

Terms and Conditions

Fresh Construction ACN 626 743 020



Fresh Construction

1. Application

- 1.1. These Terms of Engagement (“**Terms**”) will apply to any order for and any supply of Goods and/or Services by us to you.
- 1.2. If these Terms are to be modified or are not being used, they must be explicitly varied or excluded by the terms of another contract or agreement in writing between the parties.

2. Order for Goods and/or Services

- 2.1. Any quotation or estimate by us does not constitute an offer to supply.
- 2.2. Unless otherwise stated by us, any quotation or estimate by us will remain valid for 30 calendar days from the date of the quotation, however, we may withdraw or vary a quotation at any time prior to our acceptance of an Order.
- 2.3. Any Order placed by you to us or any acceptance of the supply of any Goods and/or Services by you will constitute your agreement to these Terms.
- 2.4. No Order will be binding on us unless we accept the Order.
- 2.5. If we accept an Order, a binding Contract is created and we will supply the Goods and/or Services to you, and you will pay the Price to us in accordance with the terms of the Contract (which includes these Terms), but the Contract will be subject to the availability of the materials necessary to supply the Goods.
- 2.6. If you cancel or terminate any Order or Contract you must pay to us any costs, losses, expenses, or other applicable fees and charges including for loss of income or profits, incurred by us due to the cancellation or termination of any Order or Contract.

3. Plans and Drawings

- 3.1. You must provide to us all information, instructions, reports, drawings, plans, specifications, approvals, properties, and facts relevant to the Goods and/or Services and performance of our obligations, at the time you request a quotation from us and prior to placing any Order with us.
- 3.2. If at any time we consider that any information, instructions, reports, drawings, plans, specifications, properties, or facts provided by you are not sufficient to enable us to supply the Goods and/or Services in accordance with the Contract, you must, at your cost, provide such further information, documents, or assistance as we consider reasonably necessary.
- 3.3. We will be entitled to rely on the accuracy of any information, instructions, reports, drawings, plans, specifications, properties, and facts provided by you.
- 3.4. If there are errors in any information, instructions, reports, drawings, plans, specifications, properties, or facts provided to us, we will, in addition to our other rights under these Terms and at law, be entitled to vary the Price.
- 3.5. You will be required to provide approval to the final design of any Goods and/or Services to be provided to you under a Contract. Approval by you of the final design will indicate acceptance of the design as is, and if your instructions change following that approval or you wish to make any amendments to the Goods and/or Services, and if we agree to such amendments, additional fees will be payable by you. Any further amendments will require further approval from you before we will proceed.
- 3.6. You must ensure the specifications and properties of Goods and/or Services stated in any Order will be fit for the intended purpose of the Goods and/or Services.
- 3.7. You are responsible for the quantity of any Goods and/or Services in any Order, and we will not be liable if there is any excess or shortfall of the Goods and/or Services for the intended purpose.
- 3.8. We may cancel any Contract at any time prior to delivery of the Goods and/or Services and will repay any amount of the Price paid in advance of the cancellation.

4. Price

- 4.1. If not specifically stipulated in the Contract,
 - (a) the Price will be our list price on the date of dispatch of the Goods and/or Services and is subject to variation.
 - (b) we may invoice you for Goods and/or Services before we supply the Goods and/or Services, or we may invoice at certain stages of supply of the Goods and/or Services.
 - (c) the Price is exclusive of any delivery charges and exclusive of GST.
- 4.2. We may require a deposit to be paid towards the total amount for the Goods and/or Services, prior to commencing any work, with the remainder payable on completion of the Goods and/or Services.

- 4.3. If you purport to terminate a Contract following the payment of the deposit, we reserve the right to retain the deposit, and we will retain all right title and interest in any and all Intellectual Property Rights in the Goods and/or Services.
- 4.4. If you attempt to vary the Goods and/or Services to be provided under a Contract, and we agree to such variation prior to the provision of the Goods and/or Services, we reserve the right to vary the Price.
- 4.5. You must not withhold, make deductions from, or set-off, payment of any money owed to us for any reason.
- 4.6. We may charge, in addition to the Price, any other fees, charges, and surcharges that we incur or notify to you from time to time.

5. Delivery of Goods

- 5.1. If we agree to deliver Goods, we:
 - (a) will charge delivery charges, demurrage, waiting time and other charges in our price list or otherwise nominated by us from time to time;
 - (b) will endeavour to deliver the Goods to the Delivery Address on the Delivery Date;
 - (c) may leave the Goods at the Delivery Address whether any person is present to accept delivery; and
 - (d) may charge further delivery charges if you are unable to receive delivery of the Goods at the Delivery Address or on the Delivery Date or in accordance with any other delivery arrangements.
- 5.2. We will only deliver Goods during our usual business hours unless we agree otherwise in writing.
- 5.3. We may deliver Goods in separate instalments.
- 5.4. You will ensure a member of your Personnel will be at the Delivery Address on the Delivery Date to sign the delivery docket on your behalf. We are not obliged to obtain a signed receipt or other acknowledgment from any person at the Delivery Address.
- 5.5. We may deliver Goods to the Delivery Address regardless of whether there is anyone at the Delivery Address at the time of delivery. We will not be liable at all for any loss suffered by you after delivery to the Delivery Address.
- 5.6. You agree:
 - (a) our responsibility for delivery of the Goods will cease at the threshold of the Delivery Address;
 - (b) you must provide safe access for delivery of the Goods; and
 - (c) we may refuse to deliver the Goods, and return the Goods at your cost, if we or a member of our Personnel consider it would be unsafe to deliver the Goods.
- 5.7. The signature of a member of your Personnel or from someone believed by us to be authorised by you on the delivery docket will represent your acknowledgement that the Goods comply with the Contract and these Terms.
- 5.8. A certificate signed by us in relation to delivery of the Goods will be prima facie evidence of the fact and you will not object to the admissibility of such a certificate in any legal proceedings.
- 5.9. You must inspect the Goods immediately on collection or delivery of the Goods.
- 5.10. We will not be liable for any failure to deliver or for delay in delivery of Goods occasioned by any strike, lockout, shortage of stock, shortage of labor, lack of skilled labor, delays in transit, fire, flood, hostility, civil commotion, or other causes whatsoever whether or not beyond our control.

6. Provision of Services

- 6.1. Subject to this clause it is our responsibility to ensure that the Services start as soon as reasonably practicable.
- 6.2. The timeframe for us to complete the Services will be extended by whatever time reasonable in the event we request an extension of time, in writing to you.
- 6.3. At our discretion, the cost of delivery may be changed to include additionally requested Services.
- 6.4. You will ensure that we have clear and unlimited access to the site at all given times to provide the Services. We will not be liable for any loss or damage to the Delivery Address, including but not limited to, damage to pathways, driveways or any concreted/grassed/paved areas unless there is negligence on our behalf.
- 6.5. Where we are required to store items at the Delivery Address in order to be able to provide the Services, you agree to supply us with a safe area for storage and will take all reasonable efforts to protect all items from destruction, theft or damage. In the event that any of the stored items are destroyed, stolen or damaged, then the cost of repair or replacement will be the your responsibility.
- 6.6. You agree and acknowledge that we will provide the Services to you between the hours of 7am – 4pm, and that access to the site will be provided to us within these times, unless as otherwise agreed between the parties in writing.

7. Change in Control

- 7.1. You will give us no less than fourteen days written notice of any amendments in ownership or change in your details, including but not limited to, your name, address, phone number, change of trustees or business practice.
- 7.2. You will be liable for any loss incurred by us as a result of your failure to comply with this clause.

8. Building Work Contractors Act 1995 (SA) (the "Act")

- 8.1. At our sole discretion, if there are any disputes or claims for unpaid Goods and/or Services, then the provisions of the Act may apply.
- 8.2. Nothing in these Terms is intended to have the effect of contracting out of any applicable provisions of the Act, except to the extent permitted by the Act where applicable.

9. Title

- 9.1. We may withhold any Goods and/or Services until you make full payment of the Price and any other amounts payable to us. If we supply the Goods, however, you will not receive title to the Goods until you make full payment of the Price and any other amounts payable to us.
- 9.2. Until title in the Goods passes to you in accordance with these Terms, you will:
 - (a) be a fiduciary bailee of the Goods;
 - (b) ensure the Goods are kept separate and identifiable from other goods;
 - (c) not grant any charge over, or interest in, the Goods to any third party;
 - (d) return any Goods to us immediately on request;
 - (e) authorise us or any agent of ours to enter any land and premises owned, occupied, or controlled by you where the Goods are located and take possession of the Goods; and
 - (f) hold the proceeds from any sale or disposal of the Goods on trust for us,and we may repossess, retain, deal with, or sell the Goods as we determine in our absolute discretion.
- 9.3. We may, for the purposes of exercising our rights under **clause 8.2**, enter any premises owned, occupied, or controlled by you and remove the Goods including by detaching or unfixing the Goods from any goods or land to which the Goods are attached or fixed. You indemnify us from any loss or damage suffered by us or claims brought against us arising out of us retaking possession of the Goods.

10. Payments and Personal Property Securities

- 10.1. You must make full payment of the Price and any other amounts payable to us on the date specified in the Contract or, if no date is specified in the Contract, within 7 calendar days of invoice, even where the invoice is issued before we supply Goods and/or Services to you (the "**Due Date**").
- 10.2. If you do not pay us by the Due Date, we are entitled to:
 - (a) charge you interest on the monies due on a daily basis at the rate of 10% per annum calculated daily and compounded monthly from the Due Date for payment until the actual date of payment; and
 - (b) suspend the supply of Goods and/or Services under a Contract.
- 10.3. To secure the punctual payment of all amounts owed by you to us, you grant to us:
 - (a) a purchase money security interest (as defined under the PPSA) over all present and after-acquired Goods that are subject to the retention of title arrangement described under **clause 8** of these Terms;
 - (b) a security interest (as defined under the PPSA) over all your present and after-acquired property in relation to which you can be a grantor of a security interest under the PPSA, whether or not you have title to the property, including all PPSA retention of title property (as defined under section 51F of the *Corporations Act 2001* (Cth)); and
 - (c) a fixed charge over all your present and after-acquired property in relation to which you cannot be a grantor of a security interest under the PPSA, including real property.
- 10.4. You agree and acknowledge that we may (without limiting our other rights under these Terms, at law, or otherwise) lodge absolute caveats over any real property owned by you, register our security interests, and take any other action to secure and enforce our security under **clause 9.3**.
- 10.5. You must immediately, if requested by us, sign any documents, provide all necessary information, and do anything else required by us to ensure that our purchase money security interest or other security interest is a perfected security.

10.6. You must reimburse us for the full amount of any bank or other fees associated with any dishonoured payments or cheques and any legal, debt recovery, agent, or other expenses incurred by us on a full indemnity basis associated with any action taken by us to enforce a security interest or recover money from you.

10.7. You:

- (a) agree with us that neither you, nor us, will disclose information of the kind specified in section 275(1) of the PPSA (except in the circumstances required by sections 275(7)(b) to (e) of the PPSA);
- (b) agree that, to the extent permitted under section 115(1) of the PPSA, the following provisions of the PPSA do not apply: sections 95, 118, 121(4), 125, 130, 132(3)(d), 135, 138B(4), 142 and 143;
- (c) agree that, to the extent permitted under section 115(7) of the PPSA, the following provisions of the PPSA do not apply: sections 127, 129(2), 129(3), 132, 134(2), 135, 136(5) and 137;
- (d) acknowledge that we may, at your cost, register one or more financing statements in relation to any security;
- (e) waive, if permitted under the PPSA, your right under section 157 of the PPSA to receive notice of any verification statement relating to the registration of any financing statement or any related financing change statement; and
- (f) will not, without prior written notice to us, change your name or initiate any change to any documentation registered under the PPSA.

10.8. You acknowledge and agree that if we accept payment of any sum after the Due Date this does not constitute a waiver of any of our rights as provided for in these Terms, in the Contract, and at law.

11. Force Majeure

8.1 We will not be liable to you for any failure to perform, or delay in performing, our obligations under these Terms or a Contract if the failure or delay is due to any cause beyond our reasonable control. If any such failure or delay continues for a period of 14 calendar days, we may terminate any affected Contract.

12. Confidential Information and Intellectual Property

12.1. You will not use, or disclose, any Confidential Information disclosed to you.

12.2. All Intellectual Property Rights in all designs, drawings, technical information, and documents created by us in relation to the Goods and/or Services will remain with us and will not be assigned to you and no supply of Goods and/or Services to you will grant to you any Intellectual Property Rights in respect of the Goods and/or Services or such designs, drawings, technical information, or documents.

12.3. If we supply any designs, drawings, technical information, or documents to you as part of the Goods and/or Services, we grant you a non-exclusive, non-transferrable, right to use the designs, drawings, technical information, and documents strictly and only for the purposes of your use of the Goods and/or Services.

12.4. You warrant that our use of any designs, instructions, or documents you provide to us will not infringe the Intellectual Property Rights of any other party.

13. Approvals

If any Approval is required, you must, at your expense, obtain all Approvals necessary for and incidental to the supply of the Goods and/or Services.

14. Security

14.1. You will not be entitled to retain any retention money from the Price for any reason.

14.2. If we request, and if applicable, you must provide a director's guarantee for the performance of all your obligations under these Terms and the Contract.

15. Warranties

15.1. We do not warrant the Goods and/or Services are fit for any purpose whether made known to us or any member of our Personnel.

15.2. We exclude all express and implied conditions and warranties in relation to the Goods and/or Services except those conditions or warranties that cannot be excluded by law and our liability under any such conditions or warranties is limited to, at our option, arranging to replace or repair the Goods or the outcome of the Services or resupplying the Goods and/or Services.

15.3. Nothing in these Terms is intended to have the effect of contracting out of any applicable provisions of the *Competition and Consumer Act 2010* (Cth) or any *Fair Trading Act* except to the extent permitted by such Acts.

16. Liability

- 16.1. Our liability for any Liability or Claim in relation to these Terms, any Contract, and any supply of Goods and/or Services (whether under statute, contract, tort, negligence or otherwise) will be limited to the amount of the GST exclusive aggregate Price paid by you to us under the Contract(s) that gave rise to such liability.
- 16.2. We will not be liable to you for any Liability or Claim in relation to any indirect or consequential loss (including any loss of actual or anticipated profits, revenue, savings, production, business, opportunity, access to markets, goodwill, reputation, publicity, or use) or any remote, abnormal, or unforeseeable loss or any similar loss whether or not in the reasonable contemplation of the parties.
- 16.3. The limitations and exclusions in this **clause 15** do not apply to the extent that any loss is directly attributable to:
- (a) the personal injury or death caused by our default, breach of these Terms or negligence; or
 - (b) fraud by us.
- 16.4. Each party must take reasonable steps to mitigate any loss it suffers or incurs.

17. Release and Indemnity

You indemnify us and each member of our Personnel from and against any Liability or Claim arising directly or indirectly in relation to:

- (a) the accuracy of all information you provided to us in relation to the Services, the Delivery Address, or any other matter;
- (b) your breach of these Terms or any Contract;
- (c) your failure to obtain any Approval;
- (d) the negligence or wilful misconduct of you or any member of your Personnel;
- (e) us or any member of our Personnel delivering the Goods in accordance with your instructions;
- (f) us or any member of our Personnel entering the Delivery Address;
- (g) damage to your property or to the property of any third party during any delivery of Goods or supply of Services;
- (h) any spillage, breakage, or contamination of Goods during any transport or delivery;
- (i) the Goods and/or Services not being fit for any particular purpose;
- (j) any tests in relation to Goods and/or Services;
- (k) you or any member of your Personnel directly or indirectly causing any delay in the supply of any Goods and/or Services;
- (l) us having to resupply the Goods and/or Services, or undertake any rework, as a result of the actions or omissions of you or of any third party;
- (m) you or any member of your Personnel refusing to accept any delivery;
- (n) you or any member of your Personnel purporting to cancel any Order or Contract; and
- (o) any proceedings, claims, and demands in relation to any secured property.

18. Termination

- 18.1. We may immediately terminate, or suspend the performance of, any Contract and you must immediately pay any money owed to us if:
- (a) you breach a term of these Terms or any Contract and you do not remedy the breach within 7 calendar days of receiving a notice from us requiring you to do so;
 - (b) you breach a term of these Terms or any Contract which is not capable of remedy;
 - (c) there is any change in your Control; or
 - (d) an Insolvency Event arises in relation to you.

19. Specific Services

19.1. Residential/Commercial Retaining Walls & Earthworks

- (a) In the event that asbestos or any other toxic substances are discovered at the Delivery Address during the process of delivering the Services, it is your responsibility to ensure the safe removal of the same. You further agree to indemnify us against any costs incurred by us that are wasted as a result of such a discovery. Under no circumstances will we handle the removal of any asbestos product.
- (b) We must, upon installation ensure that all the Goods are installed in a manner that is fully compliant with industry standards. If, for any reason, you specifically require us to install the Goods in any way which goes against our

recommendations and/or falls below industry standards; a request detailing that requirement must be made in writing to us, and we will offer no warranty in regard to that requirement.

- (c) We accept no responsibility for any damage/performance related problems with any Goods that have not been used and/or maintained in accordance with our and/or the manufacturers' recommendations.
- (d) You acknowledge that all specifications, illustrations, drawings, data dimensions, and weights stated in our price lists or advertising material are indicative only and that they have not relied on such information.
- (e) Where you have supplied materials for us to complete the Services, the Customer acknowledges and accepts responsibility for the suitability of purpose, quality and any faults inherent in the materials. We will not be responsible for any defects in the materials, any loss or damage to the materials howsoever arising from the use of materials supplied by you.
- (f) You warrant that no other tradesmen will interfere with any Goods and/or Services supplied by us.
- (g) You acknowledge that:
 - (i) You will remove any furniture or personal items from the vicinity of where the Services are to take place at the Delivery Address, and agree that we will not be liable for any damage caused to those items through your failure to comply with this clause; and
 - (ii) that no allowance has been made within the Price for us to undertake:
 - any rock breaking; or
 - any use of a concrete pump; or
 - any site cutting/benching or any removal of spoil.
 - (iii) You will supply electricity, temporary lighting, water, eating and first aid facilities if so required.

19.2. *Underground/Hidden Services and Boundary*

- (a) Prior to us commencing to provide the Services, you must advise us of the precise location of all underground/hidden services at the Delivery Address and clearly mark the same. These include, but are not limited to, electrical services, gas services, sewer services, pumping services, sewer connections, sewer sludge mains, water mains, irrigation pipes, telephone cables, fibre optic cables, oil pumping mains, and any other services that may be located at the Delivery Address.
- (b) Whilst we will take all care to avoid damage to any of these services you agree to indemnify us against any damage to services not precisely located and notified to us by you.
- (c) You agree and acknowledge that you are responsible for ensuring that the boundary pegs at the Delivery Address are correctly identified along the relevant boundary, and agree to indemnify us against any issue whereby the boundary is not precisely located and we undertake the Services along an incorrect boundary.

20. Interpretation and Definitions

20.1. The parties agree:

- (a) no Contract will create any partnership, joint venture, agency or relationship of employment between the parties;
- (b) these Terms or any Contract may only be amended with our express written agreement;
- (c) any waiver by us must be express and in writing;
- (d) all notices between the parties must be in writing;
- (e) our rights under these Terms or any Contract do not exclude any of our other rights;
- (f) no Contract will be a sale by sample;
- (g) in the event of any dispute, our records will be conclusive evidence;
- (h) the actions of any person claiming to have your authority will bind you to the extent permitted by law;
- (i) if any provision of these Terms or any Contract is unenforceable, the provision will be severed and the remaining provisions will continue to apply;
- (j) you must immediately provide written notice to us if there is any change in your Control;
- (k) these Terms and all obligations hereunder are binding on your personal representatives, successors, and permitted assigns and are for the benefit of our successors and assigns;
- (l) we may assign any rights or benefits under these Terms or any Contract to any third party;
- (m) you may only assign any rights or benefits under these Terms or any Contract with our prior written consent; and
- (n) these Terms and any Contract will be governed by the laws of, and the parties submit to the jurisdiction of the courts of, the State of South Australia.

20.2. In these Terms:

- (a) the headings will not affect interpretation;
- (b) the singular includes the plural and vice versa;
- (c) any other grammatical form of a word or expression defined in these Terms has a corresponding meaning;
- (d) a reference to a document includes the document as novated, altered, supplemented, or replaced;
- (e) a reference to a party includes the party's executors, administrators, heirs, successors in title, permitted assigns, and substitutes;
- (f) a reference to a person includes a natural person, body corporate, partnership, trust, association, or any other entity;
- (g) a reference to a statute, ordinance, code, or law includes regulations, rules, and other instruments under the statute, ordinance, code, or law and any consolidations, amendments, re-enactments, or replacements;
- (h) a word or expression defined in the *Corporations Act 2001* (Cth) has the meaning given to the word or expression in that Act;
- (i) the meaning of general words is not limited by specific examples introduced by "including", "for example", or similar expressions;
- (j) any agreement, representation, warranty or indemnity by two or more parties binds those parties jointly and severally;
- (k) any undertaking by a party not to do any act or thing will be deemed to include an undertaking not to permit or suffer the doing of that act or thing;
- (l) a rule of construction does not apply to the disadvantage of a party because the party was responsible for the preparation of these Terms; and
- (m) if a day on or by which an obligation must be performed or an event must occur is not a Business Day, the obligation must be performed, or the event must occur, on or by the next Business Day.

20.3. In these Terms:

"Approvals" means all approvals, authorisations, permits, consents, determinations, and licences which are issued, or required to be issued, by any Authority to permit the full and proper performance of our obligations under these Terms.

"Authority" means any government or governmental, semi-governmental, administrative, or judicial body, tribunal, department, commission, authority, agency, minister, statutory corporation, instrumentality, or entity.

"Business Day" means a day that is not a Saturday, Sunday, or public holiday in South Australia.

"Claim" means any actual, contingent, present, or future claim, demand, action, suit, or proceeding for any Liability, restitution, equitable compensation, account, injunctive relief, specific performance, or any other remedy of whatever nature and however arising, whether direct or indirect, and whether in statute, contract, tort (including negligence), equity, or otherwise.

"Confidential Information" means information, whether in visual, oral, documentary, electronic, machine-readable, tangible, intangible, or any other form, relating to us or any of our related entities, including any information relating to any business, products, markets, operations, processes, techniques, technology, forecasts, strategies, or any other matter.

"Contract" means a contract formed as a result of our acceptance of an Order from you.

"Control" has the meaning set out in the *Corporations Act 2001* (Cth).

"Delivery Address" means the address for the delivery and or provision of the Goods and/or Services in a Contract.

"Delivery Date" means the date for the delivery and or provision of the Goods and/or Services in a Contract.

"Goods" means the goods in a Contract and includes; where any goods supplied are intermingled or combined with other goods, the end goods; and where we have supplied services relating to the goods or your goods, those goods.

"Insolvency Event" means any of the following, or any analogous, events:

- (a) you dispose of the whole or any part of your assets, operations, or business, other than in the ordinary course of business;
- (b) you cease, or threaten to cease, carrying on business;
- (c) you are unable to pay your debts as the debts fall due;
- (d) any step is taken by a mortgagee to take possession or dispose of the whole or any part of your assets, operations, or business;
- (e) any step is taken for you to enter into any arrangement or compromise with, or assignment for the benefit of, your creditors or any class of your creditors; or
- (f) any step is taken to appoint an administrator, receiver, receiver and manager, trustee, provisional liquidator, or liquidator of the whole or any part of your assets, operations, or business.

“Intellectual Property Rights” means any present or future rights conferred by statute, common law, or equity in any part of the world in relation to any confidential information, copyright, trademarks, service marks, designs, patents, circuit layouts, business names, domain names, inventions, trade secrets, or other results of intellectual activity in any industrial, commercial, scientific, literary, or artistic fields.

“Liability” means any loss, liability, cost, payment, damages, debt, or expense (including legal fees).

“Order” means any written or verbal order by you to us for Goods and/or Services.

“Personnel” means any relative, employee, contractor, subcontractor, agent, partner, director, or officer of a party.

“PPSA” means the *Personal Property Securities Act 2009* (Cth).

“Price” means the price of the Goods and/or Services as nominated by us from time to time.

“Services” means the services outlined by us in the Contract and any services associated with the installation of the Goods.

“We”, “us”, “our” mean Fresh Construction Group Pty Ltd ACN 626 743 020 as trustee for the Paul Hancock Family Trust t/a Fresh Earthworks ABN 17 110 479 049.

“You”, “your” mean the customer set out in any quotation, offer or other document provided by us (or, in the absence of such information, the customer who placed the Order).