customer accepts, acknowledges and agrees that:
- (a) the Seller can, without notice to the Customer, affect and maintain a Registration (in any manner that the Seller considers appropriate) of its Security Interest on the PPSR in relation to any security interest contemplated or constituted by the Agreement including but not limited to the Seller's Goods, Services, contract rights or Intellectual Property;
  - (b) pursuant to section 275(6) of the PPSA, the Customer agrees the Seller is not required to disclose to an interested person information pertaining to the Seller's Security Interest unless required to do so pursuant to the PPSA or at law generally; and
  - (c) the Customer's Vessel is left at the location of the Services at the Customer's sole risk. The Customer shall ensure that all insurance policies in respect of the Customer's Vessel are up to date and adequate. The Seller accepts no responsibility or damage, theft or loss of the Customer's Vessel however it may occur.
- 8.8 The Customer will:
- (a) sign any documents and/or provide any further information (which information the Customer warrants to be complete, accurate and up-to-date in all respects) and/or assistance which the Seller may reasonably require to enable perfection of its Security Interest or Registration of a Financing Statement or Financing Change Statement on the PPSR;
  - (b) give the Seller not less than 14 Business Days' written notice of any proposed change in their name and/or any other changes in their details (including but not limited to, changes in their address, facsimile number, email address, trading name or business activities);

- (c) indemnify the Seller against any costs the Seller incurs in perfecting and maintaining its perfected Security Interest in the Goods or such other Personal Property under the PPSA and any costs the Seller may incur in the course of enforcing any of its rights under this Agreement, the PPSA or at law generally;
- (d) procure from any persons considered by the Seller to be relevant to its security position, such agreement and waivers as the Seller may at any time reasonably require; and
- (a) not register a financing change statement in respect of a Security Interest contemplated or constituted by the Agreement in its own favour or that of a third party without the Seller's prior written consent.

8.9 If Chapter 4 of the PPSA would otherwise apply to the enforcement of a Security Interest arising in connection with this Agreement to which these terms and conditions apply, the Customer agrees that the following provisions of the PPSA will not apply to the enforcement of the Agreement:

- (a) Section 95 (notice of removal of accession), to the extent that it requires the Seller to give a notice to the Customer;
- (b) Section 96 (when a person with an interest in the whole may retain an accession);
- (c) Subsection 121(4) (enforcement of liquid assets – notice to grantor);
- (d) Section 125 (obligation to dispose of or retain collateral);
- (e) Section 130 (notice of disposal of collateral), to the extent that it requires the Seller to give a notice to the Customer;
- (f) Section 132(3)(d) (contents of statement of account after disposal);
- (g) Section 132(4) (statement of account if no disposal);
- (h) Section 134 to the extent that notice is required;
- (i) Section 135 (notice of retention of collateral);
- (j) Section 142 (redemption of collateral); and
- (k) Section 143 (reinstatement of security agreement).

8.10 Notices or documents required or permitted to be given to the Seller for the purposes of the PPSA must be given in accordance with the PPSA.

8.11 If the Customer breaches this Agreement, the Seller may enter any premises or location and repossess the Goods and/or the Customer's Vessel using any means necessary and the Customer shall indemnify the Seller against any claim, loss or damage by any person in relation to any repossession.

## **9. CUSTOMER'S WAIVER**

9.1 Subject to clause 9.2, the Customer warrants that it has not relied on any representation made by the Seller in any form (including but not limited to the Seller's leaflets, catalogues, brochures, website) which has not been stated expressly in these Terms and Conditions or upon any descriptions, illustrations or specifications or any documentation provided by the Seller.





- 9.2 The Customer acknowledges and agrees that, to the extent the Seller has made any representation which is not otherwise expressly stated in these Terms and Conditions, the Agreement or in any other document, the Customer has been provided with an opportunity to independently verify the accuracy of that representation.
- 9.3 The Customer warrants that the Customer's Vessel is not compromised in a hire-purchase agreement containing a provision prohibiting the creation by the hirer of a lien over the Customer's Vessel.
- 9.4 The Customer waives any right to rescind, terminate or cancel the Agreement with the Seller or to sue for damages or to claim restitution arising out of any misrepresentation made to the Customer by the Seller and the Customer acknowledges that it is relying on its own skills and judgement when acquiring the Goods and/or Services.

#### **10. CUSTOMER'S OBLIGATIONS**

- 10.1 The Customer shall pay the Fees in accordance with clause 5.
- 10.2 The Customer agrees to expeditiously provide the Seller with instructions, access, information and materials that are reasonably necessary and within a reasonable time so that the Seller can carry out its obligations under this Agreement and provide the Goods and Services.
- 10.3 The Customer agrees to indemnify the Seller for any cost expense damage or loss related to non-compliance with clause 10.2 that causes delays to the Seller in providing the Services calculated using the relevant hourly rate of the Seller.
- 10.4 Notwithstanding any change of trading structure of the Customer, the Customer will remain liable for all Goods supplied and Services requested by either the Customer or the Customer's agents and the Seller may invoice the Customer directly for all charges incurred until the Customer finalises all accounts with the Seller and provides notice that the Customer no longer wishes to have an account.
- 10.5 The Customer shall fully insure the Customer's vessel and shall pay any insurance excess for any claim in any way related to the Goods and/or Services.

#### **11. SELLER'S OBLIGATIONS**

- 11.1 Any condition or warranty which would otherwise be implied in the Agreement is hereby excluded to the full extent permitted by law.
- 11.2 Where legislation implies in the Agreement any condition or warranty, and that legislation avoids or prohibits provisions in a contract excluding or modifying the application of or exercise of or liability under such condition or warranty, the condition or warranty will be deemed to be included in the Agreement. However, the liability of the Seller for any breach of such condition or warranty will be limited as set out in clauses 14.2 and 14.3.

#### **12. DEFECTS**

- 12.1 The Customer must inspect the Goods and Services on delivery and must within five (5) Business Days of delivery (time being of the essence) immediately notify the Seller of any alleged defect, damage in the Goods or failure to comply with the description or Quotation.
- 12.2 The Customer must provide the Seller the opportunity to inspect the Goods and/or Services ("Inspection") and rectify the alleged defect as soon as reasonably practicable if the Customer believes the Goods and/or Services are defective in any way. If the Customer fails to facilitate an



Inspection for the Seller, the Goods will be presumed to be free from any defect or damage and the Seller is not liable to replace or repair the Goods or re-supply the Services.

- 12.3 The Seller may repair or replace any Goods or part of any Goods with second-hand replacement parts of the same or similar age, use and quality as those Goods or part of any Goods subject to such second-hand parts being suitable for such purpose.

**13. UNCOLLECTED GOODS**

- 13.1 If the Customer fails to make payment or fails to take delivery of the Customer's Vessel within three business days of the Seller notifying the Customer of completion of the Services, then in addition to any other rights available to the Seller, the seller may take any action permitted by the *Collection of Uncollected Goods Act* or its rights under its mechanics lien.

- 13.2 If any of the Customer's Vessel is uncollected, the amount recoverable from the Customer will be increased by any amounts the Seller incurs in transporting, storing, placing or hard standing, insuring or any other associated costs incurred by the Seller in holding the Customer's Vessel until it is collected or sold.

- 13.3 For any avoidance of doubt, in addition to clause 13.2, all advertising, selling, legal, Court and other cost are recoverable from the Customer and from the sale price of the Customer's Vessel, unless otherwise determined by the Court.

**14. THE COMPETITION AND CONSUMER ACT 2010 (CTH) ("CCA") AND THE FAIR TRADING ACT ("FTA")**

- 14.1 Nothing in the Agreement is intended to have the effect of contracting out of any applicable provisions of the CCA or the FTA in each of the States and Territories of Australia, except to the extent permitted by those Acts where applicable.

- 14.2 In the case of Services being provided, the Seller's liability for a breach of any term of this Agreement is limited to the following:

- (a) the supplying of the Services again; or
- (b) the payment of the cost of having the Services supplied again.

- 14.3 In the case of supplying the Goods, the Seller's liability for a breach of any term of this Agreement is limited to the following:

- (a) the replacement of the Goods or the supply of equivalent Goods;
- (b) the repair of such Goods;
- (c) the payment of the cost of replacing the Goods or of acquiring equivalent Goods; or
- (d) the payment of the cost of having the Goods repaired.

**15. CONFIDENTIAL INFORMATION**

- 15.1 A Party ("the Receiving Party") will not, without the prior written approval of the other Party, disclose the other Party's ("the Disclosing Party") Confidential Information.

- 15.2 The Receiving Party will not be in breach of clause 15.1 in circumstances where it is legally compelled to disclose the Disclosing Party's Confidential Information.

- 15.3 The Receiving Party will ensure that its employees, agents, and any sub-contractors engaged for the purposes of this Agreement, do not make public or disclose the Disclosing Party's Confidential Information.
- 15.4 The Disclosing Party may at any time require the Receiving Party to arrange for its employees, agents, or sub-contractors engaged in the performance of this Agreement to execute a suitable confidentiality deed at the Disclosing Party's expense.
- 15.5 The Receiving Party will on demand return to the Disclosing Party any Confidential Information supplied by the Disclosing Party to the Receiving Party in connection with this Agreement.
- 15.6 Notwithstanding any other provision of this clause 15, the Parties may disclose the terms of this Agreement to its employees, related companies, solicitors, auditors, insurers or accountants, and will ensure that every person to whom that disclosure is made uses that information solely for the purposes of advising or reporting to the Parties.

## **16. INTELLECTUAL PROPERTY**

- 16.1 The Customer expressly agrees and acknowledges that:
- (a) any Intellectual Property in the Seller's Goods and/or Services (whether unregistered, registered or registrable) is the property of the Seller; and
  - (b) nothing in the Agreement is intended to provide the Customer with any interest in the Intellectual Property in the Seller's Goods and Services.

## **17. WARRANTY**

- 17.1 The Customer agrees and accepts the terms of warranty issued in respect of the Goods (as notified from time to time). Apart from those mandatory at law, no warranties are given to the Customer in respect of the Goods or Services supplied and the Seller is not liable to the Customer or any other person for any loss or damage whatsoever. Notwithstanding the above, until full payment of all monies owing for the Goods of Scope of Services is made, any implied warranty is void.
- 17.2 The warranty in clause 17.1 is subject to the conditions in clause 17.3.
- 17.3 The conditions applicable to the warranty given by clause 17.1 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 Customer to properly maintain the Goods or the Customer's Vessel; or
    - (ii) failure on the part of the Customer to follow any instructions or guidelines provided by the Seller; or
    - (iii) any use of the Goods or the Customer's Vessel otherwise than for any usual application; or
    - (iv) the continued use of the Goods or the Customer's Vessel after any defect becomes apparent or would have become apparent to a reasonably prudent operator or user;
    - (v) any condition, design, seaworthiness, defect, or configuration of, or other like issue with the Customer's Vessel; or

- (vi) fair wear and tear, any accident or act of God.
  - (b) the warranty is void and the Seller shall thereafter in no circumstances be liable under the terms of the warranty if the Goods or Services are repaired, modified, altered or overhauled without the Seller's consent.
- 17.4 For Goods not manufactured by the Seller, the warranty shall be the current warranty provided by the Manufacturer. The Seller shall not be bound by nor be responsible for any term, condition, representation or warranty other than that which is given by the Manufacturer.

## **18. EXCLUSION OF LIABILITY**

- 18.1 The Customer agrees that the Seller or its affiliates, agents and sub-contractors and each of their partners, principals, members, employees and other personnel will not be liable to the Customer for any actions, claims, or Loss in any way arising out of or relating to the Goods, Services or Customer's Vessel including where such actions, claims, or Loss:
- (a) in any way related to the condition, design, seaworthiness, defect, or configuration of, or other like issue with, the Customer's Vessel; or
  - (b) that arises through the failure of the Seller to notify the Customer of any of the items set out in clause 18.1(a).
- 18.2 The Seller liability is at all times limited to the amount of the Price paid by the Customer to the Seller under this Agreement.
- 18.3 In no event will the Seller or its affiliates, agents or sub-contractors or any of their partners, principals, members, employees or other personnel be liable for special, incidental, indirect, consequential or punitive damages, costs expenses or losses of any kind, lost profits, lost revenue, loss of management time, opportunity costs, failure to realise anticipated savings, or lost data.
- 18.4 This clause 18 will apply regardless of the form of action, damage, claim, liability, cost, expense or loss whether in contract, statute or tort (including without limitation to negligence) or otherwise. To the extent that this clause 18 refers to persons other than the Seller, the Seller holds the benefit of this clause 18 on trust for them.

## **19. CUSTOMER'S INDEMNITY**

- 19.1 The Customer continually indemnifies the Seller, the Seller's affiliates, agents or subcontractors, against any claim or proceeding that is made, threatened or commenced, and against any liability, Loss, damage or expense (including legal costs on a full indemnity basis) any of them incurs or suffers, as a direct or indirect result of any of the following:
- (i) a breach of this agreement including any warranty;
  - (ii) a wilful, unlawful or negligent act or omission by the Customer or an officer, employee, agent or subcontractor of the Customer;
  - (iii) any damage or loss to the Customer's Vessel in any way related to any condition, design, seaworthiness, defect, or configuration of, or other like issue with the Customer's Vessel; or
  - (iv) damage to or loss of any of the Seller's property.

## **20. DEFAULT AND CONSEQUENCES**

- 20.1 Neither Party shall take any action (including legal action) against the other Party for a default of the Agreement without first giving the defaulting Party written notice specifying the default and providing the defaulting Party with five (5) Business Days to rectify such.
- 20.2 Interest on overdue Invoices shall accrue daily from the date when payment becomes due, until the date of payment, at a rate of one point five percent (1.5%) per calendar month and such interest shall compound monthly at such a rate after as well as before any judgement.
- 20.3 If the Customer defaults in payment of any invoice when due, the Customer will indemnify the Seller from and against all costs and disbursements incurred by the Seller in pursuing the debt including legal costs (on a solicitor and own client basis) and the Seller's debt recovery costs.
- 20.4 Without prejudice to any other remedies the Seller may have, if at any time the Customer is in breach of any obligation (including those relating to payment) the Seller may suspend or terminate the supply of Goods to the Customer and any of its other obligations under these Terms and Conditions. The Seller will not be liable to the Customer for any loss or damage the Customer suffers because the Seller has exercised its rights under this clause.
- 20.5 Without prejudice to the Seller's other remedies at law the Seller is entitled to immediately cancel all or any part of any order of the Customer which remains unfulfilled and all amounts owing to the Seller shall, whether or not due for payment, become immediately payable in the event that:
- (a) any money payable to the Seller becomes overdue, or in the Seller's opinion the Customer will be unable to meet its payments as they fall due; or
  - (b) the Customer becomes insolvent or bankrupt, convenes a meeting with its creditors or proposes or enters into an arrangement with creditors or makes an assignment for the benefit of its creditors; or
  - (c) a trustee in bankruptcy, receiver, manager, liquidator (provisional or otherwise) or similar person is appointed in respect of the Customer or any asset of the Customer;
  - (d) the Customer dies (only applicable if the Customer is an individual);

## **21. SECURITY AND CHARGE**

- 21.1 Subject to clause 8 and the PPSA:
- (a) where the Customer and/or the Guarantor (if any) is the owner of any real property, both the Customer and/or the Guarantor agree to mortgage and/or charge all of their joint and/or several interest in the said real property to the Seller or the Seller's nominee to secure all amounts and other monetary obligations payable under the Agreement. The Customer and/or the Guarantor acknowledge and agree that the Seller (or the Seller's nominee) is entitled to lodge an absolute caveat, where appropriate and the caveat will be withdrawn once all payments and other monetary obligations payable hereunder have been met.
  - (b) should the Seller elect to proceed in any manner in accordance with this clause 21 and/or its sub-clauses, the Customer and/or the Guarantor will indemnify the Seller from and against all the Seller's incurred costs and disbursements including legal costs on a solicitor and own client basis.
  - (c) the Customer and/or the Guarantor (if any) agree to irrevocably nominate, constitute and appoint the Seller or the Seller's nominee as the Customer's and/or Guarantor's true and



lawful attorney to perform all necessary acts to give effect to the provisions of this clause 21.

**22. TERMINATION**

- 22.1 The Seller may terminate the Agreement or terminate delivery of the Goods or Services at any time before the Goods or Services are provided, by giving written notice to the Customer. On giving such notice the Seller must immediately repay to the Customer any sums paid in respect of the Price for Goods or Services not supplied to the date of termination. The Seller will not be liable for any Loss arising from such termination.
- 22.2 The Customer may only terminate any part of the Agreement or the Services with the written consent of the Seller. In the event that the Customer purports to terminate provision of the Goods or Services, the Customer will be liable for any Loss incurred by the Seller including any loss of profits, manufacturing, ordering, shipping and restocking costs in or in any way related to such termination.

**23. FORCE MAJEURE**

- 23.1 If the Seller is delayed, hindered, or otherwise prevented from complying with its obligations under these Terms and Conditions by reason of events or circumstances beyond the reasonable control of the Seller including but not limited to acts of God, wars, riots, strikes, lock-outs, trade disputes or labour disturbances, breakdown of plant or machinery, accidents, storm, fire, floods, difficulties in obtaining materials, goods, transport or labour or any other circumstances affecting the supply of goods and services, the Seller is not liable to the Customer for any loss or damage which is or may be suffered by the Customer whether as a direct or indirect result of any such events or circumstances.

**24. PRIVACY ACT 1988 (CTH)**

- 24.1 The Customer and/or its Guarantor/s agrees for the Seller to obtain from a credit reporting agency a credit report containing personal credit information about the Customer and Guarantor/s in relation to credit provided by the Seller.
- 24.2 The Customer and/or its Guarantor/s agrees that the Seller may exchange information about the Customer and the Guarantor/s with those credit providers either named as trade referees by the Customer or named in a consumer credit report issued by a credit reporting agency for the following purposes:
- (a) to assess an application by Customer; and/or
  - (b) to notify other credit providers of a default by the Customer; and/or
  - (c) to exchange information with other credit providers as to the status of this credit account, where the Customer is in default with other credit providers; and/or
  - (d) to assess the credit worthiness of Customer and/or Guarantor/s.
- 24.3 The Customer consents to the Seller being given a consumer credit report to collect overdue payment on commercial credit (Section 21G(3)(c)(i) Privacy Act 1988).
- 24.4 The Customer agrees that personal credit information provided may be used and retained by the Seller for the following purposes and for other purposes as shall be agreed between the Customer and Seller or required by law from time to time:

- (a) provision of Goods; and/or
- (b) marketing of Goods by the Seller, its agents or distributors in relation to the Goods; and/or
- (c) analysing, verifying and/or checking the Customer's credit, payment and/or status in relation to provision of Goods; and/or
- (d) processing of any payment instructions, direct debit facilities and/or credit facilities requested by Customer; and/or
- (e) enabling the daily operation of Customer's account and/or the collection of amounts outstanding in the Customer's account in relation to the Goods.

24.5 The Seller may give information about the Customer to a credit reporting agency for the following purposes:

- (a) to obtain a consumer credit report about the Customer; and/or
- (b) allow the credit reporting agency to create or maintain a credit information file containing information about the Customer.

24.6 No transmission over the internet can be guaranteed as completely secure. Whilst the Seller strives to protect such information, the Seller does not warrant and cannot ensure the security of any information which the Customer transmits to the Seller. Accordingly, any information that the Customer transmits to the Seller, including personal information, credit card details etc, is transmitted at the Customer's own risk.

24.7 Once the Seller receives the Customers transmission, the Seller will take reasonable steps to preserve the security of such information.

## **25. NOTICES**

25.1 Any notice, Invoice or document relating to the Agreement will be deemed to be served:

- (a) on the second Business Day after the date on which it was posted – if sent by ordinary pre-paid post addressed to the Customer;
- (b) on the day on which it was sent – if it is sent:
  - (i) by email transmission before or during normal business hours on a Business Day (provided no undeliverable receipt is received); or
  - (ii) by telephone or voice message of the Customer's answering machine or voicemail service.

(b) on the same day, if by telephone or mobile including by way of SMS.

## **26. GENERAL**

26.1 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.

26.2 These Terms and Conditions and any agreement to which they apply shall be governed by the laws of Western Australia and the Parties unconditionally submit to the jurisdiction of the courts of Western Australia.

- 26.3 The documents comprising the Agreement will be read in the following order of precedence:
- (a) the Agreement;
  - (b) the Terms and Conditions;
- 26.4 Where any conflict occurs between the provisions contained in the Terms and Conditions, the Terms and Conditions will be read down to resolve such conflict. If the conflict remains incapable of resolution by reading down, the conflicting provisions will be severed from the Terms and Conditions without otherwise diminishing the enforceability of the remaining provisions of the Terms and Conditions.
- 26.5 In the event of any breach of the Agreement or any of these Terms and Conditions by the Seller the remedies of the Customer shall be limited to damages which under no circumstances shall exceed the Price of the Goods.
- 26.6 The Customer shall not be entitled to set off against or deduct from the Price any sums owed or claimed to be owed to the Customer by the Seller.
- 26.7 The Seller may license or sub-contract all or any part of its rights and obligations (including supplying of the Goods and/or Services) without the Customer's consent.
- 26.8 The Seller reserves the right to 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 Seller notifies the Customer of such change including by way of posting such change on the Seller's website.
- 26.9 The failure by the Seller to enforce any provision of these Terms and Conditions shall not be treated as a waiver of that provision, nor shall it affect the Seller's right to subsequently enforce that provision.
- 26.10 Upon acceptance of these Terms and Conditions by the Customer, the Terms and Conditions are binding and can only be amended with the written consent both the Parties.