

Australian Power Equipment agrees to perform the Services and/or supply the Goods requested by the Client on the terms and conditions set out below. Words in *Italics* are defined at clause 32.1 below.

1. Quotations, Orders, Acceptance & Contracts

- 1.1 Clauses 2.3, 6.2, 6.9, 10.6, 14.4, 19.4, 23.3(c), 25.4, 27.1, 29.1 and 30.1 shall apply to the *Agreement* unless or to the extent the *Quotation* or *Order* expressly specifies otherwise.
- 1.2 The *Client* acknowledges that the submission of a *Quotation* by *Australian Power Equipment* is not an offer the acceptance of which will give rise to a contract.
- 1.3 An *Order* in relation to a *Quotation* or offer to enter into an *Agreement* may be made by the *Client* verbally or in writing.
- 1.4 An *Order* or offer is accepted when the *Client* receives from *Australian Power Equipment* an acceptance of the *Order* in writing, or if no written acceptance of the *Order* is received, verbal acceptance or delivery of the *Services* or the *Goods*, whichever occurs first ("**the Order Acceptance**").
- 1.5 When an *Order* or offer is accepted by an *Order Acceptance* an *Agreement* will be made and wholly documented by (in descending *Order* of precedence) the *Quotation*, any specific terms agreed in writing and set out in the *Order* and these terms and conditions, which documents shall constitute the entire *Agreement* and will supersede all prior negotiations, proposals and correspondence between the parties.
- 1.6 Despite the *Client* at any time providing, referring to, submitting or otherwise using or purporting to use any standard form terms and conditions other than these terms and conditions, such terms and conditions will not form part of, or be incorporated into, the *Agreement*.

2. Performance of Services & Supply of Goods

- 2.1 *Australian Power Equipment* shall carry out and complete the *Services* and/or supply the *Goods* in accordance with the *Agreement*. The *Client* and *Australian Power Equipment* agree that the items referred to as *Exclusions* in the *Quotation*, if any, are excluded from the *Agreement*.
- 2.2 *Australian Power Equipment* warrants that:
- (a) it holds all licenses, if any, required to carry out the *Services*, and
- (b) the *Services* will be carried out in a proper and workmanlike manner and in accordance with the *Contract Documents*.
- 2.3 The *Client* warrants that:
- (a) it has obtained and holds any approvals necessary for the *Services*, and
- (b) the *Site* will comply with any occupational health and safety laws relating to building and construction sites of the kind at which with the *Services* are to be performed and any other relevant safety standards or legislation.
- 2.4 *Australian Power Equipment* shall not be required to commence the *Services* or supply the *Goods* until the *Client*:
- (a) if required by *Australian Power Equipment*, provides evidence that it is the owner of the *Site* or contracted supplier of the *Services* to be carried out on the *Site*, and
- (b) has paid the *Deposit*, if any, in accordance with clause 3.2.
- 2.5 Subject to clauses 2.4 and 11, *Australian Power Equipment* shall carry out the *Services* within a reasonable time and as far as reasonably possible by the date for completion specified in the *Quotation*, if any.
- 2.6 In carrying out the *Services* *Australian Power Equipment* and its agents and employees shall observe all relevant occupational health and safety law and shall comply with all obligations under workers compensation legislation.

3. Contract Price & Deposit

- 3.1 The *Client* shall pay to *Australian Power Equipment* the *Contract Price* and other money that becomes payable under the *Agreement* (without any set off) in the manner and at the times stated in the *Agreement*.
- 3.2 The *Client* shall pay to *Australian Power Equipment* the deposit specified in the *Quotation*, if any, within seven (7) days of the *Order Acceptance*.

4. Site Possession, Access, Services & Materials

- 4.1 The *Client* warrants that it has exclusive possession of the *Site* to carry out work including the *Services*. The *Client* must provide clear and free all-weather access to the *Site* for delivery of the *Goods* and performance of the *Services*. If the *Client* does not provide all weather access, *Australian Power Equipment* may carry out any work required to achieve such access and that work is deemed to be a *Variation*. *Australian Power Equipment* shall not be liable for any loss or damage to the *Site* including, without limitation

damage to pathways, driveways and concrete, paved or grassed areas unless such damage was reasonably avoidable and caused by *Australian Power Equipment's* negligence.

- 4.2 The *Client* must not:
- (a) hinder *Australian Power Equipment's* access or possession of the *Site* for the purposes of carrying out the *Services*,
- (b) hinder the progress of the *Services*, or
- (c) make inquiry of, issue directions to, or give instructions to, *Australian Power Equipment's* workers or subcontractors. Communications must only be with *Australian Power Equipment's* nominated person.
- 4.3 The *Client* may only have access to the *Services* at reasonable times and after giving reasonable prior notice for the purposes of inspecting the progress of the *Services*.
- 4.4 The *Client* must supply electricity and water, at its expense, for *Australian Power Equipment* to use in carrying out the *Services*.
- 4.5 All materials delivered to *Site* by *Australian Power Equipment* and not required for the *Services* will remain the property of *Australian Power Equipment*.
- ### 5. Accuracy of Contract Documents
- 5.1 The party responsible for the preparation of a *Contract Document* warrants that it is accurate and correct.
- 5.2 In the event of any inconsistency between the *Contract Documents*, or any detail not being given, *Australian Power Equipment* shall give notice to the *Client* detailing the problem. The *Client* must within two (2) *Business Days* of receiving such notice give written instructions as to how *Australian Power Equipment* is to proceed with the *Services*.
- 5.3 In the event that the *Client* refuses or fails to give written instructions to *Australian Power Equipment* within two (2) *Business Days* of a notice pursuant to Clause 5.2, the *Client* authorises *Australian Power Equipment* to determine the required detail necessary to resolve the error, ambiguity or inconsistency, however, *Australian Power Equipment* shall not be obliged to act under that authority.
- 5.4 If the required detail, as determined by the *Client* or *Australian Power Equipment* necessitates a change to the scope of the *Services*, that work is deemed to be a *Variation*.
- ### 6. Delivery & Inspection of Goods
- 6.1 Delivery of the *Goods* is taken to occur when:
- (a) *Australian Power Equipment* or *Australian Power Equipment's* nominated carrier delivers the *Goods* to the *Site* or address or third party nominated by the *Client* even if the *Client* is not present at the address, or
- (b) the *Client* or its nominated carrier takes possession of the *Goods*.
- 6.2 The cost of delivery is payable by the *Client* in addition to the *Contract Price*.
- 6.3 Where the *Client* or its nominated carrier takes possession of the *Goods*, the *Australian Power Equipment* makes no warranty in relation to the capacity of the *Client* or its carrier's vehicle to carry the *Goods* and shall not be liable for any loss or damage to property as a result of the overloading of any vehicle.
- 6.4 Where *Australian Power Equipment* has agreed to deliver the *Goods*, *Australian Power Equipment* shall make reasonable efforts to deliver the *Goods* to the *Client* or its designated agent in accordance with any agreement between the parties, or in the absence of any specific agreement, within a reasonable time, but shall not be liable for:
- (a) any failure to deliver or delay in delivering the *Goods* for any reason,
- (b) any damage or loss due to unloading or packaging (unless risk in the *Goods* had not passed to the *Client* at the relevant time),
- (c) any damage to property caused upon entering the *Site* or any other premises to deliver the *Goods*, unless caused by *Australian Power Equipment's* negligent act or omission.
- 6.5 The *Client* shall accept delivery of the *Goods* even if late. In the event that the *Client* fails to take delivery of the *Goods* at the time of delivery the *Client* shall reimburse *Australian Power Equipment* for any costs incurred by the failure and *Australian Power Equipment* shall be entitled to charge a reasonable fee for redelivery and/or storage of the *Goods*.
- 6.6 The *Client* must inspect the *Goods* on delivery. The *Client* must notify *Australian Power Equipment* in writing within seven (7) days of delivery and setting out full details of all relevant matters if:
- (a) the *Goods* are damaged, faulty or defective in any,
- (b) the *Goods* do not comply with any description by which they were sold and/or specified to in the *Quotation*, or
- (c) there is any discrepancy in quantity.

- 6.7 The *Client* must notify *Australian Power Equipment* in writing of any other defect in the *Goods* as soon as reasonably possible after any such defect becomes apparent.
- 6.8 Where a notice is given under clauses 6.6 or 6.7 the *Client* shall allow *Australian Power Equipment* to inspect the *Goods*.
- 6.9 Notwithstanding any other clause, where the *Goods* or any part of the *Goods* are second hand, *Australian Power Equipment* makes no warranty in relation to the quality or suitability of the second-hand *Goods* for any purpose and the *Client*:
- acknowledges that it has had a reasonable opportunity to inspect the second-hand *Goods* prior to delivery, and
 - accepts the second-hand *Goods* with any faults, damage and/or missing parts or components.
- 7. Passing of Risk**
- 7.1 The risk in the *Goods* will pass to the *Client*:
- where the *Services* include the installation of the *Goods* or any particular *Goods*, upon completion of that part of the *Services* that relates to the installation or each installation, and
 - in all other cases, upon the earlier of: (i) the delivery of the *Goods* to the *Client* or its agent (including all risks associated with unloading), and (ii) the passing of title to the *Goods* to the *Client*.
- 7.2 Notwithstanding clause 7.1(a), if the *Client* directs *Australian Power Equipment* to deliver the *Goods* to an unattended location the *Goods* shall be left at the *Client's* sole risk and responsibility. In the event that such *Goods* are lost, damaged or destroyed the replacement of the *Goods* shall be at the *Client's* expense.
- 7.3 Where *Australian Power Equipment* retains ownership pursuant to clause 8 of *Goods* in respect of which risk has passed to the *Client*, the *Client* must maintain adequate insurance in relation to the *Goods* and provide evidence of such insurance to *Australian Power Equipment* on request.
- 8. Retention of Title**
- 8.1 Notwithstanding the delivery of *Goods*, until the *Client* has paid all monies payable to *Australian Power Equipment* under the *Agreement* in cleared funds:
- the legal and equitable title to the *Goods* will remain with *Australian Power Equipment*;
 - a fiduciary relationship will exist between the *Client* and *Australian Power Equipment*; and
 - the *Client* agrees to hold the *Goods* as bailee for *Australian Power Equipment* and keep the *Goods* separate and in good condition.
- 8.2 Unless the *Goods* have become fixtures, until ownership of the *Goods* passes to the *Client*:
- the *Client* shall not charge or grant any encumbrance over the *Goods*,
 - the *Client* must return the *Goods* to *Australian Power Equipment* on request, and
 - Australian Power Equipment* may without demand retake possession of the *Goods*.
- 8.3 For the purposes of recovering possession of the *Goods* and without limiting the generality of this clause 8, the *Client* irrevocably authorises and licenses *Australian Power Equipment* and its servants and agents to enter any premises where *Australian Power Equipment* believes the *Goods* may be stored and to take possession of the *Goods*.
- 9. Progress Claims**
- 9.1 *Australian Power Equipment* may issue a *Progress Claim* in respect of work carried out or related goods or services supplied by *Australian Power Equipment* on or after:
- the dates, periods or milestones specified in the *Quotation*, if any,
 - the date of delivery of the *Goods* or any part of the *Goods*,
 - the 14th and 28th days of each calendar month in which any work or related goods or services were supplied, and
 - when in *Australian Power Equipment's* opinion the *Services* have reached the stage of *Practical Completion*.
- 9.2 *Australian Power Equipment* may serve a *Progress Claim* on the *Client* by any method that it is entitled to give notice under the *Agreement*.
- 9.3 The *Client* must pay the *Contract Price* progressively as claimed by *Australian Power Equipment* within seven (7) days, or such other period as specified in the *Quotation*, of service of a *Progress Claim* on the *Client*.
- 9.4 The *Client* may only provide *Australian Power Equipment* with a *Payment Schedule* in relation to *Progress Claim* within seven (7) days of the date of service of the *Progress Claim*.
- 10. Variations**
- 10.1 A *Variation* occurs if:
- the *Agreement* deems a *Variation*,
 - the *Client* requests *Australian Power Equipment* to perform a *Variation* and subsequently *Australian Power Equipment* performs the *Variation* in accordance with the *Client's* direction, or
 - the *Client* and *Australian Power Equipment* agree in writing to a *Variation*, including *Agreement* as to the price of the *Variation*.
- 10.2 The price of a *Variation* is payable progressively as the *Variation* is performed and is due at the same time as the next *Progress Claim* after it is carried out unless a different time is agreed.
- 10.3 If the *Client* has requested *Australian Power Equipment* to perform a *Variation* and *Australian Power Equipment* has provided the *Client* with a cost proposal in respect of the *Variation*, unless the cost proposal is rejected by the *Client* in writing within two (2) *Business Days* the amount of the cost proposal is deemed to be the price of the *Variation* for the purposes of clause 10.1(b).
- 10.4 If there is insufficient time to calculate the price of a *Variation*, or this *Contract* deems a *Variation*, the price of the *Variation* will be charged to the *Client* at *Australian Power Equipment's* reasonable cost plus a *Profit Margin*.
- 10.5 There shall be a deemed *Variation* if:
- the requirements of any statutory or other *Authority* necessitate a change to the *Services*, such *Variation* being that work required to effect that change,
 - additional work is required, or the work is required to be performed in a manner or using equipment not anticipated, due to the discovery of latent difficulties in the performance of the *Services* (including, without limitation, unknown subsurface conditions, poor weather conditions, poor access to the *Site*, iron reinforcing rods in concrete, hidden pipes in walls, safety risks, *Services* by a third party not being completed where necessary for the *Services* to be performed),
 - after the *Agreement* is made; (i) a statutory or other *Authority* introduces or increases any tax, charge, levy or other regulation or any requirement that affects the *Services* that causes any increase in the costs of the *Services*, or (ii) *Australian Power Equipment's* wages is affected by a change to an *Industry Award*.
- 10.6 The *Client* acknowledges that the *Contract Price* has been agreed on the basis of *Australian Power Equipment* performing the *Services* during *Australian Power Equipment's* ordinary operating hours. Where no construction program was provided to *Australian Power Equipment* prior to the date of the *Quotation*, *Australian Power Equipment* will be entitled to a *Variation* if the *Services* are required to be carried out outside the aforementioned working hours to comply with any subsequent construction program.
- 10.7 Where extra cost in materials, labour and overhead is occasioned to *Australian Power Equipment* by virtue of the acceleration of an agreed work schedule or of the presence of obstructions or conditions which could not reasonably have been anticipated by *Australian Power Equipment* the *Agreement* is deemed to have been varied and the *Contract Price* shall be adjusted accordingly.
- 10.8 Notwithstanding any other clause herein, *Australian Power Equipment* is under no obligation to carry out any deemed *Variation* or *Variation* requested by the *Client*.
- 11. Stand Down Time & Demobilization**
- 11.1 *Australian Power Equipment* shall be entitled to payment from the *Client* at the *Standby Rates* for any *Stand Down Time*.
- 11.2 Unless the parties agree otherwise, the price of the *Variation* under clause 11.1 shall be calculated at the *Standby Rates* for *Stand Down Time*.
- 11.3 There shall be a deemed *Variation* if *Australian Power Equipment* reasonably demobilizes equipment used in connection with the *Services* as a result of any (a) direction by the *Client*, (b) *Variation*, (c) *Stand Down Time* or (d) suspension in accordance with the *Agreement*.
- 11.4 The price of a *Variation* under clause 11.3 shall be the *Supplier's* reasonable costs of demobilizing the equipment and remobilizing the equipment when the *Services* proceed.
- 12. Acknowledgement of Possible Delays**
- 12.1 The *Client* acknowledges that completion of the *Services* may be suspended by *Australian Power Equipment* pursuant to clause 13 or delayed by any cause beyond the control of *Australian Power Equipment* including; (a) a *Variation* or a request by the *Client* for a *Variation*; (b) an act of God, fire, explosion, earthquake or civil commotion; (c) any weather condition that, in the reasonable opinion of *Australian Power Equipment*, prevents work from being carried out in the usual manner; (d) an industrial dispute; (e) anything done or not done by the *Client*; (f) delays in getting any approvals; (g) the delay in the supply of materials; (h) the period known as "Building Industry Shutdown" being a five (5) week period commencing on or about 22 December in each year; and (i) the *Contract Documents* not being fully completed or made

- available to *Australian Power Equipment* by the date of the *Agreement*.
- 12.2 *Australian Power Equipment* shall not be liable for the failure to perform the *Services* or the *Agreement* to the extent and for so long as its performance is prevented or delayed without substantial fault or negligence by *Australian Power Equipment* because of a circumstance referred to in clause 12.1.
- 12.3 Where the costs of the *Services* has increased due to any delay beyond the control of *Australian Power Equipment*, there shall be a deemed *Variation* and *Australian Power Equipment* shall be entitled to a reasonable increase in the *Contract Price*.
- 13. Suspension**
- 13.1 If the *Client* is in breach of the *Agreement* *Australian Power Equipment* may suspend the carrying out of the *Services* and must promptly give to the *Client* written notice of the suspension and details of the breach.
- 13.2 *Australian Power Equipment* must recommence the carrying out of the *Services* within a reasonable time after the *Client* remedies the breach and gives *Australian Power Equipment* written notice of that fact.
- 14. Practical Completion**
- 14.1 *Australian Power Equipment* will give notice to the *Client* of *Practical Completion* of the *Services* within five (5) *Business Days* of *Practical Completion*. A *Progress Claim* claiming the total *Contract Price* or the unclaimed balance of the *Contract Price* shall be deemed to be notice of *Practical Completion* of the *Services*.
- 14.2 If the *Client* disagrees that the *Services* have reached the stage of *Practical Completion* the *Client* must notify *Australian Power Equipment* in writing within five (5) *Business Days* of the notice of *Practical Completion* stating the reasons why the *Services* are not practically complete. *Australian Power Equipment* shall as soon as practicable after receipt of such notice:
- complete those things as may be necessary to bring the *Services* to the stage of *Practical Completion* and give the *Client* a further notice of *Practical Completion*, or
 - reject the *Client's* notice and/or initiate dispute resolution procedures.
- 14.3 If the *Client* fails to give a notice pursuant to Clause 14.2, the *Client* is deemed to have acknowledged that the *Services* have reached the stage of *Practical Completion*.
- 14.4 *Australian Power Equipment* is not required to obtain any Certificate of Occupancy or Construction Certificate relating to the *Services*.
- 15. Hire of Equipment**
- 15.1 This clause applies if the *Agreement* includes the hire of equipment to the *Client*.
- 15.2 In this clause:
- "*Equipment*" means the equipment specified in the *Quotation* to be hired to the *Client*;
 - "*Hire Fee*" means the fee specified in the *Quotation* for the hire of the *Equipment*;
 - "*Hire Start Date*" and "*Hire End Date*" mean the dates so specified in the *Quotation* or such other date as the parties agree in writing;
 - "*Hire Period*" means the period commencing on the *Hire Start Date* and ending on the *Hire End Date*.
- 15.3 Subject to clause 15.9, *Australian Power Equipment* shall provide and the *Client* shall take on hire the *Equipment* for the *Hire Period*
- 15.4 The *Client* shall pay, at the same times as *Progress Claims* are due and payable under the *Agreement*:
- the *Hire Fee* to *Australian Power Equipment* progressively during the *Hire Period*,
 - Australian Power Equipment's* costs of delivering and/or collecting the *Equipment* to or from any site,
 - Australian Power Equipment's* costs of repairing any damage to the *Equipment* for which the *Client* is responsible, and
 - the full replacement cost of the *Equipment* where the *Client* fails or refuses to return the *Equipment* or make the *Equipment* available for collection.
- 15.5 The *Client* warrants that it:
- has inspected or had a reasonable opportunity to inspect the *Equipment* prior to placing the *Order*,
 - has not relied on any representation by *Australian Power Equipment* in relation to the suitability of the *Equipment* for any purpose,
 - will only use the *Equipment* in accordance with the recognized methods and use for equipment of the type, and
 - will keep the *Equipment* clean and in good working order and repair and will comply with any maintenance schedules referred to in the *Quotation*.
- 15.6 Except with *Australian Power Equipment's* prior written consent, the *Client* shall:
- keep *Equipment* at the location at which it was delivered or at which its intended use was disclosed to *Australian Power Equipment* prior to collection and not remove the *Equipment* from that location,
 - not make any replacement, alteration or addition to the *Equipment*, and
 - keep the equipment in the *Client's* sole possession and control.
- 15.7 The *Client* agrees to use, operate and possess the *Equipment* at the *Client's* risk. The *Client* shall be fully responsible for and liable to *Australian Power Equipment* for any loss or damage to the *Equipment* howsoever occasioned, except fair wear and tear. The *Client* shall notify *Australian Power Equipment* in writing as soon as practicable upon it becoming aware of any loss or damage to the *Equipment* in excess of fair wear and tear.
- 15.8 Title to the *Equipment* shall at all times vest in *Australian Power Equipment*. *Australian Power Equipment* shall be entitled to inspect the *Equipment* at any time on reasonable notice.
- 15.9 In the event of any default or termination of the *Agreement* the *Client* shall return the *Equipment* to *Australian Power Equipment* on demand.
- 16. Defects Liability Period**
- 16.1 This clause applies if the *Quotation* specifies a defects liability period in relation to the *Services*.
- 16.2 The defects liability period shall commence on the date of *Practical Completion*.
- 16.3 The *Client* may, before the end of the defects liability period, give *Australian Power Equipment* one (1) list of defects in the *Services* that appear after the date of *Practical Completion*.
- 16.4 *Australian Power Equipment* must rectify defects that are *Australian Power Equipment's* responsibility and which are notified to *Australian Power Equipment* during the defects liability period within a reasonable time.
- 17. Dispute Resolution**
- 17.1 The parties must attempt to resolve any dispute or claim arising out of or under the *Agreement* by negotiation in good faith before either party commences any litigation in relation to the dispute or claim. Accordingly, if a party considers that a dispute or claim has arisen under the *Agreement* they must give written notice to the other party adequately setting out and providing details of the dispute.
- 17.2 *Australian Power Equipment* and the *Client* must meet within ten (10) *Business Days* of the giving of a notice pursuant to clause 17.1 to attempt to resolve the dispute or claim or to agree on methods of doing so. The parties must be represented at the meeting by a person with authority to agree to a resolution of the dispute.
- 17.3 If the dispute is resolved the parties must write down the resolution and sign it.
- 17.4 The parties agree that anything done or said in the negotiations can not be revealed in any other proceedings.
- 17.5 Nothing in this clause affects the rights of the parties pursuant to the *Security of Payment Law* or prevents either party from commencing urgent injunctive or interlocutory proceedings in a competent Court.
- 18. Default & Termination of Contract**
- 18.1 Without limiting clause 18.2, a party may terminate the *Agreement* if:
- the other party is in default of the *Agreement*,
 - the non-defaulting party has served notice in writing on the party setting out details of the default and stating that the party will be entitled to terminate the *Agreement* unless the default is remedied within a specified time of not less than 14 days,
 - the party fails to remedy the default within 14 days of receiving a notice under clause 18.1(b), or such longer period as may be specified in the notice, and
 - the non-defaulting party serves written notice of termination whilst the default remains unsatisfied.
- 18.2 If the *Client* fails to pay any money under the *Agreement* within seven (7) days of the due date for payment:
- Australian Power Equipment* may terminate the *Agreement* by notice in writing to the *Client*,
 - Australian Power Equipment* shall be entitled to interest on the outstanding amount at the rate of 2.5% per calendar month calculated daily from the due date for payment and compounding monthly on the first day of each month until payment is received,

- (c) may without notice sell any *Goods* that *Australian Power Equipment* has recovered pursuant to clause 8 on such terms and in such manner as it determines and, after deducting all expenses incurred, shall offset such proceeds from the balance owing from *Australian Power Equipment*,
- (d) the *Client* shall indemnify *Australian Power Equipment* from and against all costs and disbursements incurred or payable by *Australian Power Equipment* in connection with the recovery of monies owing by *Australian Power Equipment* (including, without limitation, legal fees on an indemnity basis, collection agency costs and bank dishonour fees), and
- (e) *Australian Power Equipment* may cancel all or any part of the *Services* or *Services* in connection with any other contract or contracts made with the *Client* to which these terms and conditions apply whereafter all amounts payable by the *Client* to *Australian Power Equipment* shall become payable immediately.
- 18.3 The *Client* agrees to pay to *Australian Power Equipment*, as genuine pre-estimate of *Australian Power Equipment's* costs:
- (a) a processing and handling fee of \$20.00 in respect of each payment made under the *Agreement* that is not in satisfaction, or in satisfaction of the balance, of a *Progress Claim*, and
- (b) a default fee of \$50.00 in respect of any failure by the *Client* to pay a *Progress Claim* by the due date for payment or by the corresponding day of each subsequent calendar month until the *Progress Claim* is paid in full.
- 19. Warranties & Representations**
- 19.1 The *Client* warrants that the *Services* and/or *Goods* relate to 'construction work' or 'related goods and services' within the meaning of the *Security of Payment Law* and that the *Security of Payment Law* will apply to the *Agreement* unless the *Client* has specified otherwise in writing in the *Order*.
- 19.2 Subject to clause 2.2 and except as expressly provided to the contrary in the *Contract Documents*, all representations, warranties, guarantees and conditions in relation to the *Services* or the *Goods* (whether implied or otherwise) are hereby excluded to the maximum extent permitted by law.
- 19.3 If the *Client* is aware (or should be aware) that the *Services* or the *Goods* are for a particular purpose or are required to possess particular or uniform characteristics, the *Client* agrees to clearly specify that purpose or those characteristics in writing in the *Order*.
- 19.4 The *Client* warrants that it has made its own enquiries in relation to the suitability of the *Services* and the *Goods* and has not relied on any representation made by *Australian Power Equipment* in relation to their suitability for any particular purpose.
- 20. Return of Goods**
- 20.1 Subject to any applicable statute, unless *Australian Power Equipment* agrees otherwise in writing, *Australian Power Equipment* will only accept a return of the *Goods* if:
- (a) the *Client* has complied with clauses 6.6 and 6.7,
- (b) *Australian Power Equipment* acting reasonably has agreed that the *Goods* are defective and not reasonably capable of repair,
- (c) the *Goods* are returned at the *Client's* expense and within an reasonable time, and
- (d) the *Goods* are returned, as far as possible, in the same condition as the *Goods* were delivered.
- 20.2 If *Australian Power Equipment* agrees in its absolute discretion to accept the return of any non-defective *Goods*, the *Client* shall:
- (a) indemnify *Australian Power Equipment* in relation to any freight expense, and
- (b) if required by *Australian Power Equipment*, pay handling fees of up to 10% of the price of the *Goods* returned.
- 21. Limitation of Liability**
- 21.1 *Australian Power Equipment's* liability to the *Client* (and any party claiming through the *Client* against *Australian Power Equipment*) for any claim for loss or damage (including legal expenses), whether arising in contract, tort or otherwise, in connection with the *Agreement* shall be as follows:
- (a) where the liability relates to the supply of services, *Australian Power Equipment's* liability shall be limited to the lesser of the costs of: (i) supplying the services again, or (ii) payment of the costs of having the services supplied again, or
- (b) where the liability relates to the supply of goods, *Australian Power Equipment's* liability shall be limited to the lesser of the cost of: (i) replacement of the goods or the supply of equivalent goods, (ii) repair of the goods, (iii) payment of the costs of replacing the goods or acquiring equivalent goods, or (iv) payment of the costs of having the goods repaired.
- 21.2 Notwithstanding any other term of the *Agreement* but subject to any applicable statute, *Australian Power Equipment* shall not be liable for any defect, fault or damage to the *Goods* of any nature whatsoever:
- (a) in respect of which notice was not provided in accordance with clauses 6.6 or 6.7, or
- (b) resulting from or caused or contributed to in any way by: (i) the *Client* failing to properly maintain or store the *Goods* after delivery, (ii) the *Client* using the *Goods* for any purpose other than that for which the *Goods* were designed, (iii) the *Client* continuing to use the *Goods* after any defect became apparent or ought reasonably to have become apparent, (iv) the *Client* failing to following any instructions or guidelines provided by *Australian Power Equipment* or the manufacturer of the *Goods*, or (v) fair wear and tear or any accident or act of God.
- 21.3 If *Australian Power Equipment* did not manufacture the *Goods*, *Australian Power Equipment's* liability shall be limited to the lesser of the liability of the manufacturer of the *Goods* to *Australian Power Equipment* and the liability determined under clause 21.1(b).
- 21.4 Unless the *Quotation* contains an express warranty, the *Client* acknowledges that the *Goods* supplied may exhibit variations in shade, colour, texture, surface and finish and may fade or change colour over time. *Australian Power Equipment* shall make reasonable efforts to match batches of products supplied and minimise such variations but shall not be liable in any what whatsoever where such variations occur.
- 21.5 *Australian Power Equipment* shall not be liable for any indirect, special or consequential loss or damage of any nature whatsoever resulting from or caused in any way by the carrying out of the *Services* or supply of the *Goods*.
- 22. Guarantee**
- 22.1 In consideration for *Australian Power Equipment* entering into the *Agreement*, the *Guarantor* guarantees to *Australian Power Equipment* the performance by the *Client* of all of the *Client's* obligations under the *Agreement* including any *Variation*.
- 22.2 If the *Client* does not pay any money due under the *Agreement* the *Guarantor* must pay that money to *Australian Power Equipment* on demand without deduction, set-off or counterclaim even if *Australian Power Equipment* has not tried to recover payment from the *Client*.
- 22.3 Even if *Australian Power Equipment* gives the *Client* extra time to comply with an obligation under the *Agreement* or does not insist on strict compliance with the terms of the *Agreement* the *Guarantor's* obligations will not be affected.
- 22.4 Where a payment made by the *Client* or the *Guarantor* to *Australian Power Equipment* is set aside by law, the parties are restored to their respective positions prior to the payment being made and are entitled to exercise all rights which they had under the *Agreement*.
- 22.5 If there is more than one (1) *Guarantor*:
- (a) this guarantee shall be binding on each of them jointly and severally, and
- (b) the release by *Australian Power Equipment* of any *Guarantor* from this guarantee does not affect the liability of any other *Guarantor*.
- 22.6 The *Guarantor's* liability under this clause is continuing and unlimited.
- 23. Personal Property Security**
- 23.1 In this clause 'amendment demand', 'attaches', 'financing statement', 'financing change statement', 'security agreement', 'security interest' and 'verification statement' have the meanings given to them by the *PPSA*.
- 23.2 The *Client* and the *Guarantor*, if any, hereby charge the *Goods* and all of their respective *personal property* as security for the performance by the *Client* of the *Client's* obligations under the *Agreement*.
- 23.3 The *Client* acknowledges and agrees that:
- (a) the *Agreement* constitutes a *security agreement* for the purposes of the *PPSA*, and
- (b) a *security interest* exists in all goods (and their proceeds) previously supplied by *Australian Power Equipment* to the *Client* (if any) and in all future goods supplied (and their proceeds),
- (c) the *Client* has received or will receive value as at the date of first delivery of the *Goods* (or any part of the *Goods*) and that *Australian Power Equipment* has not agreed to postpone the time the *security interest* attaches to the *Goods*, and
- (d) where *Australian Power Equipment* has rights in addition to those under Chapter 4 of the *PPSA*, those rights will continue to apply.
- 23.4 The *Client* shall:
- (a) promptly sign all documents and provide any further information that *Australian Power Equipment* may reasonably require to register a *financing statement* or *financing change statement* in relation to a *security interest* granted to *Australian Power Equipment* under

- the *Agreement* or any other document required to be registered under the *PPSA*,
- (b) notify *Australian Power Equipment* in writing of any intention to change the *Client's* business practices to include the sale or leasing of goods of like kind to the *Goods* (or any part thereof) in the ordinary course of the *Client's* business, and
- (c) on demand reimburse *Australian Power Equipment* for all costs and expenses incurred in registering a *financing statement* or *financing change statement*.
- 23.5 The *Client* must not, without *Australian Power Equipment's* prior written consent:
- (a) register or permit to be registered a *financing statement* or *financing change statement* in relation to the *Goods* in favour of a third party, or
- (b) register or cause to be registered a *financing change statement* in respect of a *security interest* granted under the *Agreement*,
- (c) issue or permit any other person to issue an *amendment demand* to *Australian Power Equipment* unless all monies payable by the *Client* under the *Agreement* have been received by *Australian Power Equipment* in cleared funds.
- 23.6 Any requirement under the *PPSA* on the part of *Australian Power Equipment* to give a notice to the *Client* or any *Guarantor* shall not, to the extent that the requirement may be contracted out of (including, without limitation, under Section 115(1) of the *PPSA*), apply to the *Agreement*. Further, to the extent that the *Client* and/or the *Guarantor* may waive the right to receive a notice under the *PPSA* (including, without limitation, notice in relation to a *verification statement* under Section 157(1) of the *PPSA*), the *Client* and the *Guarantor* waives that right.
- 23.7 The *Client* irrevocably authorises and licenses *Australian Power Equipment* to enter upon the *Client's* property or premises, without notice, and without being in any way liable to the *Client*, if *Australian Power Equipment* has cause to exercise any of *Australian Power Equipment's* rights under Section 123 of the *PPSA*, and the *Client* shall indemnify *Australian Power Equipment* from any claims made by any third party as a result of such exercise.
- 23.8 *Australian Power Equipment* and the *Client* agree to treat information of the kind referred to in Section 275(1) of the *PPSA* as confidential. Neither *Australian Power Equipment* or the *Client* will disclose, send or make available any of the information referred to in Section 275(1) of the *PPSA* to any person except as required by law or the *Agreement*.
- 23.9 *Australian Power Equipment* and the *Client* acknowledge and agree that clause 23.8 constitutes a confidentiality agreement pursuant to Section 275(6) of the *PPSA*.
- 24. Real Property Security**
- 24.1 The *Client* and the *Guarantor*, if any, hereby charges all their right, title and interest in any real property or other assets capable of being charged that they, or any of them, own or hereafter own either solely or jointly, in favour of *Australian Power Equipment* as security for the performance of the *Client's* obligations pursuant to the *Agreement* and authorises *Australian Power Equipment* to register a *Caveat* over the title of any such property in the event of a default by the *Client* under the *Agreement*.
- 24.2 The *Client* shall indemnify *Australian Power Equipment* from and against all costs and disbursements incurred or payable by *Australian Power Equipment* in connection with exercise of *Australian Power Equipment's* rights under clause 24.1 (including, without limitation, legal fees on a solicitor-client basis, stamp duty and registration fees).
- 25. Intellectual Property**
- 25.1 Where *Australian Power Equipment* has designed, drawn or developed unique and/or original designs or drawings in connection with the *Services* or any *Goods*, copyright in such designs or drawings shall vest in *Australian Power Equipment*.
- 25.2 The *Client* warrants that *Australian Power Equipment* is entitled to use all documents and drawings provided by the *Client* for the purposes of performing the *Services* and that such use will not infringe any third party's intellectual property rights.
- 25.3 The *Client* shall indemnify *Australian Power Equipment* from and against all claims and all losses and damages incurred by *Australian Power Equipment* as a consequence of any claim against *Australian Power Equipment* for infringement of a third party's intellectual property rights in connection with the carrying out the *Services* or supply of the *Goods* in accordance with a document that is; supplied by, prepared under the instruction of, or prepared from sketches provided by, the *Client*.
- 25.4 The *Client* authorises *Australian Power Equipment* to use any documents, designs, drawings or goods that *Australian Power Equipment* has created for the *Client* including photographs thereof
- for the purposes of marketing *Australian Power Equipment's* business or entry into any competition.
- 26. Subcontracting & Assignment**
- 26.1 *Australian Power Equipment* may subcontract the whole or any part of the *Services* but remains responsible for all of the *Services*.
- 26.2 *Australian Power Equipment* may assign the *Agreement* to any person. In the event of the assignment the *Client* may, if it has reasonable grounds to believe that the assignee will not comply with the *Agreement*, within seven (7) days of receiving notice of the assignment terminate the *Agreement* by 30 days written notice to *Australian Power Equipment* whereafter the termination will be effective unless the assignment is withdrawn.
- 27. Cancellation**
- 27.1 Notwithstanding any other clause herein *Australian Power Equipment* may cancel any agreement to which these terms and conditions apply at any time before the *Services* are commenced or *Goods* delivered by giving written notice to the *Client* whereafter any deposit or other amount paid by the *Client* on account of the *Services* or the *Goods* shall become immediately repayable to the *Client*. *Australian Power Equipment* shall not be liable for any consequential loss or damage in relation to any such cancellation.
- 27.2 If the *Client* purports to cancel the *Agreement*, without limiting any other right available to *Australian Power Equipment*, the *Client* shall be liable to *Australian Power Equipment* for any and all loss or damage suffered by *Australian Power Equipment* in connection with the cancellation including, without limitation, loss of profit in respect of the *Services* and supply of the *Goods* and/or loss of profits in respect of orders and opportunities foregone as a result of the scheduling of the *Services*.
- 28. Privacy Act 1988 (Cth)**
- 28.1 Despite clause 1.5, this clause applies upon the making of an *Order* before and after any *Order Acceptance*.
- 28.2 The *Client* and the *Guarantor*, if any, consent to *Australian Power Equipment* obtaining a Credit Report from a credit reporting agency in relation to the *Client* and the *Guarantor* respectively for the purpose of:
- (a) assessing the creditworthiness of the *Client*, and
- (b) the collection of payments that are overdue in respect of commercial credit.
- 28.3 The *Client* and the *Guarantor*, if any, agree that *Australian Power Equipment* may exchange information about the *Client* and the *Guarantor* with those credit providers either named as trade referees by the *Client* or named in a Credit Report issued by a credit reporting agency for the following purposes:
- (a) to assess an application for commercial credit by the *Client*,
- (b) to notify other credit providers of a default by the *Client*,
- (c) to exchange information with other credit providers, where the *Client* is in default with other credit providers, and
- (d) to assess the creditworthiness of the *Client*.
- 28.4 The *Client* and the *Guarantor*, if any, consent to *Australian Power Equipment* using any personal information collected by *Australian Power Equipment* for the following purposes or as required by law:
- (a) the performance of the *Services* and/or supply of *Goods*,
- (b) the marketing of the supply of *Goods* or services by *Australian Power Equipment*,
- (c) the analysing, verifying and checking of the *Client's* credit and/or payment status in relation to the performance of the *Services* and/or supply of *Goods*,
- (d) the processing of any payment instructions, direct debit facilities and/or credit facilities requested by the *Client*, and
- (e) enabling the daily operation of the *Client's* account and/or the collection of amounts outstanding in the *Client's* account in relation to the performance of the *Services* and/or supply of *Goods*.
- 28.5 *Australian Power Equipment* may give information about the *Client* and the *Guarantor* to a credit reporting agency for the following purposes:
- (a) to obtain a consumer credit report about the *Client* and/or the *Guarantor*, or
- (b) allow the credit reporting agency to create or maintain a credit information file containing information about the *Client* and/or the *Guarantor*.
- 29. GST**
- 29.1 The *Contract Price* and all other monies payable by the *Client* pursuant to the *Agreement* are exclusive of GST.
- 29.2 If *Australian Power Equipment* incurs a liability to pay GST in connection with a supply to the *Client* pursuant to the *Agreement*, the consideration that the *Client* must pay to *Australian Power Equipment* for the supply is increased by an amount equal to the GST liability that *Australian Power Equipment* incurs in making the supply and the amount of the GST liability is payable at the same

time and in the same manner as the consideration in respect of the supply is payable.

29.3 *Australian Power Equipment* shall provide the *Client* with a tax invoice for any GST included in any payment made pursuant to the *Agreement*.

30. Notices

30.1 The parties agree that email shall be the primary method of contact and communication in relation to any matters arising under the *Agreement*.

30.2 A notice is deemed to have been given or serviced if the notice is:

- (a) delivered by hand to the other party,
- (b) posted by ordinary prepaid mail to the other party's address (including a Post Office Box) stated in the Quotation or Order on the second Business Day following the date of posting, or
- (c) sent by facsimile transmission to the parties' facsimile number stated in the Quotation or Order upon receiving confirmation of delivery of the transmission, or
- (d) sent by email to the parties' email address stated in the Quotation or Order upon receiving confirmation of delivery of the email without error.

31. General

31.1 Payments may only be made by cash, bank cheque, electronic funds transfer or credit card (unless *Australian Power Equipment* agrees otherwise in relation to a payment). The *Client* agrees to pay a surcharge equal to 2.5% in respect any payment made via credit card.

31.2 The *Client* may not; (a) set off against or deduct from any monies payable under the *Agreement* any sums owed or claimed to be owed by *Australian Power Equipment* to the *Client*, or (b) withhold payment of any *Progress Claim* because the *Progress Claim* or part of it is in dispute.

31.3 The *Agreement* embodies the whole agreement between the parties relating to the subject matter of the *Agreement* and supersedes any and all oral and written negotiations and communications by or on behalf of any of the parties.

31.4 The terms in the *Agreement* may not be varied, waived, discharged or released, except with the prior written consent of the parties.

31.5 No right under the *Agreement* is waived or deemed to have been waived in relation to any particular instance unless in writing and signed by the party waiving the right. A party does not waive its right under the *Agreement* by granting an extension of time or any other forbearance to another party.

31.6 The *Agreement* shall be governed by and constructed pursuant to the laws of the State or Territory in which the *Order* is received. The parties irrevocably submit to the jurisdiction of the Courts of that State or Territory in connection with any dispute relating to the *Agreement*. The parties further agree that the Court of competent jurisdiction located closest to *Australian Power Equipment's* principal place of business in the relevant State or Territory shall be the appropriate Court for the hearing of any claims in connection with this *Agreement*.

31.7 The parties agree that a construction of the *Agreement* that results in all provisions being enforceable is to be preferred to a construction that does not so result.

31.8 If, despite the application of clause 31.7, a provision of the *Agreement* is illegal or unenforceable:

- (a) if the provision would not be illegal or unenforceable if a word or words were omitted, that word or those words are severed; and
- (b) in any other case, the whole provision is severed, and the remainder of the *Agreement* continues in force.

32. Definitions & Interpretation

32.1 In these terms and conditions:

- (a) "**Australian Power Equipment**" means AC2 Electrical Pty Limited trading as Australian Power Equipment ABN 27 643 306 763, its successors and assigns;
- (b) "**Agreement**" means the agreement between the Client and *Australian Power Equipment* arising from *Australian Power Equipment's* acceptance of an Order from the Client;
- (c) "**Authority**" means the Local Government, State or Federal Government, or any Government agency that has power to affect the Services;
- (d) "**Business Day**" means any day other than Saturdays, Sundays or public holidays in Newcastle, NSW;
- (e) "**Client**" means the party named as the Client or customer in the Quotation, or if there was no written Quotation, in the *Order*;
- (f) "**Contract Documents**" means these terms and conditions, the *Order*, the Quotation, the *Order Acceptance* and the plans (or measurements) and specifications, if any, specified in the Quotation;

- (g) "**Contract Price**" means the amount or rates stated as the price in the Quotation, or if there was no written Quotation, in the *Order*;
- (h) "**Exclusions**" means the exclusions described in the Quotation;
- (i) "**Goods**" means any equipment, goods and other parts and components to be supplied by *Australian Power Equipment* as described in the *Contract Documents* ;
- (j) "**GST**" has the same meaning as given to it in the A New Tax System (Goods and Services Tax) Act 1999.
- (k) "**Guarantor**" means the person or persons who have signed the *Order* as Guarantor and includes their executors, administrators, successors and assigns;
- (l) "**Order**" means a work order or purchase order in writing issued by *Australian Power Equipment* in relation to a Quotation,
- (m) "**Order Acceptance**" is defined in clause 1.4.
- (n) "**PPSA**" means the Personal Property Securities Act 2009 (Cth);
- (o) "**Practical Completion**" means when the Services are complete except for minor omissions and defects that do not prevent the Services from being reasonably capable of being used for their usual purpose;
- (p) "**Profit Margin**" means a margin of 25% plus GST or such other margin specified in the Quotation (if any).
- (q) "**Progress Claim**" means both a tax invoice as defined in the A New Tax System (Goods and Services Tax) Act 1999 and a Payment Claim as defined by the Security of Payment Law;
- (r) "**Quotation**" means the proposal, if any, provided by *Australian Power Equipment* to the Client in respect of the Services and/or the Goods to which the *Order* relates;
- (s) "**Security of Payment Law**" means the laws in the State or Territory applying to the *Agreement* governing the rights of parties in the building and construction industry to obtain security for payment and, in New South Wales being the Building and Construction Industry Security of Payment Act 1999;
- (t) "**Services**" means the services described in the *Contract Documents* and includes Variations but excludes the Exclusions.
- (u) "**Site**" means the address at which the Services are to be carried out as specified in the Quotation or if there was no written Quotation, in the *Order* or the *Order Acceptance*;
- (v) "**Stand Down Time**" means anytime that the equipment and/or employees or *Australian Power Equipment* used by *Australian Power Equipment* or intended to be used in connection with the Services and/or supply the Goods are used to perform the Services and/or supply the Goods (and during which time *Australian Power Equipment* would otherwise have used the equipment or labour to perform the Services and/or supply the Goods) as of any;
 - (i) Variation,
 - (ii) inclement weather,
 - (iii) requirement or direction by the *Client*,
 - (iv) valid suspension of the Services, or
 - (v) other delay beyond *Australian Power Equipment's* control
- (w) "**Standby Rates**" means the rates specified in the Quotation, or if no rate is specified, a reasonable rate corresponding to the equipment and/or employees or *Australian Power Equipment* affected by the *Stand Down Time*.
- (x) "**Variation**" means to vary the Services by; carrying out additional work, omitting any part of the Services or changing the scope of the Services.

32.2 In the *Agreement*, unless otherwise indicated by the context: (a) the singular includes the plural and vice versa; (b) a reference to one gender includes a reference to all other genders; (c) headings to clauses are included for the sake of convenience only and will not affect the interpretation of the clauses to which they relate; (d) references to any statute or statutory provision include that statute or statutory provision as amended, extended, consolidated or replaced by subsequent legislation and any *Orders*, regulations, instruments or other subordinate legislation made under the relevant statute; (e) the word person means and includes a natural person, a company, a firm or any other legal entity whether acting as a trustee or not; (f) the *Agreement* will bind each party's legal personal representatives, successors and assigns; and (g) where a party comprises two (2) or more persons the rights and obligations of such persons pursuant to the *Agreement* will ensue for the benefit of and bind each of them jointly and severally.