

# Frater Consulting Services – 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 FCS 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 a part of a Trust, shall be bound in their 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 "Client Material" means material provided by the Client to FCS for the purpose of FCS providing the Services and includes written information, plans, diagrams, documents and any other particulars relating to the Client's requirements for the Project.
- 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 ordering from the 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 ordering Services via the website.
- 1.5 "Documentation" includes any goods, documents, designs, drawings, measurements, photographs, models or materials supplied, consumed, created or deposited incidentally by FCS in the course of it conducting, or supplying to the Client, any Services.
- 1.6 "FCS" means Frater Energy Assessor Pty Ltd T/A Frater Consulting Services, its successors and assigns or any person acting on behalf of and with the authority of Frater Energy Assessor Pty Ltd T/A Frater Consulting Services.
- 1.7 "Fee" means the Fee payable (plus any GST where applicable) for the Services as agreed between FCS and the Client in accordance with clause 5 of this contract.
- 1.8 "GST" means Goods and Services Tax as defined within the "A New Tax System (Goods and Services Tax) Act 1999" (Cth).
- 1.9 "Personal Information" means personal information such as: name, address, D.O.B, occupation, driver's licence details, electronic contact (email), or credit card details.
- 1.10 "Project" means the project as specified in FCS' quotation for which the Services are to be provided by FCS to the Client.
- 1.11 "Services" means all Services supplied by FCS to the Client at the Client's request from time to time.
- 1.12 "Supplier" means a supplier of goods and/or services relevant to the FCS business, the Services, or energy or water sustainability management, and includes (but is not limited to) suppliers of solar panels and storage batteries, electric vehicle charging equipment, storm and waste water treatment, heating and air conditioning, and glazing.
- 1.13 "Supplier Materials" means materials supplied by a Supplier to the Company for the purpose of the Company providing the Services and may include information, specifications and quotes for the supply of goods and/or services.

## 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 Services provided by FCS.
- 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 that the supply of Services on credit shall not take effect until the Client has completed a credit application with FCS and it has been approved with a credit limit established for the account.
- 2.5 In the event that the supply of Services request exceeds the Client's credit limit and/or the account exceeds the payment terms, FCS reserves the right to refuse delivery.
- 2.6 Services are supplied by FCS only on the terms and conditions of trade herein to the exclusion of anything to the contrary in the terms of the Client's order notwithstanding that any such order is placed on terms that purport to override these terms and conditions of trade.
- 2.7 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.
- 2.8 This contract constitutes the entire contract between FCS and the Client, and the Client hereby acknowledges that no reliance is placed on any representation made by FCS that is not embodied in this contract.

## 3. Errors and Omissions

- 3.1 The Client acknowledges and accepts that FCS 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 FCS 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 FCS in respect of the Services.
- 3.2 In the event such an error and/or omission occurs in accordance with clause 3.1, and is not attributable to the negligence and/or wilful misconduct of FCS, the Client shall not be entitled to treat this contract as repudiated nor render it invalid.

## 4. Change in Control

- 4.1 The Client shall give FCS 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, email, contact phone or fax number/s, change of trustees or business practice). The Client shall be liable for any loss incurred by FCS as a result of the Client's failure to comply with this clause.

## 5. Fee and Payment

- 5.1 At FCS' sole discretion the Fee shall be either:

# Frater Consulting Services – Terms & Conditions of Trade

- (a) as indicated on any invoice provided by FCS to the Client; or
- (b) FCS' quoted Fee (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.
- 5.2 FCS reserves the right to change the Fee if a variation to FCS' quotation is requested. Any variation from the plan of scheduled Services or specifications (including, but not limited to, any variation as a result of additional Services required due to unforeseen circumstances such as changes to the scope of the Services, change of the development parameters, etc.) will be charged for on the basis of FCS' quotation and will be shown as variations on the invoice. The Client shall be required to respond to any variation submitted by FCS within ten (10) working days. Failure to do so will entitle FCS to add the cost of the variation to the Fee. Payment for all variations must be made in full at the time of their completion.
- 5.3 At FCS' sole discretion a non-refundable deposit may be required.
- 5.4 Time for payment for the Services being of the essence, the Fee will be payable by the Client on the date/s determined by FCS, which may be:
- (a) on delivery of the Documentation;
- (b) on completion of the Services;
- (c) by way of instalments/progress payments in accordance with FCS' payment schedule;
- (d) thirty (30) days following the end of the month in which a statement is delivered to the Client's address or address for notices;
- (e) the date specified on any invoice or other form as being the date for payment; or
- (f) failing any notice to the contrary, the date which is either fourteen (14) days or seven (7) days following the date of any invoice given to the Client by FCS.
- 5.5 The Client agrees to indemnify FCS for all costs and expenses (including but not limited to, disbursements, postage, search fees, couriers and the like), incurred by FCS in connection with the provision of the Services. FCS shall fully document all such expenses for submission to the Client.
- 5.6 Payment may be made by cash, bank cheque, electronic/on-line banking, or by any other method as agreed to between the Client and FCS.
- 5.7 The Client shall not be entitled to set off against, or deduct from the Fee, any sums owed or claimed to be owed to the Client by FCS nor to withhold payment of any invoice because part of that invoice is in dispute.
- 5.8 Unless otherwise stated the Fee does not include GST. In addition to the Fee, the Client must pay to FCS an amount equal to any GST FCS must pay for any supply by FCS under this or any other contract for providing FCS' Services. 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 Fee. In addition, the Client must pay any other taxes and duties that may be applicable in addition to the Fee except where they are expressly included in the Fee.
- 5.9 The Client acknowledges and agrees that the Client's obligations to FCS for the provision of the Services shall not cease (and where it is intended that any ownership of the Documentation shall pass, it shall not pass) until:
- (a) the Client has paid FCS all amounts owing for the particular Services; and
- (b) the Client has met all other obligations due by the Client to FCS in respect of all contracts between the parties;
- (c) and FCS shall be entitled to retain any documents provided by the Client (or on behalf of the Client) until full and final payment has been received by FCS at which time such documents shall be returned to the Client.
- 5.10 Receipt by FCS 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 and until then FCS' ownership or rights in respect of the Services, and this contract, shall continue.

## 6. Delivery of Services

- 6.1 At FCS' sole discretion delivery of the Services shall take place when:
- (a) the Services are supplied to the Client at FCS' address; or
- (b) the Services are supplied to the Client at the Client's nominated address.
- 6.2 Delivery of the Services to a third party nominated by the Client is deemed to be delivery to the Client for the purposes of this contract.
- 6.3 At FCS' sole discretion, the cost of delivery is in addition to the Fee.
- 6.4 FCS may deliver the Services by separate instalments. Each separate instalment shall be invoiced and paid for in accordance with the provisions in these terms and conditions.
- 6.5 Subject to clause 6.6 it is FCS' responsibility to ensure that the Services start as soon as it is reasonably possible.
- 6.6 The Services' commencement date will be put back and/or the completion date extended by whatever time is reasonable in the event that FCS claims an extension of time (by giving the Client written notice) where completion is delayed by an event beyond FCS' control, including but not limited to any failure by the Client to:
- (a) provide and documentation that is required; or
- (b) adequate instructions.
- 6.7 Any time specified by FCS for delivery of the Services is an estimate only and FCS will not be liable for any loss or damage incurred by the Client as a result of delivery being late. However, both parties agree that they shall make every endeavour to enable the Services to be supplied at the time and place as was arranged between both parties. In the event that FCS is unable to supply the Services as agreed solely due to any action or inaction of the Client then FCS shall be entitled to charge a reasonable fee for re-supplying the Services at a later time and date.

## 7. Extension of contract Period

- 7.1 FCS shall as per clause 6.6 above be entitled to claim an extension to the term of the contract in the event of delays resulting from any matter whatsoever which is not entirely under the control of FCS. These matters shall include, but are not limited to delays caused by:
- (a) response(s) to information request(s) made by FCS to the Client not being available when required;
- (b) approval authorities response times for requests for preliminary decisions/information;
- (c) information from consultants, councils or referral agencies not being available when required;
- (d) changes to the design brief being requested by the Client;
- (e) time taken by the approval authority for the granting of required approvals;
- (f) any other variation to the contract.

## 8. Instructions and Advice

- 8.1 FCS shall not consider whether the Client has any existing use rights in relation to the property unless specifically instructed to do so.

## Frater Consulting Services – Terms & Conditions of Trade

- 8.2 FCS is not instructed to have any regard to, or be aware of, any contracts or other commercial arrangements entered into by the Client, or on the Client's behalf, with any other person or entity.
- 8.3 FCS shall be entitled to rely on the Client providing FCS with all relevant Client Material regarding the property and the accuracy of all such Client Material.
- 8.4 Unless expressly instructed to do so, FCS shall not be required to seek out other relevant documents from:
- (a) the Client;
  - (b) the Client's consultants;
  - (c) town planning certificates;
  - (d) other searches or enquiries.
- 8.5 The Client acknowledges that advice given by FCS may be qualified or conditional on information not yet available and/or future events. Where advice is clearly specified to be qualified or conditional, FCS shall not be liable in relation to the part of the advice to the extent that the information or events make the part incorrect.

### 9. Role of FCS

- 9.1 FCS shall exercise reasonable skill, care and diligence in the performance of the Services.
- 9.2 If FCS is required to exercise their professional judgment between the Client and a third party with whom the Client has a contract then they shall do so independently and as required by the terms of that contract.
- 9.3 FCS shall use all reasonable efforts to be informed of the Client's requirements for the Project and for that purpose shall consult with the Client throughout the performance of the Services.
- 9.4 If FCS considers that the Client Material made available by the Client is not sufficient to enable FCS to provide the Services in accordance with this contract, FCS may advise the Client who must then provide such further assistance, information, or other particulars as necessary in the circumstances.
- 9.5 If FCS becomes aware of any matter which will change or which has changed the scope or timing of the Services then FCS will give notice to the Client and the notice will contain, as far as practicable in the circumstances, particulars of the change.
- 9.6 FCS shall perform the Services in a timely manner to the extent that it is within their control to do so.

### 10. Role of the Client

- 10.1 The Client shall, as soon as practicable, make available to FCS all Client Material relating to the Client's requirements for the Project.
- 10.2 The Client shall as soon as practicable make arrangements to enable FCS to enter upon the site and other lands as necessary to enable FCS to perform the Services.
- 10.3 Unless the parties specifically agree otherwise, the Client shall as soon as practicable obtain all approvals, authorities, licenses and permits which are required from governmental, municipal or other responsible authorities for the lawful implementation and completion of the Project.
- 10.4 The Client agrees that the Services do not include any services which are properly carried out by other professions such as legal or accounting and if other such professional services are required the Client shall obtain these services at the Client's own cost.
- 10.5 The Client shall make available to FCS at the place and at the time specified in FCS' proposal or quotation, the equipment and facilities specified in FCS' proposal or quotation.
- 10.6 The Client shall appoint a person to act as their representative and give written notice to FCS of the name of the person so appointed. The Client agrees that the person appointed shall have authority to act on behalf of the Client for all purposes in connection with the contract. If circumstances arise which require the services of a specialist or expertise outside the field of FCS, then FCS may, with the prior approval of the Client engage the appropriate consultant. The consultant shall be engaged at the Client's expense and on their behalf. The Client's approval shall not be unreasonably withheld.
- 10.7 If the Client becomes aware of any matter which may change the scope or timing of the Services or the Project then the Client will give written notice to FCS.
- 10.8 The Client shall carry out the additional special obligations set out in the proposal or quotation.
- 10.9 The Client shall co-operate with FCS and shall not interfere with or obstruct the proper performance of the Services.

### 11. Risk

- 11.1 Irrespective of whether FCS retains ownership of any Documentation all risk for such items shall pass to the Client as soon as such items are provided to the Client and shall remain with the Client until such time as FCS may repossess the Documentation in accordance with clause 13.3(f). The Client must insure all Documentation on or before provision.
- 11.2 FCS reserves its right to seek compensation or damages for any damage, destruction or loss suffered in relation to the Documentation as a result of the Client's failure to insure in accordance with clause 11.1.
- 11.3 FCS advise that, in accordance with any and all current legislative requirements including all subsequent statutory instruments and/or policies/procedures, any statements or documents provided by FCS are in draft form only, and must be checked by a solicitor prior to submission for approval to any Authority or Council, and before it is signed where applicable.

### 12. Compliance with laws

- 12.1 The Client and FCS agree that both parties shall comply with the provisions of all statutes, regulations and bylaws of government, local and other public authorities that may be applicable to the provision of Services by FCS.
- 12.2 The Client shall obtain (at the expense of the Client) all licences and approvals that may be required to enable FCS to provide the Services.

### 13. Title

- 13.1 FCS and the Client agree that where it is intended that the ownership of Documentation is to pass to the Client that such ownership shall not pass until:
- (a) the Client has paid FCS all amounts owing for the Services; and
  - (b) the Client has met all other obligations due by the Client to FCS in respect of all contracts between FCS and the Client.
- 13.2 Receipt by FCS 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 and until then FCS' ownership or rights in respect of the Documentation shall continue.
- 13.3 It is further agreed that, until ownership of the Documentation passes to the Client in accordance with clause 13.1:

## Frater Consulting Services – Terms & Conditions of Trade

- (a) the Client is only a bailee of the Documentation and must return the Documentation to FCS immediately upon request by FCS;
- (b) the Client holds the benefit of the Client's insurance of the Documentation on trust for FCS and must pay to FCS the proceeds of any insurance in the event of the Documentation being lost, damaged or destroyed;
- (c) the Client must not sell, dispose, or otherwise part with possession of the Documentation. If the Client sells, disposes or parts with possession of the Documentation then the Client must hold the proceeds of sale of the Documentation on trust for FCS and must pay or deliver the proceeds to FCS on demand;
- (d) the Client should not convert or process the Documentation 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 FCS and must dispose of or return the resulting product to FCS as FCS so directs;
- (e) the Client shall not charge or grant an encumbrance over the Documentation nor grant nor otherwise give away any interest in the Documentation while they remain the property of FCS;
- (f) the Client irrevocably authorises FCS to enter any premises where FCS believes the Documentation is kept and recover possession of the Documentation.

### 14. Personal Property Securities Act 2009 ("PPSA")

- 14.1 In this clause financing statement, financing change statement, security agreement, and security interest has the meaning given to it by the PPSA.
- 14.2 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:
  - (a) all Documentation previously supplied by FCS to the Client;
  - (b) all Documentation will be supplied in the future by FCS to the Client; and
  - (c) all the Client's present and after acquired property being a charge, including anything in respect of which the Client has at any time a sufficient right, interest or power to grant a security interest in for the purposes of securing repayment of all monetary obligations of the Client to FCS for Services – that have previously been provided and that will be provided in the future by FCS to the Client.
- 14.3 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 FCS 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 14.3(a)(i) or 14.3(a)(ii);
  - (b) indemnify, and upon demand reimburse, FCS 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 Documentation charged thereby;
  - (c) not register a financing change statement in respect of a security interest without the prior written consent of FCS;
  - (d) not register, or permit to be registered, a financing statement or a financing change statement in relation to the Documentation in favour of a third party without the prior written consent of FCS.
- 14.4 FCS 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.
- 14.5 The Client waives their rights to receive notices under sections 95, 118, 121(4), 130, 132(3)(d) and 132(4) of the PPSA.
- 14.6 The Client waives their rights as a grantor and/or a debtor under sections 142 and 143 of the PPSA.
- 14.7 Unless otherwise agreed to in writing by FCS, the Client waives their right to receive a verification statement in accordance with section 157 of the PPSA.
- 14.8 The Client must unconditionally ratify any actions taken by FCS under clauses 14.3 to 14.5.
- 14.9 Subject to any express provisions to the contrary (including those contained in this clause 14), nothing in these terms and conditions is intended to have the effect of contracting out of any of the provisions of the PPSA.

### 15. Security and Charge

- 15.1 In consideration of FCS agreeing to supply Services, 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).
- 15.2 The Client indemnifies FCS from and against all FCS' costs and disbursements including legal costs on a solicitor and own client basis incurred in exercising FCS' rights under this clause.
- 15.3 The Client irrevocably appoints FCS and each director of FCS as the Client's true and lawful attorney/s to perform all necessary acts to give effect to the provisions of this clause 15 including, but not limited to, signing any document on the Client's behalf.

### 16. Defects, Warranties and the Competition and Consumer Act 2010 (CCA)

- 16.1 The Client must inspect FCS' Services on completion of the Services and must within three (3) days notify FCS in writing of any evident defect in the Services or Documentation provided (including FCS' workmanship) or of any other failure by FCS to comply with the description of, or quote for, the Services which FCS was to supply. The Client must notify any other alleged defect in FCS' Services or Documentation as soon as is reasonably possible after any such defect becomes evident. Upon such notification the Client must allow FCS to review the Services or Documentation that were provided.
- 16.2 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**).
- 16.3 FCS acknowledges that nothing in these terms and conditions purports to modify or exclude the Non-Excluded Guarantees.
- 16.4 Except as expressly set out in these terms and conditions or in respect of the Non-Excluded Guarantees, FCS makes no warranties or other representations under these terms and conditions including, but not limited to, the quality or suitability of the Services. FCS' liability in respect of these warranties is limited to the fullest extent permitted by law.
- 16.5 If the Client is a consumer within the meaning of the CCA, FCS' liability is limited to the extent permitted by section 64A of Schedule 2.
- 17. If FCS is required to rectify, re-supply, or pay the cost of re-supplying the Services under this clause or the CCA, but is unable to do so, then

# Frater Consulting Services – Terms & Conditions of Trade

FCS may refund any money the Client has paid for the Services but only to the extent that such refund shall take into account the value of Services and Documentation which have been provided to the Client which were not defective.

## 18. Intellectual Property

- 18.1 Copyright in all drawings, reports, specifications, bills of quantities, calculations and other documents provided by FCS in connection with the Project shall remain vested in FCS. Under no circumstances may such designs, drawings and documents be used without the express written approval of FCS.
- 18.2 Whilst the Client is not in default of payment or any other terms of this contract, FCS grants the Client a licence to use the documents referred to in Clause 17.1 for the purpose of completing the Project; however, the Client shall not use nor make copies of such documents in connection with any work other than work comprised in the Project unless express approval is given in advance by FCS.
- 18.3 If during the course of providing the Services, FCS develops, discovers, or first reduces to practice a concept, product or process which is capable of being patented, then such concept, product or process shall be and remain the property of FCS and the Client shall not use, infringe or otherwise appropriate the same without first obtaining the written consent of FCS.
- 18.4 If during the course of providing the Services FCS discovers, or is first to practice a concept, or develops a product or process capable of being patented, then FCS grants the Client a royalty-free licence to use the same during the life of the works comprising the Project.
- 18.5 The Client acknowledges and agrees that FCS may disclose Client Materials and Documentation to relevant Suppliers for a purpose related to the Project or the Services, including to (but not limited to) obtain an energy rating, to obtain a quote for supply of goods or services, or in the development of a relevant environmentally sustainable design report in relation to the Project. The Client grants FCS a perpetual, irrevocable, transferable, and royalty-free licence to use all intellectual property rights in the Client Material for this purpose.

## 19. Referral to Suppliers

From time-to-time FCS may incorporate Supplier Materials into the Services and/or the Documentation. The Client acknowledges that FCS may be paid a commission or fee by the Supplier if the Client subsequently purchases goods or services from that Supplier.

## 20. Marketing and advertising

- 20.1 FCS may with the consent of the Client publish, either alone or in conjunction with others, articles, photographs and other illustrations relating to the Project.
- 20.2 The Client consents to FCS (at no cost) using for the purposes of marketing or entry into any competition, any Documentation which FCS has created for the Client. The Client grants FCS a perpetual, irrevocable, transferable and royalty-free licence to use all intellectual property rights in the Documentation for this purpose.
- 20.3 The Client acknowledges that Suppliers and other third parties may advertise their goods and services on FCS's website, social media sites, and/or portal from time to time. The publication of Supplier or third-party advertisements on the FCS website, portal or social media sites, or the provision of a link to a third-party website or application does not constitute FCS's endorsement of that third-party, its goods and services, or its business practices. Clicking on a link to a third-party website or application on the FCS website, portal or social media site is at the sole risk of the client. FCS accepts no liability for any losses or expenses a client may suffer arising from or related to any dealings, agreements or activities between the client and third-party advertisers.

## 21. Default and Consequences of Default

- 21.1 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 FCS' sole discretion such interest shall compound monthly at such a rate) after as well as before any judgment.
- 21.2 If the Client owes FCS any money the Client shall indemnify FCS from and against all costs and disbursements incurred by FCS in recovering the debt (including but not limited to internal administration fees, legal costs on a solicitor and own client basis, FCS' contract default fee, and bank dishonour fees).
- 21.3 Further to any other rights or remedies FCS may have under this contract, if a Client has made payment to FCS, 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 FCS under this clause 18 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.
- 21.4 Without prejudice to FCS' other remedies at law FCS shall be entitled to cancel all or any part of any order of the Client which remains unfulfilled and all amounts owing to FCS shall, whether or not due for payment, become immediately payable if:
- any money payable to FCS becomes overdue, or in FCS' opinion the Client will be unable to make a payment when it falls due;
  - the Client has exceeded any applicable credit limit provided by FCS;
  - 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
  - a receiver, manager, liquidator (provisional or otherwise) or similar person is appointed in respect of the Client or any asset of the Client.

## 22. Cancellation

- 22.1 Without prejudice to any other remedies FCS may have, if at any time the Client is in breach of any obligation (including those relating to payment) under these terms and conditions FCS may suspend or terminate the supply of Services to the Client. FCS will not be liable to the Client for any loss or damage the Client suffers because FCS has exercised its rights under this clause.
- 22.2 FCS may cancel any contract to which these terms and conditions apply or cancel delivery of Services at any time before the Services are commenced by giving written notice to the Client. On giving such notice FCS shall repay to the Client any money paid by the Client for the Services. FCS shall not be liable for any loss or damage whatsoever arising from such cancellation.
- 22.3 In the event that the Client cancels delivery of the Services the Client shall be liable for any and all loss incurred (whether direct or indirect) by FCS as a direct result of the cancellation (including, but not limited to, any loss of profits).

## 23. Privacy Policy

- 23.1 All emails, documents, images or other recorded information held or used by FCS is Personal Information, as defined and referred to in clause 20.3, and therefore considered Confidential Information. FCS acknowledges its obligation in relation to the handling, use, disclosure and

## Frater Consulting Services – Terms & Conditions of Trade

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 other statutory requirements. FCS acknowledges that in the event it becomes aware of any data breaches and/or disclosure of the Client's Personal Information, held by FCS that may result in serious harm to the Client, FCS will notify the Client in accordance with the Act. Any release of such Personal Information must be in accordance with the Act and must be approved by the Client by written consent, unless subject to an operation of law.

23.2 Notwithstanding clause 23.1, privacy limitations will extend to FCS in respect of Cookies where transactions for purchases/orders transpire directly from FCS's website. FCS 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 FCS when FCS sends an email to the Client, so FCS may collect and review that information (“collectively Personal Information”)

In order to enable / disable the collection of Personal Information by way of Cookies, 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 proceeding with a purchase/order via FCS's website.

23.3 The Client agrees for FCS 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 FCS.

23.4 The Client agrees that FCS 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.

23.5 The Client consents to FCS being given a consumer credit report to collect overdue payment on commercial credit.

23.6 The Client agrees that personal credit information provided may be used and retained by FCS for the following purposes (and for other agreed purposes or required by):

- (a) the provision of Services; and/or
- (b) analysing, verifying and/or checking the Client's credit, payment and/or status in relation to the provision of Services; 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 Services.

23.7 FCS 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.

23.8 The information given to the CRB may include:

- (a) Personal Information as outlined in 20.3 above;
- (b) name of the credit provider and that FCS 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 FCS has been paid or otherwise discharged and all details surrounding that discharge (e.g. dates of payments);
- (g) information that, in the opinion of FCS, 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).

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

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

23.10 FCS 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 contract or is required to be maintained and/or stored in accordance with the law.

23.11 The Client can make a privacy complaint by contacting FCS via e-mail. FCS 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).

## 24. Limitation of Liability

24.1 FCS' liability to the Client in anyway arising out of, or in connection with, this contract and the Services (including in contract, tort, under statute or in equity) shall be limited to damages which under no circumstances shall exceed the amount specified in the quotation.

24.2 The Client hereby irrevocably releases FCS from all claims (including any cost, expense, loss, damage, claim, liability, action or proceeding, whether or not presently ascertained, immediate, future or contingent, and includes legal costs on a full indemnity basis) suffered or incurred by the Client (or any person claiming through or on behalf of the Client) other than to the extent caused or contributed to by:

- (a) a negligent act or omission of FCS; or
- (b) a breach of, or default under, this contract by FCS.

24.3 The Client's release under clause 21.2 is reduced proportionately to the extent that an act, default or omission of FCS has caused or contributed

## Frater Consulting Services – Terms & Conditions of Trade

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- to the claim.
- 24.4 Notwithstanding clauses 21.1 to 21.3, FCS shall not be liable for any loss or damage sustained or sustainable by a Client in relation to:
- (a) errors occurring in plans, designs or specifications not created or prepared by FCS; or
  - (b) errors occurring during the course of any services which are not provided by, nor the responsibility of, FCS; or
  - (c) the use of any Documentation or other information of advice without the approval of FCS.
- 25. Building and Construction Industry Security of Payment Act 2002**
- 25.1 At FCS' sole discretion, if there are any disputes or claims for unpaid Incidental Items and/or Services then the provisions of the Building and Construction Industry Security of Payment Act 2002 may apply.
- 25.2 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.
- 26. Service of Notices**
- 26.1 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.
- 26.2 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.
- 27. Trusts**
- 27.1 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 FCS may have notice of the Trust, the Client covenants with FCS 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 FCS (FCS 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.
- 28. General**
- 28.1 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.
- 28.2 These terms and conditions and any contract to which they apply shall be governed by the laws of Victoria, the state in which FCS has its principal place of business, and are subject to the jurisdiction of the courts of Victoria.
- 28.3 FCS may license and/or assign all or any part of its rights and/or obligations under this contract without the Client's consent.
- 28.4 Subject to these Terms and Conditions, the Client cannot license or assign without the written approval of FCS.
- 28.5 FCS 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 FCS' sub-contractors without the authority of FCS.
- 28.6 The Client agrees that FCS 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 FCS to provide Services to the Client.
- 28.7 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.
- (a) Both parties warrant that they have the power to enter into 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.