
McKinnon Heating & Cooling Pty Ltd– Terms & Conditions of Trade

1. Definitions

- 1.1 **“Client”** means the person/s, entities or any person acting on behalf of and with the authority of the Client requesting McKinnon to provide the Services as specified in any proposal, quotation, order, invoice, or other documentation, and:
- (a) if there is more than one Client, is a reference to each Client jointly and severally; and
 - (b) if the Client is a partnership, it shall bind each partner jointly and severally; and
 - (c) if the Client is on behalf of or part of, a Trust, shall be bound in its own capacity as a trustee; and
 - (d) includes the Client’s executors, administrators, successors, and permitted assigns.
- 1.2 **“Confidential Information”** means information of a confidential nature whether oral, written or in electronic form including, but not limited to, this Contract, either party’s intellectual property, operational information, know-how, trade secrets, financial and commercial affairs, Contracts, client information (including but not limited to, **“Personal Information”** such as: name, address, D.O.B, occupation, driver’s license details, electronic contact (email, Facebook or Twitter details), medical insurance details or next of kin and other contact information (where applicable), previous credit applications, credit history) and pricing details.
- 1.3 **“Contract”** means the terms and conditions contained herein, together with any quotation, order, invoice or other document or amendments expressed to be supplemental to this Contract.
- 1.4 **“Cookies”** means small files which are stored on a user’s computer. They are designed to hold a modest amount of data (including Personal Information) specific to a particular client and website and can be accessed either by the web server or the client’s computer. **If the Client does not wish to allow Cookies to operate in the background when using McKinnon’s website, then the Client shall have the right to enable / disable the Cookies first by selecting the option to enable / disable provided on the website, prior to making enquiries via the website.**
- 1.5 **“Goods”** means all Goods or Services supplied by McKinnon to the Client at the Client’s request from time to time (where the context so permits the terms ‘Goods’ or ‘Services’ shall be interchangeable for the other).
- 1.6 **“GST”** means Goods and Services Tax as defined within the “A New Tax System (Goods and Services Tax) Act 1999” (Cth).
- 1.7 **“McKinnon”** means McKinnon Heating & Cooling Pty Ltd ATF McKinnon Heating & Cooling Unit Trust T/A McKinnon Heating & Cooling Pty Ltd, its successors and assigns or any person acting on behalf of and with the authority of McKinnon Heating & Cooling Pty Ltd ATF McKinnon Heating & Cooling Unit Trust T/A McKinnon Heating & Cooling Pty Ltd.
- 1.8 **“Price”** means the Price payable (plus any GST where applicable) for the Goods as agreed between McKinnon and the Client in accordance with clause 6 below.
- 1.9 **“Worksite”** means the address nominated by the Client to which the Goods/Services are to be supplied by McKinnon.

2. Acceptance

- 2.1 The Client is taken to have exclusively accepted and is immediately bound, jointly and severally, by these terms and conditions if the Client places an order for or accepts delivery of the Goods.
- 2.2 In the event of any inconsistency between the terms and conditions of this Contract and any other prior document or schedule that the parties have entered into, the terms of this Contract shall prevail.
- 2.3 Any amendment to the terms and conditions contained in this Contract may only be amended in writing by the consent of both parties.
- 2.4 The Client acknowledges and accepts that the supply of Goods:
- (a) on credit shall not take effect until the Client has completed a credit application with McKinnon and it has been approved with a credit limit established for the account. In the event that the supply of Goods requested exceeds the Client’s credit limit and/or the account exceeds the payment terms, McKinnon reserves the right to refuse delivery; and
 - (b) for accepted orders may be subject to availability and if, for any reason, Goods are not or cease to be available, McKinnon reserves the right to substitute comparable Goods (or components of the Goods) and vary the Price as per clause 6.2. In all such cases McKinnon will notify the Client in advance of any such substitution, and also reserves the right to place the Client’s order and/or Services on hold, as per clause 7.2 until such time as McKinnon and the Client agree to such changes.
- 2.5 Any advice, recommendation, information, assistance, or service provided by McKinnon in relation to the Goods or Services supplied (including, but not limited to, specific instructions regarding the repair or use of the Goods/equipment) is given in good faith to the Client, or the Client’s agent and is based on McKinnon’s own knowledge and experience and shall be accepted without liability on the part of McKinnon. Where such advice or recommendations are not acted upon then McKinnon shall require the Client or their agent to authorise commencement of the Services in writing. McKinnon shall not be liable in any way whatsoever for any damages or losses that occur after any subsequent commencement of the Services.
- 2.6 In the event that the Client requests McKinnon to provide the Services urgently, that may require McKinnon’s staff to work outside normal business hours (including but not limited to working, through lunch breaks, weekends and/or Public Holidays) then McKinnon reserves the right to charge the Client additional labour costs (penalty rates will apply at time and a half normal rates), unless otherwise agreed between McKinnon and the Client.
- 2.7 If McKinnon has been requested by the Client to diagnose a fault that requires investigation, disassembly and/or testing, all costs involved will be charged to the Client irrespective of whether or not the repair goes ahead.
- 2.8 McKinnon has the right to postpone or refuse to provide Services where:
- (a) unsafe or unsanitary conditions exist; or
 - (b) McKinnon deems the equipment under the Contract is no longer economically repairable. McKinnon will provide the Client with a proposal to replace such equipment.
- 2.9 Electronic signatures shall be deemed to be accepted by either party providing that the parties have complied with Section 9 of the Electronic Transactions (Victoria) Act 2000 or any other applicable provisions of that Act or any Regulations referred to in that Act.

3. Authorised Representatives

- 3.1 The Client acknowledges that McKinnon shall (for the duration of the Services) liaise directly with one (1) authorised representative, and that once introduced as such to McKinnon, that person shall have the full authority of the Client to order any Goods, Services and/or to request any variation thereto on the Client’s behalf. The Client accepts that they will be solely liable to McKinnon for all additional costs incurred by

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McKinnon (including McKinnon's profit margin) in providing any Goods, Services or variation/s requested thereto by the Client's duly authorised representative.

4. Errors and Omissions

- 4.1 The Client acknowledges and accepts that McKinnon shall, without prejudice, accept no liability in respect of any alleged or actual error(s) and/or omission(s):
- (a) resulting from an inadvertent mistake made by McKinnon in the formation and/or administration of this Contract; and/or
 - (b) contained in/omitted from any literature (hard copy and/or electronic) supplied by McKinnon in respect of the Services.
- 4.2 In the event such an error and/or omission occurs in accordance with clause 4.1, and is not attributable to the negligence and/or wilful misconduct of McKinnon; the Client shall not be entitled to treat this Contract as repudiated nor render it invalid.
- 4.3 In circumstances where the Client is required to place an order for Goods, in writing, or otherwise as permitted by these terms and conditions, the Client is responsible for supplying correct order information such as, without limitation, measurements and quantity, when placing an order for Goods (whether they are made to order Goods or not) ("**Client Error**"). The Client must pay for all Goods it orders from McKinnon notwithstanding that such Goods suffer from a Client Error and notwithstanding that the Client has not taken or refuses to take Delivery of such Goods. McKinnon is entitled to, at its absolute discretion to waive its right under this sub-clause in relation to Client Errors.

5. Change in Control

- 5.1 The Client shall give McKinnon not less than fourteen (14) days prior written notice of any proposed change of ownership of the Client and/or any other change in the Client's details (including but not limited to, changes in the Client's name, address, contact phone or fax number/s, change of trustees, or business practice). The Client shall be liable for any loss incurred by McKinnon as a result of the Client's failure to comply with this clause.

6. Price and Payment

- 6.1 At McKinnon's sole discretion, the Price shall be either:
- (a) as indicated on any invoice provided by McKinnon to the Client; or
 - (b) McKinnon's quoted Price (subject to clause 6.2) which will be valid for the period stated in the quotation or otherwise for a period of fourteen (14) days.
- 6.2 McKinnon reserves the right to change the Price:
- (a) if a variation to the Goods which are to be supplied is requested; or
 - (b) if a variation to the Services originally scheduled (including any applicable plans or specifications) is requested; or
 - (c) where additional Services are required due to the discovery of hidden or unidentifiable difficulties (including, but not limited to, poor weather, limitations to accessing the Worksite, obscured building/Worksite defects which require remedial work (e.g. where the substructure is inadequate/rotten and is not able to sustain the weight of the air conditioning unit or poor existing wiring etc), incorrect measurements, plans and/or specifications provided by the Client, safety considerations (discovery of asbestos, etc.), prerequisite work by any third party not being completed, availability of machinery, hidden pipes and wiring/cabling etc.) which are only discovered on commencement of the Services; or
 - (d) in the event of increases to McKinnon in the cost of labour or materials which are beyond McKinnon's control.
- 6.3 Variations will be charged for on the basis of McKinnon's quotation, and will be detailed in writing, and shown as variations on McKinnon's invoice. The Client shall be required to respond to any variation submitted by McKinnon within ten (10) working days. Failure to do so will entitle McKinnon to add the cost of the variation to the Price. Payment for all variations must be made in full at the time of their completion.
- 6.4 At McKinnon's sole discretion, a fifty percent (50%) deposit will be required prior to the commencement of the Services.
- 6.5 Time for payment for the Goods being of the essence, the Price will be payable by the Client on the date/s determined by McKinnon, which may be:
- (a) on delivery of the Goods;
 - (b) on completion of the Services;
 - (c) by way of instalments/progress payments in accordance with McKinnon's payment schedule;
 - (d) the date specified on any invoice or other form as being the date for payment; or
 - (e) failing any notice to the contrary, the date which is seven (7) days following the date of any invoice given to the Client by McKinnon.
- 6.6 Payment may be made by cash, cheque, bank cheque, electronic/on-line banking, credit card (a surcharge may apply per transaction), or by any other method as agreed to between the Client and McKinnon.
- 6.7 McKinnon may in its discretion allocate any payment received from the Client towards any invoice that McKinnon determines and may do so at the time of receipt or at any time afterwards. On any default by the Client McKinnon may re-allocate any payments previously received and allocated. In the absence of any payment allocation by McKinnon, payment will be deemed to be allocated in such manner as preserves the maximum value of McKinnon's Purchase Money Security Interest (as defined in the PPSA) in the Goods.
- 6.8 The Client shall not be entitled to set off against, or deduct from the Price, any sums owed or claimed to be owed to the Client by McKinnon nor to withhold payment of any invoice because part of that invoice is in dispute. Once in receipt of an invoice for payment, if any part of the invoice is in dispute, then the Client must notify McKinnon in writing within three (3) business days, the invoice shall remain due and payable for the full amount, until such time as McKinnon investigates the disputed claim, no credit shall be passed for refund until the review is completed. Failure to make payment may result in McKinnon placing the Client's account into default and subject to default interest in accordance with clause 17.1.
- 6.9 Unless otherwise stated the Price does not include GST. In addition to the Price, the Client must pay to McKinnon an amount equal to any GST McKinnon must pay for any supply by McKinnon under this or any other agreement for the sale of the Goods. The Client must pay GST, without deduction or set-off of any other amounts, at the same time and on the same basis as the Client pays the Price. In addition, the Client must pay any other taxes and duties that may be applicable in addition to the Price except where they are expressly included in the Price.

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7. Provision of the Services

- 7.1 Subject to clause 7.2 it is McKinnon's responsibility to ensure that the Services start as soon as it is reasonably possible.
- 7.2 The Services' commencement date will be put back and/or the completion date extended by whatever time is reasonable in the event that McKinnon claims an extension of time (by giving the Client written notice) where completion is delayed by an event beyond McKinnon's control, including but not limited to any failure by the Client to:
- (a) have the Worksite ready for the Services; or
 - (b) notify McKinnon that the Worksite is ready.
- 7.3 Delivery ("**Delivery**") of the Goods is taken to occur at the time that:
- (a) the Client or the Client's nominated carrier takes possession of the Goods at McKinnon's address; or
 - (b) McKinnon (or McKinnon's nominated carrier) delivers the Goods to the Client's nominated address even if the Client is not present at the address.
- 7.4 At McKinnon's sole discretion, the cost of Delivery is either included in the Price or is in addition to the Price.
- 7.5 McKinnon may deliver the Goods in separate instalments. Each separate instalment shall be invoiced and paid in accordance with the provisions in these terms and conditions.
- 7.6 The Client must take Delivery by receipt or collection of the Goods whenever they are tendered for Delivery.
- 7.7 Any time specified by McKinnon for Delivery of the Goods is an estimate only and McKinnon will not be liable for any loss or damage incurred by the Client because of Delivery being late. However, both parties agree that they shall make every endeavour to enable the Goods to be delivered at the time and place as was arranged between both parties. If McKinnon is unable to supply the Goods as agreed solely due to any action or inaction of the Client, then McKinnon shall be entitled to charge a reasonable fee for redelivery and/or storage.

8. Risk

- 8.1 Risk of damage to or loss of the Goods passes to the Client on Delivery and the Client must insure the Goods on or before Delivery.
- 8.2 If any of the Goods are damaged or destroyed following Delivery but prior to ownership passing to the Client, McKinnon is entitled to receive all insurance proceeds payable for the Goods. The production of these terms and conditions by McKinnon is sufficient evidence of McKinnon's rights to receive the insurance proceeds without the need for any person dealing with McKinnon to make further enquiries.
- 8.3 If the Client requests McKinnon to leave Goods outside McKinnon's premises for collection or to deliver the Goods to an unattended location, then such Goods shall be left at the Client's sole risk.
- 8.4 Where applicable, the Client warrants that any structure/s to which the Goods are to be affixed are able to withstand the installation of the Goods and that any electrical connections (including, but not limited to, meter boxes, main switches, circuit breakers, and electrical cable) are of suitable capacity to handle the Goods once installed. If, for any reason (including the discovery of asbestos, defective or unsafe wiring, or dangerous access to roofing), McKinnon reasonably forms the opinion that the Client's premises is not safe for the Services to proceed then McKinnon shall be entitled to delay the Services in accordance with clause 7.2 until McKinnon is satisfied that it is safe for the Services to proceed.
- 8.5 Whilst the final location of the condensing unit is at the discretion of the Client, in the event the Client requests the unit not to be located adjacent to an external wall and underground piping is required to complete the installation, then additional charges will apply which will be treated as a variation as per clause 6.2.
- 8.6 In the event that:
- (a) the electrical wiring is required to be re-positioned at the request of any third party contracted by the Client then the Client agrees to notify McKinnon immediately upon any proposed changes. The Client agrees to indemnify McKinnon against any additional costs incurred with such a relocation of electrical wiring. All such variances shall be invoiced in accordance with clause 6.2; and
 - (b) any of the Goods needs to be relocated due to complaints from neighbours or local authorities, then the Client shall be responsible for any and all costs involved.
- 8.7 McKinnon shall upon installation ensure that all installed Goods meet current industry standards applicable to noise levels, however McKinnon cannot guarantee that noise levels will remain constant post installation as the Goods may be impacted by many factors such as the weather, lack of maintenance, tampering etc. Accordingly, McKinnon offers no warranty in regard to noise levels post installation unless it is evident that there is inherent fault in the Goods or that the installation process was defective.
- 8.8 The Client acknowledges and accepts that:
- (a) it is their responsibility to insure any equipment partly or completely installed at the Worksite, against theft or damage;
 - (b) where McKinnon has performed temporary repairs that McKinnon:
 - (i) offers no guarantee against the reoccurrence of the initial fault, or any further damage caused;
 - (ii) will immediately advise the Client of the fault and shall provide the Client with an estimate for the full repair required.
 - (c) McKinnon is only responsible for components that are replaced by McKinnon and does not at any stage accept any liability in respect of previous goods and/or services supplied by any other third party that subsequently fail and found to be the source of the failure;
 - (d) McKinnon shall not be liable for any loss or damage caused in accessing the work area beyond reasonable control of McKinnon (including, without limitation, to ceiling tiles and panels, face brickwork and rendered masonry services etc) which McKinnon may have to break into or disturb in performance of the Services), unless due to the negligence of McKinnon;
 - (e) under no circumstances, will McKinnon handle removal of asbestos product. In the event asbestos (or other hazardous material) is discovered on the Worksite:
 - (i) McKinnon shall suspend the Services;
 - (ii) the Client shall be fully responsible for the resolution of any resulting problems; and
 - (iii) any additional cost incurred by McKinnon shall be added to the Price under clause 6.2.
 - (f) pictures and photos in McKinnon's brochures and advertising material may not represent the actual Goods, and the dimensions and features of the Goods may vary. McKinnon shall not be liable for any loss, damages, or costs however resulting from such variations to the Goods; and
 - (g) Goods supplied may exhibit variations in shade, colour, texture, surface and finish which may:
 - (i) fade or change colour over time;
 - (ii) mark or stain if exposed to certain substances; and

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- (iii) be damaged or disfigured by impact or scratching.
- 8.9 In the event that the:
- (a) Client's property experiences any movement that effects and/or causes damage to the Goods, the Client acknowledges and accepts that McKinnon shall not be held liable for any such damage and that the Client shall be responsible for the cost of any rectification works; and
 - (b) Worksite is disturbed due to adverse weather conditions, the Client acknowledges and agrees that they shall be liable for the cost of the rectification work (including, but not limited to, roof leaks caused by storms, acts of God, earthquakes etc.).
- 8.10 The Client agrees to indemnify McKinnon from any damage caused by any other tradesman during and after the completion of the Services. If the Client instructions McKinnon to rectify any damage caused by any other tradesman, this will become a variation to the original quotation and will be charged at McKinnon's normal hourly rate per clause 6.2.
- 8.11 McKinnon accepts no responsibility for any damage or performance related problems with any Goods where they have not been used and/or maintained in accordance with McKinnon and/or the manufacturers' recommendations.
- 9. Worksite Access and Condition**
- 9.1 McKinnon is not responsible for the removal of rubbish from or clean-up of the building/construction Worksite/s. All rubbish generated by McKinnon will be placed in a designated area appointed by the Client but the responsibility of removal of same is the Client or the Client's agent, unless otherwise agreed.
- 9.2 It is the intention of McKinnon and agreed by the Client that:
- (a) the Client shall ensure that McKinnon has clear and free access to the Worksite at all times to enable them to undertake the Services (including carrying out Worksite inspections, gain signatures for required documents, and for the delivery and installation of the Goods). McKinnon shall not be liable for any loss or damage to the Worksite (including, without limitation, damage to pathways, driveways and concreted or paved or grassed areas) unless due to the negligence of McKinnon; and
 - (b) it is the Client's responsibility to provide McKinnon, while at the Worksite, with adequate access to available water, electricity, toilet and washing facilities where required.
- 9.3 The Client agrees to be present at the Worksite when and as reasonably requested by McKinnon and its employees, contractors and/or agents.
- 9.4 Where McKinnon requires that Goods, tools etc. required for the Services be stored at the Worksite, the Client shall supply McKinnon a safe area for storage and shall take all reasonable efforts to protect all items from destruction, theft or damage. In the event that any of the stored items are destroyed, stolen or damaged, then the cost of repair or replacement shall be the Client's responsibility.
- 9.5 *Worksite Inductions*
- (a) in the event the Client requires an employee or sub-contractor of McKinnon to undertake a Worksite induction during working hours, the Client will be liable to pay the hourly charges for that period. If any induction needs to be undertaken prior to the commencement date then the Client shall be liable to pay McKinnon's standard (and/or overtime, if applicable) hourly labour rate; or
 - (b) where McKinnon is in control of the Worksite, the Client and/or the Client's third-party contractors must initially carry out McKinnon's Health & Safety induction course before access to the Worksite will be granted. Inspection of the Worksite during the course of the Services will be by **appointment only** and unless otherwise agreed, in such an event the Client and/or third party acting on behalf of the Client must at all times be accompanied by McKinnon.
- 10. Underground/Hidden Locations**
- 10.1 Prior to McKinnon commencing any work the Client must advise McKinnon of the precise location of all underground/hidden services on the Worksite and clearly mark the same. The underground/hidden mains and services the Client must identify include, but are not limited to, electrical services, gas services, sewer services, pumping services, sewer connections, sewer sludge mains, water mains, irrigation pipes, telephone cables, fibre optic cables, oil pumping mains, and any other services that may be on the Worksite.
- 10.2 Whilst McKinnon will take all care to avoid damage to any underground/hidden services the Client agrees to indemnify McKinnon in respect of all and any liability claims, loss, damage, costs and fines as a result of damage to services not precisely located and notified as per clause 10.1.
- 11. Compliance with Laws**
- 11.1 The Client and McKinnon shall comply with the provisions of all statutes, regulations and bylaws of government, local and other public authorities that may be applicable to the Goods/Services, including any occupational health and safety laws (OHS) relating or any other relevant safety standards or legislation pertaining to the Services.
- 11.2 The Client shall obtain (at the expense of the Client) all licenses and approvals that may be required for the Services.
- 11.3 All work will be tested to ensure that it is electrically safe and is in accordance with the wiring rules and other standards applying to the electrical installation under the Electrical Safety Regulations. All of the cabling work will comply with all relevant Australian and New Zealand Wiring standards.
- 11.4 Where the Client has supplied materials for McKinnon to complete the Services, the Client acknowledges that it accepts responsibility for the suitability of purpose and use for their materials and the intended use and any faults inherent in those materials. However, if in McKinnon's opinion, it is believed that the materials supplied are non-conforming products and will not conform with state and/or territory regulations, then McKinnon shall be entitled, without prejudice, to halt the Services until the appropriate conforming products are sourced and all costs associated with such a change to the plans and design will be invoiced in accordance with clause 6.2.
- Modern Slavery*
- 11.5 For the purposes of clauses 11.5 to 11.10:
- (a) "**Act**" means the *Modern Slavery Act 2018 (cth)*
 - (b) "**Modern Slavery**", "**Modern Slavery Statement**" and "**Reporting Entity**" have the meanings given by the Act.
- 11.6 If the Client is a Reporting Entity, it shall comply with all of its obligations under the Act.
- 11.7 Whether the Client is a Reporting Entity or not, the Client shall:
- (a) use reasonable endeavours to identify, assess and address risks of Modern Slavery practices in its operations and supply chains;
 - (b) use its reasonable endeavours to ensure that the personnel responsible for managing the operations and supply chains used for the purposes of the Contract have undertaken suitable training to identify and report Modern Slavery;

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- (c) use its reasonable endeavours to ensure that if at any time the Client becomes aware of Modern Slavery practices in its operations and supply chains, the Client must as soon as reasonably practicable take all reasonable steps to address or remove these practices;
 - (d) provide to McKinnon a copy of any Modern Slavery Statement that it submits under the Act within seven (7) days of so doing; and
 - (e) within seven (7) days of McKinnon's request (or such longer period as McKinnon agrees), provide to McKinnon any information or assistance reasonable requested by McKinnon;
 - (i) concerning the Client's compliance with the Act;
 - (ii) concerning the Client's operations and supply chains;
 - (iii) to enable McKinnon to prepare a Modern Slavery Statement or otherwise comply with the Act; or
 - (iv) to enable McKinnon to assess and address risks of Modern Slavery practices in its operations and supply chains.
- 11.8 The parties agree that in the circumstances a breach arises pursuant to this clause or the terms of the Act, the parties will try and resolve the breach by way of remediation and McKinnon will be able to terminate the Contract for any breach by the Client.
- 11.9 The Client warrants that any information supplied to McKinnon is true and accurate and may be relied upon for the purposes of the Act.
- 11.10 The Client shall indemnify McKinnon against any loss or liability suffered by McKinnon as a result of the Client's breach of this clause 11.

12. Title

- 12.1 McKinnon and the Client agree that ownership of the Goods shall not pass until:
- (a) the Client has paid McKinnon all amounts owing to McKinnon; and
 - (b) the Client has met all of its other obligations to McKinnon.
- 12.2 Receipt by McKinnon of any form of payment other than cash shall not be deemed to be payment until that form of payment has been honoured, cleared or recognised.
- 12.3 It is further agreed that, until ownership of the Goods passes to the Client in accordance with clause 12.1:
- (a) the Client is only a bailee of the Goods and must return the Goods to McKinnon on request;
 - (b) the Client holds the benefit of the Client's insurance of the Goods on trust for McKinnon and must pay to McKinnon the proceeds of any insurance in the event of the Goods being lost, damaged or destroyed;
 - (c) the Client must not sell, dispose, or otherwise part with possession of the Goods other than in the ordinary course of business and for market value. If the Client sells, disposes or parts with possession of the Goods then the Client must hold the proceeds of any such act on trust for McKinnon and must pay or deliver the proceeds to McKinnon on demand;
 - (d) the Client should not convert or process the Goods or intermix them with other goods but if the Client does so then the Client holds the resulting product on trust for the benefit of McKinnon and must sell, dispose of or return the resulting product to McKinnon as it so directs;
 - (e) the Client irrevocably authorises McKinnon to enter any premises where McKinnon believes the Goods are kept and recover possession of the Goods;
 - (f) McKinnon may recover possession of any Goods in transit whether or not Delivery has occurred;
 - (g) the Client shall not charge or grant an encumbrance over the Goods nor grant nor otherwise give away any interest in the Goods while they remain the property of McKinnon;
 - (h) McKinnon may commence proceedings to recover the Price of the Goods sold notwithstanding that ownership of the Goods has not passed to the Client.

13. Personal Property Securities Act 2009 ("PPSA")

- 13.1 In this clause financing statement, financing change statement, security agreement, and security interest has the meaning given to it by the PPSA.
- 13.2 Upon assenting to these terms and conditions in writing the Client acknowledges and agrees that these terms and conditions constitute a security agreement for the purposes of the PPSA and creates a security interest in all Goods that have previously been supplied and that will be supplied in the future by McKinnon to the Client, and the proceeds from such Goods.
- 13.3 The Client undertakes to:
- (a) promptly sign any further documents and/or provide any further information (such information to be complete, accurate and up-to-date in all respects) which McKinnon may reasonably require to:
 - (i) register a financing statement or financing change statement in relation to a security interest on the Personal Property Securities Register;
 - (ii) register any other document required to be registered by the PPSA; or
 - (iii) correct a defect in a statement referred to in clause 13.3(a)(i) or 13.3(a)(ii);
 - (b) indemnify, and upon demand reimburse, McKinnon for all expenses incurred in registering a financing statement or financing change statement on the Personal Property Securities Register established by the PPSA or releasing any Goods charged thereby;
 - (c) not register a financing change statement in respect of a security interest without the prior written consent of McKinnon;
 - (d) not register, or permit to be registered, a financing statement or a financing change statement in relation to the Goods or the proceeds of such Goods in favour of a third party without the prior written consent of McKinnon;
 - (e) immediately advise McKinnon of any material change in its business practices of selling the Goods which would result in a change in proceeds derived from such sales.
- 13.4 McKinnon and the Client agree that sections 96, 115 and 125 of the PPSA do not apply to the security agreement created by these terms and conditions.
- 13.5 The Client waives their rights to receive notices under sections 95, 118, 121(4), 130, 132(3)(d) and 132(4) of the PPSA.
- 13.6 The Client waives their rights as a grantor and/or a debtor under sections 142 and 143 of the PPSA.
- 13.7 Unless otherwise agreed to in writing by McKinnon, the Client waives their right to receive a verification statement in accordance with section 157 of the PPSA.
- 13.8 The Client must unconditionally ratify any actions taken by McKinnon under clauses 13.3 to 13.5.
- 13.9 Subject to any express provisions to the contrary (including those contained in this clause 13), nothing in these terms and conditions is intended to have the effect of contracting out of any of the provisions of the PPSA.

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14. Security and Charge

- 14.1 In consideration of McKinnon agreeing to supply the Goods, the Client charges all of its rights, title and interest (whether joint or several) in any land, realty or other assets capable of being charged, owned by the Client either now or in the future, and the Client grants a security interest in all of its present and after-acquired property for the purposes of, including but not limited to registering McKinnon's security interest over the Client on the PPSA, to secure the performance by the Client of its obligations under these terms and conditions (including, but not limited to, the payment of any money).
- 14.2 The Client indemnifies McKinnon from and against all McKinnon's costs and disbursements including legal costs on a solicitor and own client basis incurred in exercising McKinnon's rights under this clause.
- 14.3 The Client irrevocably appoints McKinnon and each director of McKinnon as the Client's true and lawful attorney/s to perform all necessary acts to give effect to the provisions of this clause 14 including, but not limited to, signing any document on the Client's behalf.

15. Defects, Warranties and Returns, Competition and Consumer Act 2010 (CCA)

- 15.1 The Client must inspect the Goods on Delivery and must within seven (7) days of Delivery notify McKinnon in writing of any evident defect/damage, shortage in quantity, or failure to comply with the description or quote. The Client must notify any other alleged defect in the Goods as soon as reasonably possible after any such defect becomes evident. Upon such notification the Client must allow McKinnon to inspect the Goods.
- 15.2 Under applicable State, Territory and Commonwealth Law (including, without limitation the CCA), certain statutory implied guarantees and warranties (including, without limitation the statutory guarantees under the CCA) may be implied into these terms and conditions (**Non-Excluded Guarantees**).
- 15.3 McKinnon acknowledges that nothing in these terms and conditions purports to modify or exclude the Non-Excluded Guarantees.
- 15.4 Except as expressly set out in these terms and conditions or in respect of the Non-Excluded Guarantees, McKinnon makes no warranties or other representations under these terms and conditions including but not limited to the quality or suitability of the Goods. McKinnon's liability in respect of these warranties is limited to the fullest extent permitted by law.
- 15.5 If the Client is a consumer within the meaning of the CCA, McKinnon's liability is limited to the extent permitted by section 64A of Schedule 2.
- 15.6 If McKinnon is required to replace the Goods under this clause or the CCA, but is unable to do so, McKinnon may refund any money the Client has paid for the Goods.
- 15.7 If the Client is not a consumer within the meaning of the CCA, McKinnon's liability for any defect or damage in the Goods is:
- (a) limited to the value of any express warranty or warranty card provided to the Client by McKinnon at McKinnon's sole discretion;
 - (b) limited to any warranty to which McKinnon is entitled, if McKinnon did not manufacture the Goods;
 - (c) otherwise negated absolutely.
- 15.8 Subject to this clause 15, returns will only be accepted provided that:
- (a) the Client has complied with the provisions of clause 15.1; and
 - (b) McKinnon has agreed that the Goods are defective; and
 - (c) the Goods are returned within a reasonable time at the Client's cost (if that cost is not significant); and
 - (d) the Goods are returned in as close a condition to that in which they were delivered as is possible.
- 15.9 Notwithstanding clauses 15.1 to 15.8 but subject to the CCA, McKinnon shall not be liable for any defect or damage which may be caused or partly caused by or arise as a result of:
- (a) the Client failing to properly maintain or store any Goods;
 - (b) the Client using the Goods for any purpose other than that for which they were designed;
 - (c) the Client continuing the use of any Goods after any defect became apparent or should have become apparent to a reasonably prudent operator or user;
 - (d) the Client failing to follow any instructions or guidelines provided by McKinnon;
 - (e) fair wear and tear, any accident, or act of God.
- 15.10 In the case of second hand Goods, unless the Client is a consumer under the CCA, the Client acknowledges that it has had full opportunity to inspect the second hand Goods prior to Delivery and accepts them with all faults and that to the extent permitted by law no warranty is given by McKinnon as to the quality or suitability for any purpose and any implied warranty, statutory or otherwise, is expressly excluded. The Client acknowledges and agrees that McKinnon has agreed to provide the Client with the second hand Goods and calculated the Price of the second hand Goods in reliance of this clause 15.10.
- 15.11 Notwithstanding anything contained in this clause if McKinnon is required by a law to accept a return, then McKinnon will only accept a return on the conditions imposed by that law.

16. Intellectual Property

- 16.1 Where McKinnon has designed, drawn or developed Goods for the Client, then the copyright in any designs and drawings and documents shall remain the property of McKinnon. Under no circumstances may such designs, drawings and documents be used without the express written approval of McKinnon.
- 16.2 The Client warrants that all designs, specifications, or instructions given to McKinnon will not cause McKinnon to infringe any patent, registered design or trademark in the execution of the Client's order and the Client agrees to indemnify McKinnon against any action taken by a third party against McKinnon in respect of any such infringement.
- 16.3 The Client agrees that McKinnon may (at no cost) use for the purposes of marketing or entry into any competition, any documents, designs, drawings or Goods which McKinnon has created for the Client.

17. Default and Consequences of Default

- 17.1 Interest on overdue invoices shall accrue daily from the date when payment becomes due, until the date of payment, at a rate of two and a half percent (2.5%) per calendar month (and at McKinnon's sole discretion such interest shall compound monthly at such a rate) after as well as before any judgment.
- 17.2 If the Client owes McKinnon any money, the Client shall indemnify McKinnon from and against all costs and disbursements:
- (a) incurred; and/or

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- (b) which would be incurred and/or
- (c) for which by the Client would be liable;
- in regard to legal costs on a solicitor and own client basis, internal administration fees, McKinnon's Contract fees owing for breach of these terms and conditions', including, but not limited to, contract default fees and/or recovery costs (if applicable), as well as bank dishonour fees.
- 17.3 Further to any other rights or remedies McKinnon may have under this Contract, if a Client has made payment to McKinnon, and the transaction is subsequently reversed, the Client shall be liable for the amount of the reversed transaction, in addition to any further costs incurred by McKinnon under this clause 17 where it can be proven that such reversal is found to be illegal, fraudulent or in contravention to the Client's obligations under this Contract.
- 17.4 Without prejudice to McKinnon's other remedies at law McKinnon shall be entitled to cancel all or any part of any order of the Client which remains unfulfilled and all amounts owing to McKinnon shall, whether or not due for payment, become immediately payable if:
- (a) any money payable to McKinnon becomes overdue, or in McKinnon's opinion the Client will be unable to make a payment when it falls due;
- (b) the Client has exceeded any applicable credit limit provided by McKinnon;
- (c) the Client becomes insolvent, convenes a meeting with its creditors or proposes or enters into an arrangement with creditors, or makes an assignment for the benefit of its creditors; or
- (d) a receiver, manager, liquidator (provisional or otherwise) or similar person is appointed in respect of the Client or any asset of the Client.
- 18. Cancellation**
- 18.1 Without prejudice to any other remedies McKinnon may have, if at any time the Client is in breach of any obligation (including those relating to payment) under these terms and conditions McKinnon may suspend or terminate the supply of Goods to the Client. McKinnon will not be liable to the Client for any loss or damage the Client suffers because McKinnon has exercised its rights under this clause.
- 18.2 McKinnon may cancel any Contract to which these terms and conditions apply or cancel Delivery of Goods at any time before the Goods are delivered by giving written notice to the Client. On giving such notice McKinnon shall repay to the Client any money paid by the Client for the Goods. McKinnon shall not be liable for any loss or damage whatsoever arising from such cancellation.
- 18.3 If the Client cancels Delivery of Goods, the Client shall be liable for all losses incurred (whether direct or indirect) by McKinnon as a direct result of the cancellation (including, but not limited to, any loss of profits).
- 18.4 Cancellation of orders for Goods made to the Client's specifications, or for non-stocklist items, will not be accepted once production has commenced, or an order has been placed.
- 19. Privacy Policy**
- 19.1 All emails, documents, images, or other recorded information held or used by McKinnon is Personal Information, as defined and referred to in clause 19.4, and therefore considered Confidential Information. McKinnon acknowledges its obligation in relation to the handling, use, disclosure and processing of Personal Information pursuant to the Privacy Act 1988 ("the Act") including the Part IIIC of the Act being Privacy Amendment (Notifiable Data Breaches) Act 2017 (NDB) and any statutory requirements, where relevant in a European Economic Area ("EEA"), under the EU Data Privacy Laws (including the General Data Protection Regulation "GDPR") (collectively, "EU Data Privacy Laws"). McKinnon acknowledges that in the event it becomes aware of any data breaches and/or disclosure of the Client's Personal Information, held by McKinnon that may result in serious harm to the Client, McKinnon will notify the Client in accordance with the Act and/or the GDPR. Any release of such Personal Information must be in accordance with the Act and the GDPR (where relevant) and must be approved by the Client by written consent, unless subject to an operation of law.
- 19.2 Notwithstanding clause 19.1, privacy limitations will extend to McKinnon in respect of Cookies where the Client utilises McKinnon's website to make enquiries. McKinnon agrees to display reference to such Cookies and/or similar tracking technologies, such as pixels and web beacons (if applicable), such technology allows the collection of Personal Information such as the Client's:
- (a) IP address, browser, email client type and other similar details;
- (b) tracking website usage and traffic; and
- (c) reports are available to McKinnon when McKinnon sends an email to the Client, so McKinnon may collect and review that information ("collectively Personal Information")
- If the Client consents to McKinnon's use of Cookies on McKinnon's website and later wishes to withdraw that consent, the Client may manage and control McKinnon's privacy controls via the Client's web browser, including removing Cookies by deleting them from the browser history when exiting the site.
- 19.3 The Client agrees for McKinnon to obtain from a credit reporting body (CRB) a credit report containing personal credit information (e.g. name, address, D.O.B, occupation, driver's license details, electronic contact (email, Facebook or Twitter details), medical insurance details or next of kin and other contact information (where applicable), previous credit applications, credit history) about the Client in relation to credit provided by McKinnon.
- 19.4 The Client agrees that McKinnon may exchange information about the Client with those credit providers and with related body corporates for the following purposes:
- (a) to assess an application by the Client; and/or
- (b) to notify other credit providers of a default by the Client; and/or
- (c) to exchange information with other credit providers as to the status of this credit account, where the Client is in default with other credit providers; and/or
- (d) to assess the creditworthiness of the Client including the Client's repayment history in the preceding two (2) years.
- 19.5 The Client consents to McKinnon being given a consumer credit report to collect personal credit information relating to any overdue payment on commercial credit.
- 19.6 The Client agrees that personal credit information provided may be used and retained by McKinnon for the following purposes (and for other agreed purposes or required by):
- (a) the provision of Goods; and/or
- (b) analysing, verifying and/or checking the Client's credit, payment and/or status in relation to the provision of Goods; and/or
- (c) processing of any payment instructions, direct debit facilities and/or credit facilities requested by the Client; and/or

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- (d) enabling the collection of amounts outstanding in relation to the Goods.
- 19.7 McKinnon may give information about the Client to a CRB for the following purposes:
- (a) to obtain a consumer credit report;
 - (b) allow the CRB to create or maintain a credit information file about the Client including credit history.
- 19.8 The information given to the CRB may include:
- (a) Personal Information as outlined in 19.4 above;
 - (b) name of the credit provider and that McKinnon is a current credit provider to the Client;
 - (c) whether the credit provider is a licensee;
 - (d) type of consumer credit;
 - (e) details concerning the Client's application for credit or commercial credit (e.g. date of commencement/termination of the credit account and the amount requested);
 - (f) advice of consumer credit defaults (provided McKinnon is a member of an approved OAIC External Disputes Resolution Scheme), overdue accounts, loan repayments or outstanding monies which are overdue by more than sixty (60) days and for which written notice for request of payment has been made and debt recovery action commenced or alternatively that the Client no longer has any overdue accounts and McKinnon has been paid or otherwise discharged and all details surrounding that discharge (e.g. dates of payments);
 - (g) information that, in the opinion of McKinnon, the Client has committed a serious credit infringement;
 - (h) advice that the amount of the Client's overdue payment is equal to or more than one hundred and fifty dollars (\$150).
- 19.9 The Client shall have the right to request (by e-mail) from McKinnon:
- (a) a copy of the Personal Information about the Client retained by McKinnon and the right to request that McKinnon correct any incorrect Personal Information; and
 - (b) that McKinnon does not disclose any Personal Information about the Client for the purpose of direct marketing.
- 19.10 McKinnon will destroy Personal Information upon the Client's request (by e-mail) or if it is no longer required unless it is required to fulfil the obligations of this Contract or is required to be maintained and/or stored in accordance with the law.
- 19.11 The Client can make a privacy complaint by contacting McKinnon via e-mail. McKinnon will respond to that complaint within seven (7) days of receipt and will take all reasonable steps to reach a decision on the complaint within thirty (30) days of receipt of the complaint. If the Client is not satisfied with the resolution provided, the Client can make a complaint to the Information Commissioner at www.oaic.gov.au.

20. Building and Construction Industry Security of Payment Act 2002

- 20.1 At McKinnon's sole discretion, if there are any disputes or claims for unpaid Goods and/or Services then the provisions of the Building and Construction Industry Security of Payment Act 2002 may apply.
- 20.2 Nothing in this Contract is intended to have the effect of contracting out of any applicable provisions of the Building and Construction Industry Security of Payment Act 2002 of Victoria, except to the extent permitted by the Act where applicable.

21. Service of Notices

- 21.1 Any written notice given under this Contract shall be deemed to have been given and received:
- (a) by handing the notice to the other party, in person;
 - (b) by leaving it at the address of the other party as stated in this Contract;
 - (c) by sending it by registered post to the address of the other party as stated in this Contract;
 - (d) if sent by facsimile transmission to the fax number of the other party as stated in this Contract (if any), on receipt of confirmation of the transmission;
 - (e) if sent by email to the other party's last known email address.
- 21.2 Any notice that is posted shall be deemed to have been served, unless the contrary is shown, at the time when by the ordinary course of post, the notice would have been delivered.

22. Trusts

- 22.1 If the Client at any time upon or subsequent to entering in to the Contract is acting in the capacity of trustee of any trust ("Trust") then whether or not McKinnon may have notice of the Trust, the Client covenants with McKinnon as follows:
- (a) the Contract extends to all rights of indemnity which the Client now or subsequently may have against the Trust and the trust fund;
 - (b) the Client has full and complete power and authority under the Trust to enter into the Contract and the provisions of the Trust do not purport to exclude or take away the right of indemnity of the Client against the Trust or the trust fund. The Client will not release the right of indemnity or commit any breach of trust or be a party to any other action which might prejudice that right of indemnity;
 - (c) the Client will not without consent in writing of McKinnon (McKinnon will not unreasonably withhold consent), cause, permit, or suffer to happen any of the following events:
 - (i) the removal, replacement or retirement of the Client as trustee of the Trust;
 - (ii) any alteration to or variation of the terms of the Trust;
 - (iii) any advancement or distribution of capital of the Trust; or
 - (iv) any resettlement of the trust property.

23. General

- 23.1 Any dispute or difference arising as to the interpretation of these terms and conditions or as to any matter arising herein, shall be submitted to, and settled by, mediation before resorting to any external dispute resolution mechanisms (including arbitration or court proceedings) by notifying the other party in writing setting out the reason for the dispute. The parties shall share equally the mediator's fees. Should mediation fail to resolve the dispute, the parties shall be free to pursue other dispute resolution avenues.
- 23.2 The failure by either party to enforce any provision of these terms and conditions shall not be treated as a waiver of that provision, nor shall it affect that party's right to subsequently enforce that provision. If any provision of these terms and conditions shall be invalid, void, illegal or unenforceable the validity, existence, legality and enforceability of the remaining provisions shall not be affected, prejudiced or impaired.

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- 23.3 These terms and conditions and any Contract to which they apply shall be governed by the laws of Victoria and are subject to the jurisdiction of the courts in that state. These terms prevail over all terms and conditions of the Client (even if they form part of the Client's purchase order).
- 23.4 Subject to clause 15, McKinnon shall be under no liability whatsoever to the Client for any indirect and/or consequential loss and/or expense (including loss of profit) suffered by the Client arising out of a breach by McKinnon of these terms and conditions (alternatively McKinnon's liability shall be limited to damages which under no circumstances shall exceed the Price of the Goods).
- 23.5 McKinnon may licence and/or assign all or any part of its rights and/or obligations under this Contract without the Client's consent.
- 23.6 The Client cannot licence or assign without the written approval of McKinnon.
- 23.7 McKinnon may elect to subcontract out any part of the Services but shall not be relieved from any liability or obligation under this Contract by so doing. Furthermore, the Client agrees and understands that they have no authority to give any instruction to any of McKinnon's sub-contractors without the authority of McKinnon.
- 23.8 The Client agrees that McKinnon may amend their general terms and conditions for subsequent future Contracts with the Client by disclosing such to the Client in writing. These changes shall be deemed to take effect from the date on which the Client accepts such changes, or otherwise at such time as the Client makes a further request for McKinnon to provide Goods to the Client.
- 23.9 Neither party shall be liable for any default due to any act of God, war, terrorism, strike, lock-out, industrial action, fire, flood, storm, national or global pandemics and/or the implementation of regulation, directions, rules or measures being enforced by Governments or embargo, including but not limited to, any Government imposed border lockdowns (including, worldwide destination ports), etc, ("Force Majeure") or other event beyond the reasonable control of either party. This clause does not apply to a failure by the Client to make a payment to McKinnon.
- 23.10 Both parties warrant that they have the power to enter this Contract and have obtained all necessary authorisations to allow them to do so, they are not insolvent and that this Contract creates binding and valid legal obligations on them.
- 23.11 The rights and obligations of the parties will not merge on completion of any transaction under this Contract, and they will survive the execution and Delivery of any assignment or other document entered, for the purpose of, implementing any transaction under this Contract.
- 23.12 Certificate of Compliance will only be issued once the account is paid in full.