

## **1. Definitions**

- 1.1 “**SAP**” means SA Plasterboard Pty Ltd and its successors and assigns, or any person acting on behalf of and with its authority.
- 1.2 “**Client**” means the person/s buying the Goods as specified in any invoice, document or order, and if there is more than one Client is a reference to each Client jointly and severally.
- 1.3 “**Goods**” means all Goods or Services supplied by SAP 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).
- 1.3 “**Price**” means the Price payable for the Goods as agreed between SAP and the Client in accordance with clause 4 below.

## **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 These terms and conditions may only be amended with SAP’s consent in writing and shall prevail to the extent of any inconsistency with any other document or agreement between the Client and SAP.

## **3. Change in Control**

- 3.1 The Client shall give SAP 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, or business practice). The Client shall be liable for any loss incurred by SAP as a result of the Client’s failure to comply with this clause.

## **4. Price and Payment**

- 4.1 At SAP’s sole discretion the Price shall be either:
- (a) as indicated on any invoice provided by SAP to the Client; or
  - (b) the Price as at the date of delivery of the Goods according to SAP’s current applicable price list; or
  - (c) SAP’s quoted price (subject to clause 4.2) which will be valid for the period stated in the quotation or otherwise for a period of thirty (30) days.

#### 4.2 SAP 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, limitations to accessing the site, prerequisite work by any third party not being completed, change of design, installation or remedial work due to poor or incorrect installation by a third party, etc.) which are only discovered on commencement of the Services; or
- (d) in the event of increases to SAP in the cost of labour or materials (including but not limited to overseas transactions that may increase as a consequence of variations in foreign currency rates of exchange and/or international freight and insurance charges) which are beyond SAP's control.

#### 4.3 At SAP's 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 Client on the date/s determined by SAP, which may be:

- (a) on delivery of the Goods;
- (b) before delivery of the Goods;
- (c) by way of instalments/progress payments in accordance with SAP'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 SAP.

#### 4.5 Payment may be made by cash, cheque, electronic/on-line banking, or by any other method as agreed to between the Client and SAP.

#### 4.6 Unless otherwise stated the Price does not include GST. In addition to the Price the Client must pay to SAP an amount equal to any GST SAP must pay for any supply by SAP 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.

## **5. Delivery of Goods**

5.1 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 SAP’s address; or
- (b) SAP (or SAP’s nominated carrier) delivers the Goods to the Client’s nominated address even if the Client is not present at the address.

5.2 At SAP’s sole discretion the cost of delivery is in addition to the Price.

5.3 The Client must take delivery by receipt or collection of the Goods whenever they are tendered for delivery. In the event that the Client is unable to take delivery of the Goods as arranged then SAP shall be entitled to charge a reasonable fee for redelivery and/or storage.

5.4 SAP 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.

5.5 Any time or date given by SAP to the Client is an estimate only. The Client must still accept delivery of the Goods even if late and SAP will not be liable for any loss or damage incurred by the Client as a result of the delivery being late.

## **6. Risk**

6.1 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.

6.2 If any of the Goods are damaged or destroyed following delivery but prior to ownership passing to the Client, SAP is entitled to receive all insurance proceeds payable for the Goods. The production of these terms and conditions by SAP is sufficient evidence of SAP’s rights to receive the insurance proceeds without the need for any person dealing with SAP to make further enquiries.

6.3 If the Client requests SAP to leave Goods outside SAP’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.

6.4 Plaster is a natural, handmade product and as such may exhibit variations in texture, shade, colour, surface, finish, markings, and contain natural fissures, occlusions, and indentations. Whilst SAP will make every effort to match

sales samples to the finished Goods SAP accepts no liability whatsoever where such samples differ to the finished Goods supplied and as such shall not be deemed as a defect.

6.5 SAP shall not be liable whatsoever for any loss or damage to the works (including, but not limited to, painted surfaces, and mouldings) that is caused by any other tradesmen.

6.6 The Client accepts that alterations to orders will not be accepted by SAP once production of the Goods have commenced.

## **7. Client's Responsibilities**

7.1 It is the intention of SAP and agreed by the Client that it is the responsibility of the Client to provide and have erected scaffolding to enable the Services to be undertaken (where in SAP's opinion it is deemed necessary). It is also agreed that all scaffolding erected will comply with industry safety standards and that any person erecting the scaffolding shall be suitably qualified to ensure its safe and proper erection and where necessary shall hold a current certificate of competency and/or be fully licensed.

7.2 The Client agrees to remove any furniture, furnishings or personal goods from the vicinity of the works and agrees that SAP shall not be liable for any damage caused to those items through the Client's failure to comply with this clause.

## **8. Access**

8.1 The Client shall ensure that SAP has clear and free access to the work site at all times to enable them to undertake the works. SAP shall not be liable for any loss or damage to the site (including, without limitation, damage to pathways, driveways and concreted or paved or grassed areas) unless due to the negligence of SAP.

## **9. Title**

9.1 SAP and the Client agree that ownership of the Goods shall not pass until:

- (a) the Client has paid SAP all amounts owing to SAP; and
- (b) the Client has met all of its other obligations to SAP.

9.2 Receipt by SAP 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.

9.3 It is further agreed that:

- (a) until ownership of the Goods passes to the Client in accordance with clause 9.1 that the Client is only a bailee of the Goods and must return the Goods to SAP on request.
- (b) the Client holds the benefit of the Client's insurance of the Goods on trust for SAP and must pay to SAP 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 SAP and must pay or deliver the proceeds to SAP 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 SAP and must sell, dispose of or return the resulting product to SAP as it so directs.
- (e) the Client irrevocably authorises SAP to enter any premises where SAP believes the Goods are kept and recover possession of the Goods.
- (f) SAP 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 SAP.
- (h) SAP may commence proceedings to recover the Price of the Goods sold notwithstanding that ownership of the Goods has not passed to the Client.

## **10. Personal Property Securities Act 2009 ("PPSA")**

10.1 In this clause financing statement, financing change statement, security agreement, and security interest has the meaning given to it by the PPSA.

10.2 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 SAP to the Client.

10.3 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 SAP 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 10.3(a)(i) or 10.3(a)(ii);
- (b) indemnify, and upon demand reimburse, SAP 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 SAP;
- (d) 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 SAP;
- (e) immediately advise SAP of any material change in its business practices of selling the Goods which would result in a change in the nature of proceeds derived from such sales.

10.4 SAP 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.

10.5 The Client waives their rights to receive notices under sections 95, 118, 121(4), 130, 132(3)(d) and 132(4) of the PPSA.

10.6 The Client waives their rights as a grantor and/or a debtor under sections 142 and 143 of the PPSA.

10.7 Unless otherwise agreed to in writing by SAP, the Client waives their right to receive a verification statement in accordance with section 157 of the PPSA.

10.8 The Client must unconditionally ratify any actions taken by SAP under clauses 10.3 to 10.5.

10.9 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.

## **11. Security and Charge**

11.1 In consideration of SAP 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, 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).

11.2 The Client indemnifies SAP from and against all SAP's costs and disbursements including legal costs on a solicitor and own client basis incurred in exercising SAP's rights under this clause.

11.3 The Client irrevocably appoints SAP and each director of SAP as the Client's true and lawful attorney/s to perform all necessary acts to give effect to the provisions of this clause 11 including, but not limited to, signing any document on the Client's behalf.

## **12. Defects, Warranties and Returns, Competition and Consumer Act 2010 ("CCA")**

12.1 The Client must inspect the Goods on delivery and must within twenty-four (24) hours of delivery notify SAP 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 within five (5) days of delivery of any such defect. Upon such notification the Client must preserve the Goods intact for fourteen (14) days to allow SAP to inspect the Goods.

12.2 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**).

12.3 SAP acknowledges that nothing in these terms and conditions purports to modify or exclude the Non-Excluded Guarantees.

12.4 Except as expressly set out in these terms and conditions or in respect of the Non-Excluded Guarantees, SAP makes no warranties or other representations under these terms and conditions including but not limited to the quality or suitability of the Goods. SAP's liability in respect of these warranties is limited to the fullest extent permitted by law.

12.5 If the Client is a consumer within the meaning of the CCA, SAP's liability is limited to the extent permitted by section 64A of Schedule 2.

12.6 If SAP is required to replace the Goods under this clause or the CCA, but is unable to do so, SAP may refund any money the Client has paid for the Goods.

12.7 If the Client is not a consumer within the meaning of the CCA, SAP'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 SAP at SAP's sole discretion;
- (b) limited to any warranty to which SAP is entitled, if SAP did not manufacture the Goods;
- (c) otherwise negated absolutely.

12.8 Subject to this clause 12, returns will only be accepted provided that:

- (a) the Client has complied with the provisions of clause 12.1; and
- (b) SAP 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.

12.9 Notwithstanding clauses 12.1 to 12.8 but subject to the CCA, SAP 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 SAP
- (e) incorrect installation by the Client or a third party;
- (f) fair wear and tear, any accident, or act of God.

12.10 Notwithstanding anything contained in this clause if SAP is required by a law to accept a return then SAP will only accept a return on the conditions imposed by that law.

### **13. Intellectual Property**

13.1 Where SAP has designed, drawn or developed Goods for the Client, then the copyright in any designs and drawings and documents shall remain the property of SAP.

13.2 The Client agrees that SAP may (at no cost) use for the purposes of marketing or entry into any competition, any documents, designs, drawings or Goods which SAP has created for the Client.



## **14. Default and Consequences of Default**

- 14.1 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 SAP's sole discretion such interest shall compound monthly at such a rate) after as well as before any judgment.
- 14.2 If the Client owes SAP any money the Client shall indemnify SAP from and against all costs and disbursements incurred by SAP in recovering the debt (including but not limited to internal administration fees, legal costs on a solicitor and own client basis, SAP's contract default fee, and bank dishonour fees).
- 14.3 Without prejudice to any other remedies SAP may have, if at any time the Client is in breach of any obligation (including those relating to payment) under these terms and conditions SAP may suspend or terminate the supply of Goods to the Client. SAP will not be liable to the Client for any loss or damage the Client suffers because SAP has exercised its rights under this clause.
- 14.4 Without prejudice to SAP's other remedies at law SAP shall be entitled to cancel all or any part of any order of the Client which remains unfulfilled and all amounts owing to SAP shall, whether or not due for payment, become immediately payable if:
- (a) any money payable to SAP becomes overdue, or in SAP's opinion the Client will be unable to make a payment when it falls due;
  - (b) the Client becomes insolvent, convenes a meeting with its creditors or proposes or enters into an arrangement with creditors, or makes an assignment for the benefit of its creditors; or
  - (c) a receiver, manager, liquidator (provisional or otherwise) or similar person is appointed in respect of the Client or any asset of the Client.

## **15. Cancellation**

- 15.1 SAP 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 SAP shall repay to the Client any money paid by the Client for the Goods. SAP shall not be liable for any loss or damage whatsoever arising from such cancellation.

- 15.2 In the event that the Client cancels delivery of Goods the Client shall be liable for any and all loss incurred (whether direct or indirect) by SAP as a direct result of the cancellation (including, but not limited to, any loss of profits).
- 15.3 Cancellation of orders for Goods made to the Client's specifications, or for non-stocklist items, will definitely not be accepted once production has commenced, or an order has been placed.

## **16. Privacy Act 1988**

- 16.1 The Client agrees for SAP 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 Client in relation to credit provided by SAP.
- 16.2 The Client agrees that SAP 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 years.
- 16.3 The Client consents to SAP being given a consumer credit report to collect overdue payment on commercial credit.
- 16.4 The Client agrees that personal credit information provided may be used and retained by SAP 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
  - (d) enabling the collection of amounts outstanding in relation to the Goods.
- 16.5 SAP 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.

16.6 The information given to the CRB may include:

- (a) personal information as outlined in 16.1 above;
- (b) name of the credit provider and that SAP 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, 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 SAP has been paid or otherwise discharged and all details surrounding that discharge (e.g. dates of payments);
- (g) information that, in the opinion of SAP, 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).

16.7 The Client shall have the right to request (by e-mail) from SAP:

- (a) a copy of the information about the Client retained by SAP and the right to request that SAP correct any incorrect information; and
- (b) that SAP does not disclose any personal information about the Client for the purpose of direct marketing.

16.8 SAP will destroy personal information upon the Client'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.

16.9 The Client can make a privacy complaint by contacting SAP via e-mail. SAP 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 Client is not satisfied with the resolution provided, the Client can make a complaint to the Information Commissioner at [www.oaic.gov.au](http://www.oaic.gov.au)

## **17. Dispute Resolution**

- 17.1 If a dispute arises between the parties to this contract then either party shall send to the other party a notice of dispute in writing adequately identifying and providing details of the dispute. Within fourteen (14) days after service of a notice of dispute, the parties shall confer at least once, to attempt to resolve the dispute. At any such conference each party shall be represented by a person having authority to agree to a resolution of the dispute. In the event that the dispute cannot be so resolved either party may by further notice in writing delivered by hand or sent by certified mail to the other party refer such dispute to arbitration. Any arbitration shall be:
- (a) referred to a single arbitrator to be nominated by the President of the Institute of Arbitrators Australia; and
  - (b) conducted in accordance with the Institute of Arbitrators Australia Rules for the Conduct of Commercial Arbitration.

## **18. Compliance with Laws**

- 18.1 The Client agrees that the site will comply with any occupational health and safety laws relating to building/construction sites and any other relevant safety standards or legislation.

## **19. Building and Construction Industry Security of Payment Act 2002 (SA)**

- 19.1 At SAP's sole discretion, if there are any disputes or claims for Paid Goods and/or Services then the provisions of the Building and Construction Industry Security of Payment Act 2002 (SA) may apply.
- 19.2 Nothing in this agreement is intended to have the affect of contracting out of any applicable provisions of the Building and Construction Industry Security of Payment Act 2002 (SA), except to the extent permitted by the Act where applicable.

## **20. General**

- 20.1 The failure by SAP to enforce any provision of these terms and conditions shall not be treated as a waiver of that provision, nor shall it affect SAP'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.
- 20.2 These terms and conditions and any contract to which they apply shall be governed by the laws of South Australia in which SAP has its principal place

of business, and are subject to the jurisdiction of the courts of South Australia.

- 20.3 Subject to clause 12, SAP 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 SAP of these terms and conditions (alternatively SAP's liability shall be limited to damages which under no circumstances shall exceed the Price of the Goods).
- 20.4 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 SAP nor to withhold payment of any invoice because part of that invoice is in dispute.
- 20.5 SAP may license or sub-contract all or any part of its rights and obligations without the Client's consent.
- 20.6 The Client agrees that SAP may amend these terms and conditions at any time. If SAP makes a change to these terms and conditions, then that change will take effect from the date on which SAP notifies the Client of such change. The Client will be taken to have accepted such changes if the Client makes a further request for SAP to provide Goods to the Client.
- 20.7 Neither party shall be liable for any default due to any act of God, war, terrorism, strike, lock-out, industrial action, fire, flood, storm or other event beyond the reasonable control of either party.
- 20.8 The Client warrants that it has the power to enter into this agreement and has obtained all necessary authorisations to allow it to do so, it is not insolvent and that this agreement creates binding and valid legal obligations on it.