

Terms Of Trade (TOT) BOODJERA CONSTRUCT PTY LTD (BCPL)

1. **DEFINITIONS**
- 1.1 "BCPL" means BOODJERA CONSTRUCT PTY LTD (ABN 71 640 065 756) by its successors assigns or any person acting on behalf of and with the authority of BOODJERA CONSTRUCT PTY LTD.
- 1.2 "Customer" means the person/s buying the, 'Goods' or 'Services' as specified in any invoice, document/contract or order, and if there is more than one Customer is a reference to each Customer jointly and severally.
- 1.3 "Trade Credit" means "Invoice", "Goods" or "Services" supplied by BCPL to the Customer at the Customer's request from time to time (where the context so permits the terms, 'Invoice', 'Goods', or 'Services', shall be interchangeable for each other).
- 1.4 "Price" means the Price payable as agreed between BCPL and the Customer in accordance with clause 4.
2. **ACCEPTANCE**
- 2.1 The Customer is taken to have exclusively accepted and is immediately bound, jointly and severally, by these terms and conditions if the Customer places an order for or accepts delivery of any 'Goods' or 'Services'.
- 2.2 These terms and conditions may only be amended with BCPL consent in writing and shall prevail to the extent of any inconsistency with any other document or agreement between the Customer and BCPL.
3. **CHANGE OF CONTROL**
- 3.1 The Customer shall give BCPL not less than fourteen (14) days prior written notice of any proposed change of ownership of the Customer and/or any other change in the Customer's details (including but not limited to, changes in the Customer's name, address, contact phone or fax number/s, or business practice). The Customer shall be liable for any loss incurred by BCPL as a result of the Customer's failure to comply with this clause.
4. **PRICE & PAYMENT**
- 4.1 At BCPL sole discretion the Price shall be either:
 - a) as indicated on any invoice provided by BCPL to the Customer; or
 - b) the Price as at the date of delivery of the Goods according to BCPL current price list; or
 - c) BCPL quoted price (subject to clause 5.2) which will be valid for the period stated in the quotation or otherwise for a period of thirty (30) days.
- 4.2 BCPL reserves the right to change the Price if a variation to BCPL quotation is requested. Payment for all variations must be made in full at their time of completion.
- 4.3 At BCPL sole discretion a non-refundable deposit may be required.
- 4.4 Time for payment for the Goods being of the essence, the Price will be payable by the Customer on the date/s determined by BCPL, which may be:
 - a) on delivery of the Goods;
 - b) before delivery of the Goods;
 - c) the date specified on any invoice or other form as being the date for payment; or
 - d) failing any notice to the contrary, the date which is fourteen (14) days following the date of any invoice given to the Customer by BCPL.
- 4.5 Payment may be made by cash, cheque, bank cheque, electronic/on-line banking, or by any other method as agreed to between the Customer and BCPL.
- 4.6 Unless otherwise stated the Price does not include GST. In addition to the Price the Customer must pay to BCPL an amount equal to any GST BCPL must pay for any supply by BCPL under this or any other agreement for the sale of the Goods. The Customer must pay GST, without deduction or set off of any other amounts, at the same time and on the same basis as the Customer pays the Price. In addition, the Customer 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.
5. **DELIVERY OF GOODS**
- 5.1 Delivery ("Delivery") of the Goods is taken to occur at the time that:
 - a) The Customer or the Customer's nominated carrier takes possession of the Goods at BCPL address; or
 - b) BCPL (or BCPL nominated carrier) delivers the Goods to the Customer's nominated address even if the Customer is not present at the address.
- 5.2 At BCPL sole discretion the cost of delivery is either included in the Price or is in addition to the Price.
- 5.3 Delivery of the Goods to a third party nominated by the Customer is deemed to be delivery to the Customer for the purposes of this agreement.
- 5.4 The Customer must take delivery by receipt or collection of the Goods whenever either is tendered for delivery. In the event that the Customer is unable to take delivery of the Goods as arranged then BCPL shall be entitled to charge a reasonable fee for re-delivery of the Goods and/or the storage of the Goods.
- 5.5 The Customer shall take delivery of the Goods tendered notwithstanding that the quantity so delivered shall be either greater or lesser than the quantity purchased provided that:
 - a) such discrepancy in quantity shall not exceed five percent (5%); and
 - b) the Price shall be adjusted pro rata to the discrepancy.
- 5.6 BCPL may deliver the Goods in separate instalments. Each separate instalment shall be invoiced and paid in accordance with the following conditions:
 - a) BCPL shall invoice the Customer for each separate instalment.
 - b) Any time or date given by BCPL to the Customer is an estimate only. The Customer must still accept delivery of the Goods even if late and BCPL will not be liable for any loss or damage incurred by the Customer as a result of the delivery being late.
6. **RISK**
- 6.1 Risk of damage to or loss of the Goods passes to the Customer on Delivery and the Customer must insure the Goods on or before Delivery.
- 6.2 If any of the Goods are damaged or destroyed following delivery but prior to ownership passing to the Customer, BCPL is entitled to receive all insurance proceeds payable for the Goods. The production of these terms and conditions by BCPL is sufficient evidence of BCPL rights to receive the insurance proceeds without the need for any person dealing with BCPL to make further enquiries.
7. **ACCESS**
- 7.1 The Customer shall ensure that BCPL has clear and free access to the work site at all times to enable BCPL to undertake the works. BCPL shall not be liable for any loss or damage to the site including without limitation, damage to pathways, driveways and concrete or paved or grassed areas.
8. **DIMENSION, PLANS & SPECIFICATIONS**
- 8.1 The Customer's industry tolerances shall apply to the dimensions and measurements of the Goods unless BCPL and the Customer agree otherwise in writing. BCPL shall be entitled to rely on the accuracy of any plans, specifications and other information provided by the Customer.
- 8.2 If the giving of an estimate or quotation for the supply of Goods involves BCPL estimating measurements and quantities, it shall be the responsibility of the Customer to verify the accuracy of BCPL estimated measurements and quantities, before the Customer places an order based on such estimate or accepts such quotation.
- 8.3 Should the Customer require any changes to BCPL estimated measurements and quantities, the Customer shall request such changes in writing. In the case of an estimate before placing an order and in the case of a quotation before acceptance.
9. **CUSTOMER'S DISCLAIMER**
- 9.1 The Customer hereby disclaims any right to rescind, or cancel the contract or to sue for damages or to claim restitution arising out of any inadvertent misrepresentation made to the Customer by BCPL and the Customer acknowledges that the Goods are bought relying solely upon the Customer's skill and judgment.
- 9.2 Where BCPL provides advice to the Customer, such advice is given in good faith only. The Customer acknowledges that BCPL shall not be liable for any claims howsoever arising out of any advice given.
10. **RETENTION OF TITLE TO GOODS**
- 10.1 BCPL and the Customer agree that ownership of the Goods does not pass until:
 - a) the Customer has paid BCPL all amounts owing to BCPL; and
 - b) the Customer has met all of its other obligations to BCPL.
- 10.2 Receipt by BCPL 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.
- 10.3 It is further agreed that:
 - a) until ownership of the Goods passes to the Customer in accordance with clause 10.1 that the Customer is only a bailee of the Goods and must return the Goods to BCPL on request;
 - b) the Customer holds the benefit of the Customer's insurance of the Goods on trust for BCPL and must pay to BCPL the proceeds of any insurance in the event of the Goods being lost, damaged or destroyed;
 - c) the Customer 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 Customer sells, disposes or parts with possession of the Goods then the Customer must hold the proceeds of any such act on trust for BCPL and must pay or deliver the proceeds to BCPL on demand.
 - d) the Customer should not convert or process the Goods or intermix them with other goods but if the Customer does so then the Customer holds the resulting product on trust for the benefit of BCPL, and must sell, dispose of or return the resulting product to BCPL as its sole agent.
 - e) the Customer irrevocably authorises BCPL to enter any premises where BCPL believes the Goods are kept and recover possession of the goods.
 - f) BCPL may recover possession of any Goods in transit whether or not delivery has occurred.
 - g) the Customer 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 BCPL.
 - h) BCPL may commence proceedings to recover the Price of the Goods sold notwithstanding that ownership of the Goods has not passed to the Customer.
11. **PERSONAL PROPERTY SECURITIES Act 2009 (PPSA)**
- 11.1 In this clause financing statement, financing change statement, security agreement, and security interest has the meaning given to it by the PPSA.
- 11.2 Upon assenting to these terms and conditions in writing or act, the Customer acknowledges and agrees that these terms and conditions constitute a security agreement for the purposes of the PPSA and creates a security interest in Account, Goods and/or All Personal Property of the Customer / Grantor, including that has previously been supplied and that will be supplied in the future by BCPL to the Customer.
- 11.3 The Customer undertakes to:
 - (i) sign any further documents and/or provide any further information (such information to be complete, accurate and up-to-date in all respects) which BCPL may reasonably require to;
 - (ii) register a financing statement or financing change statement in relation to a security interest on the Personal Property Securities Register;
 - (iii) register any other document required to be registered by the PPSA; or
 - (iv) correct a defect in a statement referred to in clause 11.3(a)(i) or 11.3(a)(ii);
 - (v) indemnify and upon demand reimburse BCPL 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;
 - (vi) not register a financing change statement in respect of a security interest without the prior written consent of BCPL;
 - (vii) not register, or permit to be registered, a financing statement or a financing change statement in relation to the Goods in favour of a third party without the prior written consent of BCPL;
 - (viii) immediately advise BCPL of any material change in its business practices of selling Goods which would result in a change in the nature of proceeds derived from such sales.
- 11.4 BCPL and the Customer agree that sections 96, 115 and 125 of the PPSA do not apply to the security agreement created by these terms and conditions.
- 11.5 The Customer waives their rights to receive notices under sections 95, 118, 121(4), 130, 132(3) (d) and 132(4) of the PPSA.
- 11.6 The Customer waives their rights as a grantor and/or a debtor under sections 142 and 143 of the PPSA.
- 11.7 Unless otherwise agreed to in writing by BCPL, the Customer waives their right to receive a verification statement in accordance with section 157 of the PPSA.
- 11.8 The Customer must unconditionally ratify any actions taken by the BCPL under clauses 11.3 to 11.7.
- 11.9 Subject to any express provisions to the contrary nothing in these terms and conditions is intended to have the effect of contracting out of any of the provisions of the PPSA.
12. **SECURITY & CHARGE**
- 12.1 In consideration of BCPL agreeing to supply the Works/Goods, the Customer charges all of its rights, title and interest (whether joint or several) in any land, reality or other assets capable of being charged, owned by the Customer either now or in the future, to secure the performance by the Customer of its obligations under these terms and conditions (including, but not limited to, the payment of any money).
- 12.2 The Customer indemnifies BCPL from and against all BCPL costs and disbursements including legal costs on a solicitor and own Customer basis incurred in exercising BCPL rights under this clause.
- 12.3 The Customer irrevocably appoints BCPL and each director of BCPL as the Customer's true and lawful attorney/s to perform all necessary acts to give effect to the provisions of this clause 12 including, but not limited to, signing any document on the Customer's behalf.
13. **DEFECTS, WARRANTY, RETURNS, COMPETITION CONSUMER Act (CCA)**
- 13.1 The Customer must inspect the Goods on delivery and must within thirty (30) days of delivery notify BCPL in writing of any evident defect/damage, shortage in quantity, or failure to comply with the description or quote.
- 13.2 The Customer must notify any other alleged defect in the Goods as soon as reasonably possible after any such defect becomes evident. Upon such notification the Customer must allow BCPL to inspect the Goods.
- 13.3 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).
- 13.4 BCPL acknowledges that nothing in these terms and conditions purports to modify or exclude the Non-Excluded Guarantees.
- 13.5 Except as expressly set out in these terms and conditions in respect of the Non-Excluded Guarantees, BCPL makes no Warranties or other representations under these terms and conditions including but not limited to the quality or suitability of the Goods. BCPL liability in respect of these warranties is limited to the fullest extent permitted by law.
- 13.6 If the Customer is a consumer within the meaning of the CCA, BCPL liability is limited to the extent permitted by section 64A of Schedule 2.
- 13.7 If BCPL is required to replace the Goods under this clause or the CCA, but is unable to do so, BCPL may refund any money the Customer has paid for the Goods.
- 13.8 If the Customer is not a consumer within the meaning of the CCA, BCPL 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 Customer by BCPL at the BCPL sole discretion;
 - b) limited to any warranty to which BCPL is entitled, if BCPL did not manufacture the Goods;
 - c) otherwise regulated absolutely.
- 13.9 Subject to this clause 13, returns will only be accepted provided that:
 - a) The Customer has complied with the provisions of clause 13.1; and
 - b) the BCPL has agreed that the Goods are defective; and
 - c) the Goods are returned within a reasonable time at the Customer'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.
- 13.10 Notwithstanding clauses 13.1 to 13.9 but subject to the CCA, BCPL 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 Customer failing to properly maintain or store any Goods;
 - b) the Customer using the Goods for any purpose other than that for which they were designed;
 - c) the Customer continuing the use of the Goods after any defect became apparent or should have become apparent to a reasonably prudent operator or user;
 - d) the Customer failing to follow any instructions or guidelines provided by the BCPL;
 - e) fair wear and tear, any accident, or act of God.
- 13.11 BCPL may in its absolute discretion accept non-defective Goods for return in which case BCPL may require the Customer to pay handling fees of up to fifteen percent (15%) of the value of the returned Goods plus any freight costs.
14. **INTELLECTUAL PROPERTY**
- 14.1 Where BCPL has designed, drawn or developed Goods for the Customer, then the copyright in any designs and drawings and documents shall remain the property of BCPL.
- 14.2 The Customer warrants that all designs, specifications or instructions given to BCPL will not cause BCPL to infringe any patent, registered design or trademark in the execution of the Customer's order and the Customer agrees to indemnify BCPL against any action taken by a third party against BCPL in respect of any such infringement.
15. **CONSEQUENCES OF DEFAULT**
- 15.1 Debtor agrees to pay \$550 initial recovery costs. Interest on overdue invoices shall accrue daily from the date when payment becomes due, until the date of payment, at a rate of three percent (3%) per calendar month and at BCPL sole discretion such interest shall compound monthly at such a rate after as well as before any judgment.
- 15.2 If the Customer owes BCPL any money the Customer shall indemnify BCPL from and against all costs and disbursements incurred by BCPL in recovering the debt (including but not limited to internal administration fees, legal costs on a solicitor and own Customer basis, BCPL contract default fee, and bank dishonour fees).
- 15.3 If any amount remains overdue after thirty (30) days then an amount of the greater of twenty dollars (\$20.00) or ten percent (10%) of the amount overdue (up to a maximum of two hundred dollars (\$200.00)) shall be levied for administration fees which sum shall become immediately due and payable.
- 15.4 Without prejudice to any other remedies BCPL may have, if at any time the Customer is in breach of any obligation (including those relating to payment) under these terms and conditions BCPL may suspend or terminate the supply of Goods to the Customer. BCPL shall be liable to the Customer for any loss or damage the Customer suffers because BCPL has exercised its rights under this clause.
- 15.5 Without prejudice to BCPL other remedies at law BCPL shall be entitled to cancel all or any part of any order of the Customer which remains unfulfilled and all amounts owing to BCPL shall, whether or not due for payment, become immediately payable if:
 - a) any money payable to BCPL becomes overdue, or in BCPL opinion the Customer will be unable to make a payment when it falls due;
 - b) the Customer become insolvent, convenes a meeting with its creditors or proposes or enters into an arrangement with creditors, or makes an assignment for the benefit of its creditors; or
 - c) a receiver, manager, liquidator (provisional or otherwise) or similar person is appointed in respect of the Customer or any asset of the Customer.
16. **CANCELLATION**
- 16.1 BCPL may cancel any contract to which these terms and conditions apply or cancel delivery of Goods at any time before the Goods are due to be delivered by giving written notice to the Customer. On giving such notice BCPL shall repay to the Customer any money paid by the Customer for the Goods. BCPL shall not be liable for any loss or damage whatsoever arising from such cancellation.
- 16.2 In the event that the Customer cancels delivery of the Goods the Customer shall be liable for any and all loss incurred (whether direct or indirect) by BCPL as a direct result of the cancellation (including, but not limited to, any loss of profits).
17. **PRIVACY Act 1988**
- 17.1 The Customer agrees for BCPL to obtain from a credit reporting body (CRB) a credit report containing personal credit information (e.g. name, address, D.O.B., occupation, previous credit applications, credit history) about the Customer in relation to credit provided by BCPL.
- 17.2 The Customer agrees that BCPL may exchange information about the Customer with those credit providers and with related body corporates for the following purposes:
 - a) to assess an application by the 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 creditworthiness of the Customer including the Customer's repayment history in the preceding two (2) years.
- 17.3 The Customer consents to BCPL being given a consumer credit report to collect overdue payment on commercial credit.
- 17.4 The Customer agrees that personal credit information provided may be used and retained by BCPL 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 Customer's credit, payment and/or status in relation to the provision of Works; and/or
 - c) processing of any payment instructions, direct debit facilities and/or credit facilities requested by the Customer; and/or
 - d) enabling the collection of amounts outstanding in relation to;
- 17.5 BCPL may give information about the Customer 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.
- 17.6 The information given to the CRB may include:
 - a) personal information as outlined in 17.1 above;
 - b) name of the credit provider and that BCPL is a current credit provider to the Customer;
 - c) whether the credit provider is a licensee;
 - d) type of consumer or commercial credit;
 - e) details concerning the Customer's application for credit or commercial credit (e.g. date of commencement or termination of the credit account and the amount requested);
 - f) advice of consumer credit defaults, 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 Customer no longer has any overdue accounts and BCPL has been paid or otherwise discharged and all details surrounding that discharge (e.g. dates of payments);
 - g) information that, in the opinion of BCPL, the Customer has committed a serious credit infringement;
 - h) advice that the amount of the Customer's overdue payment is equal to or more than one hundred and fifty dollars (\$150)
- 17.7 The Customer shall have the right to request (by e-mail from BCPL:
 - a) a copy of the information about the Customer retained by BCPL and the right to request that BCPL correct any incorrect information; and
 - b) that BCPL does not disclose any personal information about the Customer for the purpose of direct marketing.
- 17.8 BCPL will destroy personal information upon the Customer's request (by e-mail) or if it is no longer required unless it is required in order to fulfil the obligations of this agreement or is required to be maintained and/or stored in accordance with the law.
- 17.9 The Customer can make a privacy complaint by contacting BCPL via e-mail. BCPL will respond to that complaint within seven (7) days of receipt and will take all reasonable steps to make a decision as to the complaint within thirty (30) days of receipt of the complaint. In the event that the Customer is not satisfied with the resolution provided, the Customer can make a complaint to the Information Commissioner at www.oaic.gov.au.
18. **GENERAL**
- 18.1 The failure by BCPL to enforce any provision of these terms and conditions shall not be treated as a waiver of that provision, nor shall it affect BCPL'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.
- 18.2 These terms and conditions and any contract to which they apply shall be governed by the laws of in which BCPL has its principal place of business, and are subject to that jurisdiction.
- 18.3 Subject to clause 13, BCPL shall be under no liability whatsoever to the Customer for any indirect and/or consequential loss and/or expense (including loss of profit) suffered by the Customer arising out of a breach by BCPL of these terms and conditions (alternatively BCPL liability shall be limited to damages which under no circumstances shall exceed the Price of the Goods).
- 18.4 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 BCPL nor to withhold payment of any invoice because part of that invoice is in dispute.
- 18.5 BCPL may license or sub-contract all or any part of its rights and obligations without the Customer's consent.
- 18.6 The Customer agrees that BCPL may amend these terms and conditions at any time. If BCPL makes a change to these terms and conditions, then that change will take effect from the date on which BCPL notifies the Customer of such change. The Customer will be taken to have accepted such changes if the Customer makes a further request for BCPL to provide Goods to the Customer.