

Terms and Conditions of Sale and Service



1 Definitions

Business Days means any day except for a Saturday, Sunday or public holiday in the jurisdiction the Products or Services are being supplied.

Customer Materials means any document, goods or material provided by the Customer or on behalf of the Customer to Newground in relation to this Agreement.

Customer's Personnel means any subcontractor, employee, agent or officer of the Customer or such other person engaged by or representing the Customer from time to time.

Completion Date means the earliest of the date on which the Term (as extended in accordance with this Agreement) expires or the Works have been completed.

Fees means the Fees specified in the Details (as adjusted in accordance with this Agreement).

Force Majeure means an event beyond the control of Newground, including but not limited to strikes, industrial disputes, fire, flood, acts of God, war, insurrection, vandalism, sabotage, riot, national emergency, piracy, hijack, terrorism, embargoes or restraints, extreme weather or traffic conditions, temporary closure of roads, changes in Legislative Requirements.

GST, GST Law and other terms defined in the GST Law have the meanings given to those terms in *A New Tax System (Goods and Services Tax) Act 1999* (Cth), except that 'GST Law' must be interpreted as including any applicable rulings issued from time to time by the Commissioner of Taxation.

Legislative Requirements means relevant:

- (a) acts, ordinances, regulations, by-laws, orders, awards and proclamations of the Commonwealth and the State or Territory;
- (b) codes, standards, certificates, licences, consents, permits, approvals and requirements of organisations having jurisdiction in connection with the carrying out of the Works, including the requirements of any Authority, and the requirements of any approvals; and
- (c) Australian Standards and the Building Code of Australia;

Products means the products described in the quotation issued by Newground to the Customer.

Services means the services described in the quotation issued by Newground to the Customer.

Site means the land or premises specified in the Details.

Term means the term of this Agreement as specified in the Details and as extended in accordance with this Agreement or otherwise by agreement between the parties.

Variation means an increase or change to the Products or Services to be supplied, including a change to any specification or Customer Materials.

Warranty Period means a 12 month period which will commence on:

- (i) the date of completion of installation of the Products, for Products sold on a supply and installation basis; or
- (ii) delivery of the Products to the Customer, for Products sold on a supply only or supply and commission basis,

as applicable.

WHS Law means the relevant work health and safety legislation applicable or any Legislative Requirement having a similar effect or purpose, in the State or Territory in which the Products or Services are being supplied.

Works means the Products and Services to be provided under this Agreement including Variations.

2 General obligation

(a) Newground agrees to provide the Customer with the Products and Services, and the Customer agrees to pay Newground the Fees, in accordance with:

- (i) service-specific terms described in the quotation issued by Newground to the Customer, if applicable;
- (ii) the Details;
- (iii) these terms and conditions;
- (iv) remaining schedules, forms, specifications and other referenced documents (if any),

(together, "**this Agreement**").

(b) If there is an inconsistency between the documents listed in clause 2(a), the order of precedence will be the order that the documents are listed in 2(a) to the extent of the inconsistency.

3 Fees for the Works

(a) Unless otherwise agreed in writing, the Fees:

- (i) are based on the Works being carried out from 08:30 to 17:00 on Business Days (subject to alteration by Newground);
- (ii) are based on having continuous, uninterrupted, and unhindered access to the required people, equipment, facilities, utilities, and areas where the Works are to be carried out;
- (iii) are based on current workplace agreements;
- (iv) do not cover extraneous work, including but not limited to patching/painting, carpet lifting or refitting, building work or decoration and emergency service call-outs; and

- (v) do not cover any costs associated with the discovery of unforeseen conditions or any other event beyond the reasonable control of Newground.
- (b) Any additional costs arising from a change in the assumptions set out in clause 3(a) will be treated as a Variation under clause 5
- (c) Should Newground agree to carry out extraneous work of the kind set out in clause 3(a)(iv), at the request of the Customer, then Newground shall not be liable for any damage arising from carrying out this extraneous work provided that Newground uses reasonable skill and care and taking into consideration the age and condition of the existing land or premises to which the extraneous work is performed.
- (d) Newground may adjust the Fees on an annual basis in respect of an increase/fall in the cost of any annual services and increased/decreased costs. Should the Customer object to Newground's proposed adjustment of Fees, the Customer may terminate this Agreement in accordance with clause 17(e).
- (e) If it becomes necessary to pay any additional site allowances, other than a State or Federal award, or amounts in excess of any current workplace agreement applicable to the type of work being performed, these costs will be added to the Fee.
- (f) Emergency service call-outs will be charged in accordance with Newground's standard fees for such emergency services. These fees can be provided on request.

4 Delivery

- (a) Newground shall use reasonable endeavours to complete the delivery of the Works by the Completion Date.
- (b) The Customer acknowledges that delivery dates or periods quoted are estimates only and are subject to prompt receipt of all Customer Materials necessary to allow Newground to proceed with the delivery of the Works.
- (c) Newground accepts no liability whatsoever for any loss or damage suffered by the Customer as a consequence of any delay in the delivery of the Works.
- (d) Risk in the Products shall pass to the Customer upon delivery of the Products to the Customer. Title to and ownership of the Products shall pass to the Customer upon receipt by Newground of payment in full for those Products.

5 Variations

- (a) The Customer shall pay for any Variation as follows:
 - (i) if Newground has quoted an amount for such Variation, the amount quoted; or

- (ii) if Newground has not given any quote, an amount calculated for the Variation by Newground in accordance with Newground's standard rates for such Works applicable at that time; and
- (iii) Newground is entitled to charge the Customer for any design, management, overhead and profit for each Variation carried out.

6 Delays

The Customer agrees that Newground will be entitled to an extension of time to any Completion Date or other delivery date and associated additional costs where Newground has been delayed as a result of:

- (a) a breach of this Agreement by the Customer;
- (b) an act or omission by the Customer or the Customer's Personnel;
- (c) delays caused by the Customer or the Customer's Personnel;
- (d) delays caused under clause 3(a)(ii), clause 4(b) and clauses 7(a) to 7(b);
- (e) a Variation; and
- (f) a Force Majeure event.

7 Customer's specific obligations

- (a) The Customer shall:
 - (i) provide Newground with sufficient access to the Site as reasonably required for the purpose of allowing Newground to perform its obligations under this Agreement;
 - (ii) ensure that the Customer and the Customer's Personnel:
 - (A) do not interfere with or disrupt, delay or hinder Newground, its employees, agents, subcontractors or other persons engaged by Newground or prevent them from carrying out the Works or cause them to incur additional cost; and
 - (B) reasonably cooperate with Newground and its employees, agents and subcontractors;
 - (iii) advise Newground of the existence of any conditions affecting the Site, including but not limited to, concealed pipes, wires and cables for water, gas, electricity, telephone, or asbestos, and shall confirm the location of such conditions to Newground's technician before work commences. In the absence of such notice Newground accepts no liability for any loss or damage as a result of such conditions and the Customer agrees to indemnify Newground against any claim whatsoever for any loss or liability under this clause;

- (iv) provide the Customer Materials as required by Newground for the delivery of the Products and/or performance of the Services by the date agreed between the parties or otherwise within a reasonable time after the date of this Agreement;
 - (v) provide Newground, within a reasonable time of a request made by Newground, any further data, specifications and information required by Newground to fulfil its obligations under this Agreement;
 - (vi) provide adequate facilities at the Site at no cost to Newground, including but not limited to parking, power, lifting equipment, scaffolding, scissor lifts, rubbish removal skips and lockable storage; and
 - (vii) ensure that the Site is at all times a safe working environment and complies with all applicable WHS Law. The Customer acknowledges that Newground has not been engaged as the principal contractor for the purposes of WHS Law in carrying out the Works.
- (b) If Newground considers that the Site is unsafe, it may delay or cease delivery of the Works until the Site is restored to a safe condition. In addition to any of Newground's rights under this Agreement, the Customer acknowledges that any such delay or cessation of the Works:
- (i) will not constitute a breach of this Agreement; and
 - (ii) will not entitle the Customer to the payment of liquidated damages or a financial penalty or any other damages.
- (c) The Customer indemnifies Newground against any claims (including claims made by third parties) for:
- (i) the failure of equipment due to events beyond Newground's reasonable control, including but not limited to the failure of telecommunication carrier lines, power supply, and servers;
 - (ii) costs relating to emergency services charges; and
 - (iii) the relocation of equipment.
- ## 8 Warranty and Product Returns
- (a) The Customer must inspect all Products upon delivery and, within 5 Business Days of delivery, give written notice to Newground if any of the Products delivered are not in accordance with this Agreement.
- (b) Newground will replace or rectify (at Newground's option) any Products that are:
- (i) not provided in accordance with this Agreement, provided that the Customer has complied with its obligations under clause 8(a); and
 - (ii) defective, provided that the Customer has notified Newground of the defect in accordance with clause 8(a), or, in circumstances where the defect was not identifiable on a reasonable inspection of the Products upon delivery, the defect is notified to Newground during the Warranty Period, (the **Warranty**).
- (c) Newground has no obligation to replace or rectify any Products under clause 8(b)(i) where the Customer has failed to comply with clause 8(a) or 8(b)(ii).
- (d) If the Customer wants to return a Product for credit (for a reason other than as set out in clause 8(b)), the Customer must:
- (i) not return a Product to Newground without the prior agreement of Newground;
 - (ii) ensure that the Product to be returned is properly packaged so that no damage occurs during transit;
 - (iii) pay a reasonable restocking fee as determined by Newground; and
 - (iv) pre-pay all postage, freight and packaging costs for the return of the Product (unless otherwise approved by Newground in writing).
- (e) The Customer acknowledges that:
- (i) it is required to carry out regular maintenance in accordance with the applicable Legislative Requirements, codes and manufacturer guidelines, by qualified, trained personnel, using Newground authorised parts, conforming to original design specifications as applicable;
 - (ii) the Warranty given by Newground is conditional upon the Customer complying with such maintenance obligations;
 - (iii) Newground is not liable for fair wear and tear of any Products; and
 - (iv) if Newground elects to repair any Products under clause 8(b) or otherwise:
 - (A) Products presented for repair may be replaced by refurbished goods of the same type rather than being repaired. Refurbished parts may be used to repair the goods; and
 - (B) if the Products are capable of retaining user-generated data, the repair of the Products may result in the loss of the data.
- (f) The parties agree that when evaluating a claim for a defective Product, due allowance shall be made for fair wear and tear of the Product.

- (g) The Customer agrees that Newground will be relieved of its obligations under this clause if:
 - (i) the Customer or any other party other than Newground (or authorised by Newground), attempts to install, carry out repairs, mal-operate or modify the Products in any way during or after the expiry of the Warranty Period; or
 - (ii) the defect or damage to the Product arises out of the Customer's, or the Customer's Personnel's, negligence, fault, neglect, abuse, incorrect use or as a result of vandalism, fire, water damage, power surge, an error or defect in the Customer Materials, or any other circumstance outside of Newground's control.
- (h) To the extent permitted by law, and unless otherwise expressly agreed with the Customer, Newground will exclude from its obligations under clause 8(b), any Products that are connected to any of the Customer's systems.
- (i) Notwithstanding anything in this clause, Newground can elect to reimburse the Customer for the cost of any defective Products supplied to a maximum total value of the Fees paid by the Customer under this Agreement for the Products.

9 Warranty and Product Returns – Consumer only

- (a) This clause 9 only applies if the Customer is a consumer for the purposes of the *Competition and Consumer Act 2010* (Cth).
- (b) Nothing in this Agreement limits or excludes the application of the *Competition and Consumer Act 2010* (Cth). If the Customer is a consumer as defined in the Australian Consumer Law, the consumer guarantees under the Australian Consumer Law apply to the extent of any inconsistency with clauses 8 and 9.
- (c) Newground's Products and Services come with guarantees that cannot be excluded under the *Australian Consumer Law*. The Customer is entitled to a replacement or refund for a major failure and for compensation for any other reasonably foreseeable loss or damage. The Customer is also entitled to have the Products repaired or replaced, or the Services resupplied if the Works fail to be of acceptable quality and the failure does not amount to a major failure.
- (d) The benefits to the consumer given by this warranty are in addition to other rights and remedies of the consumer under applicable laws relating to the Product or Service.
- (e) If a defect in the Product or Service appears within 12 months, the Customer is entitled to submit a warranty claim by returning it to the address shown in the Details. When returning the Product, the Customer must ensure it is properly packaged so that no damage occurs during transit. Any postage and packaging expenses required to return the Product to Newground will be at the Customer's cost.

- (f) The Customer must provide the original or a copy of the proof of purchase and, where possible, include an explanation of the problem.
- (g) If Newground elects to repair the Product:
 - (i) Products presented for repair may be replaced by refurbished goods of the same type rather than being repaired. Refurbished parts may be used to repair the Product; and
 - (ii) if the Products are capable of retaining user-generated data, the repair of the Product may result in the loss of the data.

10 Intellectual Property Rights

- (a) Newground retains all rights, title and interest subsisting in any design, documentation, diagrams, plans, or other information and materials supplied to the Customer in relation to this Agreement.
- (b) All intellectual property rights in Customer Materials supplied by the Customer for the purposes of this Agreement remain the property of the Customer but the Customer grants Newground a perpetual, irrevocable, royalty free, non-exclusive licence to use, reproduce and modify the Customer's Materials for any purpose related to this Agreement.
- (c) The Customer agrees to accept full responsibility for the Customer Materials and to indemnify Newground for any action, claim, liability, cost or expense arising out of Newground's use of the Customer Materials.

11 Quotation validity

Unless otherwise agreed in writing, a quotation provided by Newground may be accepted up to 30 days from the quotation date, after which Newground reserves the right to amend or withdraw it. If any amounts are quoted in a foreign currency, the applicable exchange rate (as published by the Reserve Bank of Australia) shall be as at the date of the quotation.

12 Credit Information

- (a) The Customer acknowledges and agrees that if Newground requires financial information about the Customer for any credit application which attracts the operation of the *Privacy Act 1988* (Cth), Newground may:
 - (i) disclose and collect commercial credit information about the Customer (and if the Customer is a company, about its directors and officers) for the purpose of determining the Customer's credit worthiness;
 - (ii) obtain a credit report from a credit reporting agency (which may contain personal credit information, information about commercial activities or commercial worthiness) for the purpose of assessing an application for credit and any later request for credit;

- (iii) provide to, or obtain from any credit provider(s) named in a credit report information about the Customer's personal or commercial credit arrangements (including information relating to credit worthiness, credit standing, credit history and credit capacity); and
 - (iv) disclose personal information about the Customer to a credit provider other than Newground or to a credit reporting agency, for the purpose of collecting outstanding amounts owed by the Customer to Newground.
- (b) Newground's obligations under this Agreement are subject to satisfactory credit evaluation. Newground reserves the right to withdraw any quotation, cancel the services, and terminate this Agreement under clause 17(a) should the Customer's credit evaluation be or become unsatisfactory.

13 Privacy

The Customer agrees that Newground may collect and use the Customer's personal information in accordance with Newground's privacy policy which is available upon request.

14 Payment

- (a) For performing its obligations under this Agreement Newground is entitled to be paid the Fees by the Customer.
- (b) The Customer shall pay Newground the Fees specified in the invoice within 30 days of the date of the invoice without set-off, deduction or discount of any kind.
- (c) If the Works extend over a period greater than one month, Newground shall be entitled to submit claims for payment to the Customer for Works provided up to that date (including materials purchased for Works not yet delivered) by providing a tax invoice setting out details of the amount due to Newground and the GST payable (**Payment Claim**).
- (d) The Customer shall pay Newground the amount specified in the Payment Claim within 30 days of the date of the Payment Claim without set-off, deduction or discount of any kind.
- (e) The Customer acknowledges and agrees that this clause 14 creates a security interest in the Products and in all proceeds of those Products as security for the payment of all moneys owing by the Customer to Newground, and for the performance of all of the Customer's obligations to Newground.

- (f) The Customer agrees at Newground's request to promptly sign any documents, provide all necessary information (which information the Customer warrants to be complete, accurate and up-to-date in all respects) and do anything else reasonably required by Newground to ensure that any security interest constitutes a perfected "Purchase Money Security Interest" for the purposes of the *Personal Property Securities Act 2009*.
- (g) Should the Customer fail to make payment by the due date for payment of an invoice or Payment Claim, the Customer will pay interest calculated daily on the overdue amount at 2% above the 30 day bank bill rate specified by National Australia Bank at the relevant time and may suspend work.
- (h) The Customer acknowledges that an invoice can include the full cost of materials or equipment purchased, and/or labour expended on work in progress and to place into storage materials which cannot be accepted for delivery on Site.
- (i) The Customer will be liable for the payment of all expenses reasonably incurred by Newground in the recovery of any payment, including legal costs to the extent permitted by law.
- (j) Payment of Fees by the Customer within the specified period is an essential term of this Agreement, and failure to pay Newground by the due date will constitute a material breach under clause 17(a).
- (k) Newground may set off any amounts that Newground reasonably considers is due to Newground from the Customer against any amounts payable by Newground to the Customer under this Agreement.

15 GST

- (a) Any consideration payable or to be provided for a supply made under or in connection with this Agreement, unless specifically described in this Agreement as 'GST inclusive', does not include any amount on account of GST. If GST is payable on any supply made under or in connection with this Agreement (not being a supply the consideration for which is specifically described in this Agreement as 'GST inclusive'), the recipient of the supply must pay to the supplier, an additional amount equal to the GST payable on the supply (**GST Amount**). The GST Amount is payable at the same time as the GST exclusive consideration is paid or provided, subject to the supplier issuing the recipient with a tax invoice for the supply to which the payment relates.

16 Newground's Liability

- (a) Nothing in this Agreement excludes, restricts or modifies the application of the provisions of any statute (including the *Competition and Consumer Act 2010* (Cth)) where to do so would contravene that statute or cause any part of this Agreement to be void.

- (b) To the extent permitted by law, the Customer agrees that:
- (i) subject to the consumer guarantees and other provisions of the *Competition and Consumer Act 2010* (Cth) (if applicable), Newground will have no liability for any statements, representations, guarantees, conditions or warranties that are not expressly contained in this Agreement;
 - (ii) where Newground breaches its obligations under this Agreement, Newground shall, at its election, re-supply the Products or Services or pay to have those Services supplied again or the replacement, repair or repayment of the Products to a maximum total value of the Fees paid by the Customer under this Agreement;
 - (iii) any liability of Newground will be reduced to the extent that any loss, damage or expense was caused by the Customer, the Customer's Personnel or a third party including as a result of a breach of this Agreement, negligence, fault, lack of reasonable care or through any other act or omission of the Customer, the Customer's Personnel or a third party;
 - (iv) Newground's total aggregate liability to the Customer, however arising at law, in equity, under statute, or otherwise, in respect of all claims arising out of or in connection with this Agreement, will be limited to the total value of Fees received by Newground from the Customer under this Agreement; and
 - (v) Newground will not be liable to the Customer for any claims not notified to Newground in accordance with clause 18(a) within three months of the Completion Date (except for claims made under clause 8 and 9).
- (c) Notwithstanding anything else in this Agreement, neither party will be liable to the other party for any indirect, consequential, special or economic loss, cost, liability, damage or expense howsoever arising; and/or loss of profit, loss of use, loss of income, loss of rental or other benefit, loss of production, loss of actual or potential business opportunity or loss of reputation, cost of capital or other financing costs howsoever arising.
- (d) The Customer acknowledges and agrees that it is reasonable for Newground to limit its liability under this Agreement and that the Fees charged by Newground are based solely on the value of the Works supplied.

17 Termination

- (a) If a party is in material or persistent breach of its obligations under this Agreement, or if the Customer is in breach as set out in clause 14(j), the other party must provide a written notice to the party in breach specifying the alleged material or persistent breach and, where the breach is capable of remedy, provide the party with a reasonable period to remedy the breach.
- (b) A party may terminate this Agreement by a further written notice to the party who committed the breach after expiry of the period stated in the notice given under clause 17(a).
- (c) If a party to this Agreement becomes insolvent as defined by the *Corporations Act 2001* (Cth), or commits an act of bankruptcy as defined by the *Bankruptcy Act 1966* (Cth), the other party may terminate this Agreement immediately upon written notice.
- (d) Newground may terminate this Agreement at its convenience on the provision of 10 Business Days' written notice to the Customer.
- (e) If the Customer is a consumer for the purposes of the *Competition and Consumer Act 2010* (Cth), the Customer may terminate this Agreement at its convenience on the provision of 20 Business Days' written notice to Newground.
- (f) If the Customer terminates in accordance with (b) or (e) above, the Customer must pay Newground for:
 - (i) Works carried out prior to the date of termination;
 - (ii) the cost (including freight and storage charges) of Products ordered by Newground for the Works; and
 - (iii) the cost of removing from the Site all labour, equipment, appliances and other things in connection with the Works.
- (g) The parties agree that if the Works continue beyond the Term, this Agreement will remain in force for such further Term until a party gives notice to terminate in accordance with (d) or (e) above.

18 Dispute resolution

- (a) The parties agree that:
 - (i) any dispute is to be initially notified to the other party in writing (**Notice of Dispute**) and the Notice of Dispute will include particulars of the nature of the dispute and amount claimed, if relevant and the remedy sought;
 - (ii) the parties will use all reasonable endeavours to resolve the dispute within 10 Business Days of the date of the Notice of Dispute;

- (iii) if the parties are unable to resolve the dispute within that time frame specified in clause 18(a)(ii), the dispute must be referred in writing to an executive officer or person with authority to settle the dispute from each party for executive negotiation; and
 - (iv) the parties will use all reasonable endeavours to resolve the dispute through executive negotiation within a further 10 Business Days or such other reasonable period agreed between the parties.
- (b) Where the matter is not resolved under clause 18(a) either party may refer the dispute to litigation.
 - (c) The parties must continue to perform their obligations under this Agreement notwithstanding the referral of a dispute to any form of dispute resolution under clause 18.
 - (d) Nothing in this Agreement shall prejudice the right of either party to institute proceedings to seek injunctive or urgent declaratory relief.

19 Force majeure

Neither party will be in breach of this Agreement if it fails to perform or is in delay in the performance of an obligation (other than an obligation to make payment) as a result of a Force Majeure event.

20 International Trade Compliance

- (a) The Customer, on request by Newground, must provide Newground with all information in relation to the Customer's (including, but not limited to, the Customer's customers, end-users and intermediaries) compliance with Legislative Requirements, ethical rules applicable to Newground and international trade compliance rules prohibiting sale of goods and services to certain sectors, certain countries, certain individuals or legal entities that are subject to economic, financial or other sanctions.
- (b) Newground may terminate this Agreement where the Customer fails to provide the information requested by Newground under clause 20(a) or the Customer (including, but not limited to, the Customer's customers, end-users and intermediaries) is in breach of any Legislative Requirements or ethical rules applicable to Newground, including, but not limited to, international trade compliance rules prohibiting sale of goods and services to certain sectors, certain countries, certain individuals or legal entities that are subject to economic, financial or other sanctions (**ITC Information and Rules**).
- (c) The Customer will not sell, re-export or transfer any products, services or technical information supplied under this Agreement except in full compliance with all applicable governmental requirements and only upon prior written approval of Newground.

21 General

- (a) Newground may assign, novate, or subcontract this Agreement without the consent of the Customer. Newground will give the Customer prior notice of its intention to assign, novate or subcontract this Agreement.
- (b) This Agreement is subject to the laws of the State or Territory in which the Works or the majority of the Works are undertaken and the parties agree to submit to the non-exclusive jurisdiction of the court of such State or Territory.
- (c) If it is not reasonably possible to ascertain in which State or Territory the majority of the Works is undertaken, or if the Works are undertaken outside of Australia, the laws of New South Wales will govern this Agreement and the parties will submit to the exclusive jurisdiction of the courts of New South Wales.
- (d) This Agreement constitutes the entire agreement between the parties and supersedes all prior representations, contracts, statements and understandings, whether verbal or in writing. All other terms and conditions are excluded to the fullest extent permitted by law. The terms, provisions and conditions of this Agreement may only be varied by agreement in writing and signed by the parties.
- (e) No right under this Agreement will be deemed to be waived except by notice in writing and signed by each party, and any failure by Newground to enforce any clause of this Agreement will not be construed as a waiver of Newground's rights under this Agreement.
- (f) The Agreement is entered into subject to satisfactory credit approval of the Customer by Newground, and the Customer's satisfaction of the ITC Information and Rules set out in clause 20(b).
- (g) A provision of this Agreement must not be construed to the disadvantage of a Party merely because that Participant was responsible for the preparation of the Agreement or the inclusion of the provision in the Agreement.