

CONTRACT

This contract is produced by the MASTER BUILDERS ASSOCIATION OF VICTORIA ["MASTER BUILDERS"] as a service to builders and owners who want to enter a contract for building a new home in the State of Victoria.

It complies with the requirements set out in the Domestic Building Contracts Act 1995 for all **major domestic building contracts**.

PLEASE NOTE:

Master Builders does not represent that any person or organisation that uses this contract is, in fact,

- entitled under the laws, to enter a major domestic (or any) building contract, or
- a member of Master Builders.

Owners should check and verify that

- their builder holds the appropriate registration/s; by contacting the Building Practitioners Board on 1300 360 320
- he she or it is a member of Master Builders; by contacting the Association on 9411-4555 or www.mbav.com.au

For the above reasons Master Builders cannot and does not make any representation regarding – and accepts no responsibility or liability in respect of - the builder's performance or conduct under this particular contract.



9411 4555
www.mbav.com.au



Cost Plus

MAJOR DOMESTIC BUILDING CONTRACT (VICTORIA)

(MUST BE COMPLETED IN ENGLISH)

Between

.....
(Builder)

-and-

.....
(Owner)

Builder's Copy/Owner's Copy

(Delete as Applicable)

Builder's Job No.

Prepared in accordance with the Domestic Building Contracts Act 1995



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INTRODUCTION

i. PRE – CONTRACTUAL MATTERS

A. COST-PLUS METHOD OF CONTRACTING

1. Under the domestic building contracts legislation¹ a cost-plus contract may only be used for domestic building work in the following circumstances:
 - (i) when the work to be carried out under the contract is reasonably estimated to end up costing at least \$500,000.00; or
 - (ii) when the work to be carried out under the contract involves the renovation, restoration or refurbishment of an existing building and it is not possible to calculate the cost of a substantial part of the work without carrying out some domestic building work first; or
 - (iii) domestic building contracts for public construction where one of the parties to the contract is the Crown or a public statutory authority.

If your circumstances do not fall within one of the above categories, entering a cost-plus contract – and the use of this standard form contract – for domestic work is PROHIBITED BY LAW.
2. The cost-plus method involves the parties in entering a contract on the basis of a "builder's reasonable estimate" rather than on the basis of a firm "fixed price". The builder then carries out the work and charges the owner the actual
 - (i) COSTS incurred by the builder in providing the requisite material, labour and other supplies;
 - (ii) PLUS a margin for the builder, on a pre-agreed basis;
 - (iii) PLUS any applicable GST.
3. This method is not reasonably compatible with some of the consumer protection constraints generally imposed by the domestic building contracts legislation; in particular:
 - a 'staged' progress payment scheme (refer section 40 of the DBCA);
 - the inclusion of any Prime Cost Items or Provisional Sums.
4. Owners, who are not prepared to accept the risks associated with these features, which are part and parcel of this method, **SHOULD NOT ENTER COST-PLUS CONTRACTS**.

B. PRIOR TO ENTERING THIS CONTRACT

Once the parties have decided that they may, and that they want to, enter a cost-plus domestic contract for the Works of a particular project, it is recommended that they proceed as outlined below:

1. The builder prepares a fair and reasonable estimate of the anticipated cost of the Works, on the basis of the best information available at the time.
2. If the owner finds the amount of this estimate acceptable, the contract will be entered showing this amount as the "builder's fair and reasonable estimate"
3. The builder lends a blank copy of the contract form to the owner, so that the owner may study and understand the terms and conditions. Whenever an owner requires clarification of any of the contents, he or she should obtain independent legal advice on those points.

¹ The Domestic Building Contracts Act 1995 ["the DBCA"], the Domestic Building Contracts Regulations 2007 ["the DBCR"] and Ministerial Orders published pursuant to those.



Owner(s) Initials/.....

Builder's Initials

4. Meanwhile the parties complete a pencil draft of the Appendix (Section C), in accordance with the outcome of their negotiations concerning all those items in the Appendix which require agreement.
5. When the owner is confident that he or she understands the contract, he or she needs to first complete and sign the Checklist at page (v) of this document.
 - a. Note that the Checklist does not and will not form part of the Contract, but its inclusion and correct completion is mandated by the domestic building contracts legislation, as a condition precedent to signing the Contract.
 - b. Note also that unless and until the owner can truthfully answer "yes" to all the questions (but the first two), the legislation takes the view that he or she is "not yet ready to sign the Contract."
6. Once the Checklist has been satisfactorily dealt with, the parties may proceed with completing and entering the Contract.

C. COMPLETING THE CONTRACT

1. The parties must complete and execute two fully identical counterpart sets of the contract. One set must be kept by the owner and the other by the builder.
2. The parties must complete the entire **Section C** (Appendix) first, in accordance with the agreed details. They should not leave any blank spaces – if an item or a line or a box or an option is not required or not used, it should be crossed out and each crossing-out should be initialled by all parties.
3. The owner(s) must also sign and date each **mandatory warning** throughout the contract.
 - a. These mandatory warnings are placed throughout **Section A** and **Section C** in **boxes with yellow backgrounds**.
 - b. While the warnings do not and will not form part of the Contract, their inclusion, placement and correct completion is mandated by the domestic building contracts legislation.
4. The parties should insert, in **Section B**, any Special Conditions that they may have agreed on. Each clause of each Special Condition should be initialled by all parties.
5. The parties must also attach to each counterpart contract a full set of all plans, specifications and any other documents listed in Items 6, 7 and 8 of the Appendix; and
 - a. each plan, and the cover of each specification, should be signed and dated by all parties; and
 - b. each page of each specification and of any other document should be initialled by all parties.
6. Each page of the contract must also be initialled by the owners and by the builder in the boxes provided for this purpose at the bottom of the pages in question.

D. GUARANTEE AND INDEMNITY

1. Whenever the owner is a corporation, each of its directors **must** guarantee the owner's performance of the contract.
2. Whenever the owner is a trust, each of its trustees **must** guarantee the owner's performance of the contract.
3. Whenever the owner is a partnership, each of its partners **must** guarantee the owner's performance of the contract.
4. In all other cases it is **recommended** that some third party or parties of substance guarantee the owner's performance of the contract.
5. Each Guarantor must execute the (two-page) **Deed of Guarantee and Indemnity** ["the Deed"], by completing and signing one of the boxes on page 65 of the Deed and having his or her signature counter-signed by a witness whose details must also be shown in the space provided for this purpose.
6. Note that the Deed does not and will not form part of the contract itself, but it forms a collateral agreement.



Owner(s) Initials/.....

Builder's Initials

ii. ENTERING THE CONTRACT

A. SIGNING AND DATING

When all of the steps specified above have been completed, the parties must sign and date the Instrument of Agreement on page 63. These signatures will constitute the primary evidence of the agreement entered by the parties and this date will be the "date of the contract."

NOTE that, under s31(2) of the DBCA, each counterpart of this contract must be signed by both the builder and the owner or owners – or by their authorised agents – otherwise it will be void (that is: of no legal effect).

B. AFTER SIGNING

Subject to some exceptions, owners have a statutory right to a 5-day cooling-off period, during which they may end (or cancel) the contract. The details of this right and the method of exercising it are set out in the document headed "Cooling-off Period: Notice to Owner". This document is included in this volume at page (vii). Like the *Checklist* on page (v) it does not and will not form part of the contract but its inclusion and its form are mandated by the domestic building contracts legislation.

iii. PUBLISHER'S NOTES

A. USER GUIDE NOTES

The publishers have inserted a series of notes for the guidance of the users of this contract. These **user guide notes** are placed throughout **Section A** and **Section C** in **boxes with dark blue backgrounds**.

These notes do not and will not form part of the contract; and they are not mandated by any legislation, either. They are included to make the users aware of certain matters but they do not constitute legal or any other advice of a kind on which the parties may rely in arranging their affairs.

B. DISCLAIMERS

This product is prepared and published by the Master Builders Association of Victoria as a service to both builders and consumers wishing to enter cost-plus contracts for domestic building work in Victoria.

The information with respect to the domestic building contracts legislation is correct at the date of publication; but needs to be confirmed or verified and, if necessary, updated. Of particular importance is verification of the \$500,000.00 trigger amount (minimum estimated price) for the lawful use of this type of contract.

Use of this contract does not in itself signify or imply that the builder using it is a member of, or is in any way associated with or endorsed by, the Master Builders Association of Victoria.

CHECKLIST

Before signing this legally binding *Contract*, complete the following checklist by circling YES or NO (as the case may be) for each question

• Has an insurance policy or certificate of currency for builders insurance been issued and provided to you? If not, the <i>Contract</i> is conditional on you receiving either an insurance policy or a certificate of currency for builders insurance.	Yes or No	
• If the <i>Contract</i> is conditional on the owner receiving written approval for finance, has the owner obtained such approval?	Yes or No	

If you answer 'NO' to any of the following questions, you are not yet ready to sign the *Contract*.

• Has the owner had the <i>Contract</i> long enough to read and understand it?	Yes or No	
• Has the owner been provided with evidence that the builder named in this <i>Contract</i> is registered with the Building Practitioners Board?	Yes or No	
• Are the price and <i>progress payments</i> clearly stated?	Yes or No	
• Do you (the owner) understand how the price is calculated and how it may be varied?	Yes or No	
• Has the builder assessed the suitability of the site for the proposed <i>works</i> , and if tests are necessary, have they been carried out before signing the <i>Contract</i> ?	Yes or No	
• If a <i>deposit</i> is payable, is it within the legal limit: (which is 5% of the builder's reasonable estimate)	Yes or No	
• Is the work shown and described clearly in the <i>Contract</i> , the <i>plans</i> , the <i>specifications</i> and any other relevant documents e.g. engineering computations or soil report?	Yes or No	
• Are the owner's special requirements or finishes included in the <i>plans</i> or <i>specifications</i> ?	Yes or No	
• Are the <i>commencement date</i> and <i>completion date</i> clearly stated and capable of being understood?	Yes or No	
• Is the procedure for extensions of time understood?	Yes or No	
• Are any <i>provisional sums</i> or <i>prime cost items</i> clearly stated in the schedules and understood?	Yes or No	
• Is the procedure for variations of <i>plans</i> or <i>specifications</i> understood?	Yes or No	
• Do you understand the circumstances in which you can end the <i>Contract</i> ?	Yes or No	

Read, completed, signed and dated by the owner(s)

on the day of 20

owner

owner

COOLING-OFF PERIOD: NOTICE TO OWNER

You may end this *Contract* within five (5) clear *business days* after receipt by you of a signed copy of this *Contract* by filling in the "Notice" below and giving it to the *builder* in one of the following ways:

1. Personally;
2. Leaving it at the address set out in the *Contract* with a person who appears to be at least 16 years old;
3. Sending it by pre-paid certified mail to the address set out in this *Contract*;
4. Sending it by facsimile to the facsimile number (if any) set out in this *Contract*.

Detach along the dotted line

Notice that the Contract is Ended

An *owner* cannot withdraw from the *Contract* under the *Act* if:

1. The *builder* and the *owner* have previously entered into a major domestic building contract as defined in the *Act* that is in substantially the same terms for the carrying out of the work in relation to the *Works*; or
2. The *owner* received independent legal advice from a legal practitioner concerning the *Contract* before entering into the *Contract*.

To (*builder*)

I / we

give notice under our *Contract* with you that the *Contract* is ended. Please refund the *deposit* less \$100.00 and any out of pocket expenses incurred by you which I / we have previously approved.

Signed for and on behalf of the *owner(s)*

.....
date

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Cooling-Off
Period



Owner(s) Initials/.....

Builder's Initials

SECTION A GENERAL CONDITIONS OF CONTRACT

CLAUSE 1 Definitions

1.1 Key words and phrases

This *Contract* uses a number of key words and phrases. When these words and phrases are used they are shown in *italics*. Unless the context requires otherwise, the definitions of these words and phrases are as set out in *clause* 1.2.

1.2 Definitions of key words and phrases

Key Words/Phrases	Definitions
<i>Act</i>	the <i>Domestic Building Contracts Act</i> 1995.
<i>actual net cost</i>	the actual cost after deducting all credits, allowances, discounts and rebates obtained by the <i>builder</i> ; but including all <i>GST</i> paid or payable for the supply by the <i>builder</i>
<i>adjusted contract price</i>	the <i>original contract price</i> as modified at any given time, by adding all authorised and permissible extra costs and deducting all required or agreed credits, as required, agreed or authorised to that date in accordance with this <i>Contract</i> .
<i>Appendix</i>	the <i>Appendix</i> contained in this document.
<i>authorities</i>	all parliaments, government departments, government, semi-government and other statutory and municipal bodies, and all other organisations and individuals (private, public or mixed) that have lawful control over any aspect of the construction process and/or over any of the infrastructure and other services affecting, or affected by, the <i>Works</i> .
<i>builder</i>	the person stated in Item 2 of the <i>Appendix</i> . The term ' <i>builder</i> ' can also include the ' <i>assignees</i> ' and ' <i>transferees</i> ' of that person.
<i>builder's fee</i>	the sum specified in Item 11.4 of the <i>Appendix</i> .
<i>builder's fair and reasonable estimate</i>	see: <i>original contract price</i>
<i>business day</i>	a day that is not a Saturday or Sunday, and not a day (or part day) that is observed as a public holiday throughout Victoria.
<i>clause</i>	a <i>clause</i> or a sub-clause of the <i>Contract</i> .
<i>commencement date</i>	the date by which the <i>builder</i> will start to carry out the <i>Works</i> on the <i>land</i> , being either the date specified in Item 9.1 of the <i>Appendix</i> or the date determined in accordance with <i>clauses</i> 8.1.2 and 8.1.3

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completion	the state reached when: <ul style="list-style-type: none"> the work carried out under the <i>Contract</i> has been completed in accordance with the <i>plans</i> and <i>specifications</i> set out in the <i>Contract</i>; and <ul style="list-style-type: none"> the <i>owner</i> is given a copy of the <i>occupancy permit</i> (if such <i>occupancy permit</i> is required by the building permit), or a copy of the certificate of final inspection (in any other case).
completion date	the date specified in <i>clause</i> 8.3; being the date determined accordance with <i>clause</i> 8.2.
construction period	the number of <i>days</i> specified in Item 9.2 K of the <i>Appendix</i> as the 'total construction period including delay days'.
Contract	this document, and all <i>plans, specifications, schedules</i> and other documents annexed to, or incorporated by reference in, this document.
contract price	the amount defined in and stated in Item 11.1 of the <i>Appendix</i> .
days	means calendar <i>days</i> .
defect	<ul style="list-style-type: none"> a breach of any warranty listed in <i>clause</i> 10.1; or a failure to maintain a standard or quality of building work specified in this <i>Contract</i>;
defects liability period	the period (if any) stated in Item 18 of the <i>Appendix</i> .
deposit	the initial sum to be paid by the <i>owner</i> to the <i>builder</i> according to <i>clause</i> 12.4.1 of this <i>Contract</i> and as stated in Item 13 of the <i>Appendix</i> .
direct costs	the costs stated in Item 11.2 of the <i>Appendix</i> .
existing building	all buildings and structures which may exist on the <i>land</i> at the time of the execution of the <i>Contract</i> .
final payment	the amount remaining to be paid, according to the <i>Contract</i> , by the <i>owner</i> to the <i>builder</i> on <i>completion</i> .
final payment claim (also called final claim)	the <i>builder's progress payment claim</i> for the unpaid balance of the <i>adjusted contract price</i> for the work and other items supplied by the <i>builder</i> under this <i>Contract</i> , together with any other moneys payable by the <i>owner</i> under this <i>Contract</i> .
foundations data	has the same meaning as stated in Section 30 of the <i>Act</i> .

General Conditions

insolvency event	<p>any action taken by or against a person that indicates they are, or are likely to become, unable to meet their payment obligations as and when they fall due. This includes:</p> <ul style="list-style-type: none"> Whenever a natural person or a partnership <ul style="list-style-type: none"> has a creditor levy execution against him / her / it; is declared, made or becomes insolvent or bankrupt; commits an act of bankruptcy; has any execution or distress process levied against his / her / its assets and / or income; has any bankruptcy petition presented against him / her / it; proposes any composition or scheme of arrangement, or has it proposed by others; has a trustee in bankruptcy, interim receiver, controlling trustee or any other such administrator appointed; <p>and</p> <ul style="list-style-type: none"> Whenever a corporation or incorporated association: <ul style="list-style-type: none"> makes a company arrangement with its creditor(s); enters into a deed of arrangement with its creditor(s); commits an act of insolvency according to the <i>Corporations Act</i>; fails to comply with a bankruptcy notice or statutory demand according to the <i>Corporations Act</i>; has an application made to a Court for its winding up <u>and either</u> <ul style="list-style-type: none"> the application is not stayed within fourteen (14) days, <u>or</u> the Court makes a winding up order; appoints, or has appointed, a <ul style="list-style-type: none"> provisional liquidator, liquidator, receiver, receiver – and – manager, administrator, controller or manager; has any of its property taken into possession by a mortgagee or by any other secured creditor. <p>or</p> <p>whenever a scheme administrator, manager-and-administrator, receiver-and-administrator, or any other such administrator initiates or proceeds with any voluntary administration or winding up (other than for a member's voluntary winding up).</p>
land	the <i>land</i> , on which the <i>Works</i> are to be carried out, and which is described in Item 4 of the <i>Appendix</i> .
land owner	each registered proprietor of the <i>land</i> as noted on the Certificate of Title, (or on the abstract of chain of title), relating to the <i>land</i> .
land owner's consents	the written consents and licences obtained by the <i>owner</i> from each <i>land owner</i> , under <i>clause</i> 7.1(b). They include consents to the carrying out of the <i>Works</i> by the <i>builder</i> on the <i>land</i> .

General Conditions



Owner(s) Initials/.....

Builder's Initials



Owner(s) Initials/.....

Builder's Initials

liquidated damages	<ul style="list-style-type: none"> the pre-agreed amount (if any) stated in Item 21 of the <i>Appendix</i> which may be payable to the <i>builder</i> by the <i>owner</i> in accordance with <i>clause 17.3</i>; or the pre-agreed amount (if any) stated in Item 22 of the <i>Appendix</i> which may be payable to the <i>owner</i> by the <i>builder</i> in accordance with <i>clause 20</i>. <p style="text-align: center;"><i>(liquidated damages are GST inclusive)</i></p>
materials	all items (not being work or equipment) supplied or to be supplied by either the <i>builder</i> or by the <i>owner</i> for the purpose of carrying out the <i>Works</i> .
occupancy permit	an <i>occupancy permit</i> issued under the <u>Building Act</u> 1993.
original contract price	the sum stated in Item 10 of the <i>Appendix</i> .
owner	each person named in Item 1 of the <i>Appendix</i> , and including the lawful heirs, successors, executors, administrators, and permitted assignees and transferees of each <i>owner</i> .
owner's agent	the person authorised in writing by the <i>owner</i> to act as the <i>owner's agent</i> , with the written consent of the <i>builder</i> , in accordance with clauses 27.10 and 27.11
payment claim	a claim for payment of work carried out and costs incurred and all amounts otherwise due to the <i>builder</i> under the terms of the <i>Contract</i> ; including any claim referred to in section 14 of the <i>Security of Payment Act</i> .
payment schedule	a schedule that may be served by the <i>owner</i> in response to a <i>payment claim</i> under and in accordance with the <i>Security of Payment Act</i> .
persons for whom the builder is responsible	all persons who act with the actual or apparent authority of the <i>builder</i> . They include directors, partners, officers, related persons, related entities, employees, servants, consultants, subcontractors, invitees, suppliers and agents of the <i>builder</i> .
persons for whom the owner is responsible	all persons who act with the actual or apparent authority of the <i>owner</i> . They include directors, partners, officers, related persons, related entities, employees, servants, consultants, tenants, invitees, suppliers and agents of the <i>owner</i> .
plans	all drawings, sketches, diagrams, layouts, maps and documents which form part of the <i>Contract</i> and are listed in Items 7 and 8 of the <i>Appendix</i> ; or which may be issued by or on behalf of the <i>owner</i> during the course of the <i>Contract</i> and incorporated by agreement.
possession	when the <i>Works</i> , or any portion of the <i>Works</i> , are taken over, taken into control, occupied or used by the <i>owner</i> , or by any <i>persons for whom the owner is responsible</i> .
prime cost item	an item (eg. a fixture or fitting) that has not yet been selected, or whose price is not yet known, at the time the <i>Contract</i> is entered into.
progress payment	all monies due and payable by the <i>owner</i> to the <i>builder</i> under and according to the relevant provisions of <i>clause 11</i> , and (where applicable) the <i>Security of Payment Act</i> .
progress payment claim (also called payment claim)	each claim (including the <i>final progress payment claim</i>) made or to be made by the <i>builder</i> to the <i>owner</i> for the payment of monies to which the <i>builder</i> is, or claims to be, entitled. It includes <i>payment claims</i> served under the <i>Security of Payment Act</i> .

provisional sum	is an estimate of the cost of carrying out particular work (including the cost of supplying any <i>materials</i> needed for the work) under a domestic building contract for which a <i>builder</i> , after making all reasonable inquiries, cannot give a definite amount at the time the <i>Contract</i> is entered into;
Security of Payment Act	the <u>Building and Construction Industry Security of Payment Act</u> (Victoria) 2002.
specifications	the <i>specifications</i> described in Item 6 of the <i>Appendix</i> . <ul style="list-style-type: none"> The <i>specifications</i> incorporate the "Guide to Standards and Tolerances" published by the Building Commission, as current at the time the <i>Contract</i> is entered into.
working day	A day, which is designated as a "working day" in the "Working Day Calendar" published by the Master Builders Association of Victoria, current at the time the <i>Contract</i> is entered into.
Works	the totality of the work to be carried out by the <i>builder</i> under and in accordance with the <i>Contract</i> , that is necessary to produce on the <i>land</i> the end product described in Item 5 of the <i>Appendix</i> , and which is described in more detail in the <i>plans</i> and <i>specifications</i> and, where applicable, the documents specified in Item 8 of the <i>Appendix</i> .

CLAUSE 2 Interpretation of the Contract

2.1 Entire agreement

Subject to terms implied by law, the *Contract* is the entire agreement and understanding between the parties on everything connected to the subject matter of the *Contract*. It supersedes all prior agreements, representations, negotiations, offers, counter-offers or understandings concerning anything whatever with respect to that subject matter.

2.2 Headings and notes

Clause headings, boxed explanatory notes and boxed warning notes in this *Contract* are advisory only, and they shall not be used in the interpretation of the *Contract*.

2.3 Singular, plural, gender

Words in the singular include the plural and vice-versa, according to the context. Words importing a gender include every gender.

2.4 References to person or party

Unless otherwise stated, references to a person include individuals, (natural persons), partnerships, firms, trusts and incorporated or unincorporated bodies, according to the context. Whenever the context permits, references to a person (or party) also include the executors, administrators, trustees and successors and permitted assignees of that person (or party).

2.5 Deadlines

If the time for giving any notice, making any payment, or doing any other act required or permitted by the *Contract* falls on a day which is not a *business day*, the time for giving the notice, making the payment or doing the other act shall be the next *business day*. Similar interpretation applies in respect of days that are not *working days*.

2.6 Statutory provisions

References to any statutory provision include all federal and state Acts of Parliament, subordinate legislation, regulations, orders, schedules, proclamations, and other instruments made or issued under statute or under delegated powers; together with all amendments, re-enactments or replacements lawfully made to those provisions.

2.7 Interpretation of 'including'

'Including' and similar expressions must be read as if followed by the words 'without limitation'.

CLAUSE 3 Ambiguities, discrepancies, etc

3.1 Consultation between parties

If either party finds any ambiguity or discrepancy in the *Contract*, that party must notify the other party in writing.

3.2 Default resolution

Subject to the provisions of *clause 3.3*; any inconsistency, ambiguity or discrepancy within or between any one or more of the documents forming part of the *Contract* must be resolved in accordance with the following principles:

- 3.2.1 The following (descending) order of priority shall apply between classes of contract documents:
 - 1. special conditions (if any) in or annexed to this document at Section B;
 - 2. the balance of this document including the *Appendix*;
 - 3. the *specifications*;
 - 4. the *plans*;
 - 5. any other documents listed in the *Appendix*;
 - 6. any other documents that may otherwise form or become part of the *Contract*.
- 3.2.2 Information shown on larger scale *plans* takes priority over that shown on *plans* drawn to smaller scales.
- 3.2.3 Figured dimensions take priority over dimensions measured from the *plans*.
- 3.2.4 All dimensions shown or figured on any *plans* are only approximate to the extent that they are based on dimensions referable to any *existing building*.
- 3.2.5 Whenever any of the contract documents prepared and issued by the structural engineers show or contain information concerning the characteristics of any material or component, that information takes precedence over any inconsistent or conflicting information that may be contained in any other contract document.
- 3.2.6 The *builder* is deemed to have allowed in the *original contract price* for the result that is arrived at by the application of the appropriate principles set out above.

3.3 Alternative resolutions

- 3.3.1 Despite *clause 3.2* the *owner* may wish to resolve a particular instance of inconsistency, ambiguity or discrepancy in a different manner to that set out in *clause 3.2*.
- 3.3.2 In the event that none of the principles in *clause 3.2* are capable of resolving a particular instance of inconsistency, ambiguity or discrepancy, the parties must confer and resolve the matter by negotiations.

Whenever any inconsistency, ambiguity or discrepancy is resolved in accordance with either *clause 3.3.1* or *clause 3.3.2*, the outcome shall be a variation to the *Contract* pursuant to *clauses 13* and *15*

Clause 3.3 is a cost adjustment clause to which Section 33 of the Act applies. The *owner* acknowledges receipt of **WARNING 2** given by the *builder* in Item 11.3 of the *Appendix* explaining the effect of this *clause*.

.....
signature/s of owner/s

General Conditions

General Conditions



Owner(s) Initials

Builder's Initials



Owner(s) Initials

Builder's Initials

CLAUSE 4 Required permits

The required permits are specified in Item 15 of the *Appendix*.

4.1 No work without required permits

The *builder* may under no circumstances carry out any building work under the *Contract* or under any other arrangement until it has obtained, or been provided with (as the case may be)

- (a) either
 - (i) a valid and current planning permit; or
 - (ii) satisfactory documentary proof from the municipal planning authority that no planning permit is required for the *Works* of the *Contract*;
- and
- (b) either
 - (i) a current and valid building permit; or
 - (ii) satisfactory documentary proof from a building surveyor registered under the Building Act 1993 that no building permit is required for the *Works* of the *Contract*.

Note that any breach of these provisions is an offence under the *Building Act 1993*; and the authorities may initiate criminal proceedings against offenders. Upon conviction offenders may face substantial fines and other serious penalties.

4.2 Obtaining of planning permits

Unless the *Contract* provides otherwise,

- 4.2.1 The *builder* is not obliged to enter the *Contract* or any other arrangement with respect to the *Works* until it has been provided with either
 - a valid and current planning permit ; or
 - satisfactory documentary proof from the municipal planning authority that no planning permit is required for the *Works* of the *Contract*.
- 4.2.2 Where a planning permit is required but had not yet been issued, the *owner* must do all necessary things and take all necessary and reasonable steps to obtain it as promptly as possible under the circumstances.

4.3 Obtaining of building permits

Unless the *Contract* provides otherwise,

- 4.3.1 The *builder* is not obliged to enter the *Contract* or any other arrangement with respect to the *Works* until it has been provided with either
 - a valid and current building permit; or
 - satisfactory documentary proof from a registered building surveyor that no building permit is required for the *Works* of the *Contract*.



Owner(s) Initials

Builder's Initials

4.3.2 Where a building permit is required but had not yet been issued, the *owner* must do all necessary things and take all necessary and reasonable steps to obtain it as promptly as possible under the circumstances.

- 4.3.3 The necessary steps referred to above include (but are not restricted to) ensuring that
 - the *owner* engages and commissions a registered building surveyor to act as the Relevant Building Surveyor; and
 - all *plans, specifications* and other documents required for the issuing of the building permit are in, or are brought by the designers to, a condition that complies with the Relevant Building Surveyor's requirements; and
 - the building permit complies with all such terms and conditions that the planning permit (if any) may stipulate in order to render the building permit valid.

4.3.4 If the *owner* requires the *builder* to apply (on the *owner's* behalf) for any permit, and the *builder* agrees to do so, the *owner* must provide the *builder* with a signed written authorisation to do so.

4.4 If the required building permit is not obtained

4.4.1 If a valid building permit – including, whenever applicable, the prior issue of the plan of subdivision and/or of the planning permit – is not obtained within sixty (60) *days* after the date of the signing of the *Contract*, either party may give written notice to the other party, terminating the *Contract*.

This notice must be served by hand on the other party, no later than five (5) working days after the expiry of the above 60 days.

In the event of such a termination neither party will incur any obligation or liability by reason of having entered the *Contract*, or by reason of such termination, except only that

- a) the *builder* shall be entitled to be paid a reasonable sum for services lawfully performed and expenses justifiably incurred under this *Contract* to the date of service of the notice of termination; and
- b) that sum (less any amount the *builder* may have already received from the *owner*) shall be payable by the *owner* to the *builder* on termination and be recoverable accordingly; and
- c) if the *builder* has received any payment from the *owner* and the sum received is more than the sum payable to the *builder* under this *clause*, the *builder* must refund any excess to the *owner* within five (5) *working days* after termination.

4.4.2 If neither party has served a notice on the other party under *clause* 4.4.1 within the said five (5) *working days*, the *Contract* remains in force for a further thirty (30) calendar *days*.

4.4.3 If, during the above further thirty (30) *days*, the *owner* provides to the *builder* satisfactory evidence of all pre-requisite permits, the *builder* will commence work on the *Contract* within fourteen (14) days of receiving that evidence, and the *Contract* remains in force until it is discharged or otherwise terminated.

4.4.4 If, after the expiry of the thirty (30) *days* referred to in *clause* 4.4.2, the evidence referred to in *clause* 4.4.3 is still not available, **the *Contract* is hereby terminated without need for any further notice.** Each party hereby reserves all its rights and remedies in such an event.

4.5 Adjustment for delay in commencement

4.5.1 If a *commencement date* specified in Item 9.1 of the *Appendix* falls earlier than the date on which the *builder* may lawfully commence work under statute or under the *Contract*, the *commencement date* and the associated *completion date* must be postponed by a number of days equal to the delay.



Owner(s) Initials

Builder's Initials

General Conditions

General Conditions

4.5.2 Unless the delay results from a breach by the *builder* of an obligation under this *Contract*, the delay referred to in *clause* 4.5.1 is a delay for which the *owner* is responsible.

Clause 4.5.2 is a cost escalation clause to which Section 15 of the *Act* applies. The *owner* acknowledges receipt of **WARNING 1** given by the *builder* in Item 11.3 of the *Appendix* explaining the effect of this *clause*.
.....
signature/s of owner/s

CLAUSE 5 Home owners' warranty insurance

5.1 No building work without required insurance

Before carrying out any building work under the *Contract*, the *builder* must be in possession of, or obtain, the home owners' warranty insurance policy (if any) required under the *Building Act* 1993 for the size and type of work in question.

The insurance must be in accordance with the relevant provisions of the Domestic Building Insurance Ministerial Order(s) in effect on the date of the execution of the *Contract*.

5.2 No payment until proof of required insurance

5.2.1 If the Ministerial Order mandates a home owners' warranty insurance – or a home owners' warranty insurance of any particular type – for the type or size of the *Works* of this project then the *builder* must provide to the *owner* a copy of the complying policy **and** a copy of the associated certificate of currency or certificate of insurance (as the case may be) covering the work under the *Contract*. The applicable of these documents must be provided to the *owner* either

- (a) before entering the *Contract*; or
- (b) (subject to compliance with *clauses* 5.2.2 and 5.2.3 below) after entering the *Contract*, but no later than seven (7) *days* after the date on which the specific policy is issued.

5.2.2 If the above documents are to be provided to the *owner* under the option set out in *clause* 5.2.1(b), the *builder* is not entitled to enforce any term of the *Contract* until the *builder* has obtained the required home owners' warranty insurance and provided to the *owner* the copies specified in *clause* 5.2.1.

5.2.3 Without limiting the generality of *clause* 5.2.2, no monies whatsoever (including any *deposit* money) are payable by the *owner* to the *builder* under the *Contract* until the *builder* has provided the information and documents referred to in *clause* 5.2.1.



Owner(s) Initials

Builder's Initials

CLAUSE 6 General insurances

6.1 Work Safe requirements

The *builder* must comply with all laws relevant to accident compensation insurance applicable to all workers engaged in the *Works* or on the *land*.

The *builder* must also take out common law liability insurance policies covering the personal injury or death of all persons engaged in the *Works* or on the *land*.

6.2 Contractors' all risk insurance

6.2.1 Prior to the commencement of any work under the *Contract*, the *builder* must take out a contractor's all risk insurance policy in respect of accident, storm, fire etc damage to the *Works* or any part thereof; and also covering loss of or damage to the *builder's* own property and the property of suppliers and subcontractors. Such property includes, without limitation:

- all items of material, fittings, components and/or equipment in the *builder's* possession or control, but not yet permanently fixed to the *owner's* *land*;
- all other items of *material*, fittings, components and/or equipment intended and ascertained for inclusion in the *Works* which are in the possession or control of sub-contractors or suppliers;
- all the above items in transit; and
- all relevant plant, tools, vehicles and equipment.

The *builder* must maintain this policy until the completion of the *Works*, or until the *owner* or any *persons* for whom the *owner* is responsible take control, occupation or *possession* of the *Works*, whichever is the earlier.

6.2.2 The minimum cover required is the amount shown in Item 3.2 of the *Appendix*. If no amount is stated in that item, the minimum cover is to be 150% of the *original contract price*.

6.2.3 Insurance to cover the above risks in respect of all *existing buildings* – whether or not these are being modified, altered, renovated, extended or added to under the *Contract* – must normally be provided by *owners*.

6.2.4 Should the *builder* be required to take out any cover referred to in *clause* 6.2.3 for any reason whatsoever, the cost of obtaining and maintaining such additional insurance shall be a *direct cost*.

Clause 6.2.4 is a cost adjustment clause to which Section 33 of the *Act* applies. The *owner* acknowledges receipt of **WARNING 2** given by the *builder* in Item 11.3 of the *Appendix* explaining the effect of this *clause*.
.....
signature/s of owner/s



Owner(s) Initials

Builder's Initials

General Conditions

General Conditions

6.3 Public liability insurance

Prior to the commencement of any work under the *Contract*, the *builder* **must** also take out public liability insurance for an amount that is not less for any one claim than the amount specified in Item 3.3 of the *Appendix*. If nothing is specified under that item in the *Appendix*, the minimum amount is \$5 million.

This policy must indemnify both the *builder* and the *owner* in respect of any:

- personal injury or death of any person; and
- loss of or damage to property

which arises out of, associated with, or with respect to, the performance of the *Contract* or the *Works*.

6.4 Interests of the other party and of third parties

The *builder* and *owner* shall each ensure that, in every insurance policy taken out by either one of them; the interests of all additional parties (including, as may be applicable, the *builder*, the *owner*, financiers, mortgagees, the *builder's* subcontractors and suppliers; or any other persons) are noted by the insurer.

6.5 Limitations on liability

Despite any other provision in the *Contract*, the *builder's* responsibility and liability are hereby excluded to the maximum extent permitted by law, for or with respect to death of or personal injury to any person, or loss of or damage to any property caused by, arising from or as a result of, any act or omission of the *owner* or of any *persons for whom the owner is responsible*.

6.6 Indemnity for the builder

The *owner* hereby indemnifies the *builder* in respect of all costs, expenses, losses and damages the *builder* may suffer or incur associated with claims arising from any of the excluded risks or events referred to in *clause* 6.5.

6.7 Evidence of insurances

Each party must, within seven (7) days of receiving a written request by the other party, provide satisfactory evidence of all insurance policies which the (first) party is required to take out under *clause* 6 of the *Contract*.



Owner(s) Initials

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CLAUSE 7 The Land

7.1 Ownership

The *owner* hereby warrants that, within fourteen (14) *days* after the signing of the *Contract*, and prior to the commencement of any work, he, she, it or they will:

- (a) provide to the *builder* satisfactory
 - (i) written details of the *land* (including certified current copies of all relevant Plans of Subdivision), and
 - (ii) evidence and details of the ownership of the *land* (including a current certified copy of each Certificate of Title – and/or other title documents, where applicable);
 together with full details of all easements, covenants and all other restrictions or interests – whether registered or not – which affect, or may affect, the *land*, or its use; and
- (b) obtain from each and every *land owner*, and supply to the *builder*, all of the following:
 - (i) a written and signed consent to the carrying out of the *Works* of this *Contract* by the *builder* on the *land*; and
 - (ii) a written and signed irrevocable licence to the *builder* in the same terms, and subject to the same conditions, as each *owner* grants under *clause* 7.2 below;

Note that an *owner* may or may not also be a *land owner*. If the *owner* is identical with the *land owner*, or if the *owners* are identical with the *land owners*, shown on the Certificate of Title – and there is no additional *land owner* shown on the Certificate of Title – then *clause* 7.1 (b) will not apply.

7.2 Licence

- 7.2.1 Each *owner* hereby grants to the *builder* an irrevocable licence to free and uninterrupted access to and occupation of the *land* (including any relevant *existing buildings* on the *land*), as the *builder* reasonably requires to enable him her or it to fully and properly comply with all his her or its obligations under the *Contract* and at law.
- 7.2.2 This licence does not expire until the *builder* has received payment in full of the *final payment claim*, or until such earlier time (if any) as the *builder* may agree in writing.
- 7.2.3 Any actual, attempted or purported withdrawal, cancellation, infringement or restriction – by the *owner*, by any *land owner* or by any other *person for whom the owner is responsible* – of any one or more of the consents given under 7.1(b)(i) or of any of the licences given under *clause* 7.1(b)(ii) and/or under *clause* 7.2.1 will constitute a fundamental breach of the *Contract*, and a Common Law repudiation, by the *owner*.

7.3 All weather access

Unless otherwise stated elsewhere in the *Contract*, the costs of providing all-weather access to the *land* for any vehicle or machinery necessary for the carrying out of the *works*, or for the delivery of *materials* (being only those which are to be provided by the *builder*), are included in the *original contract price*.



Owner(s) Initials

Builder's Initials

General Conditions

General Conditions

7.4 Control of the site

- 7.4.1 During the currency of the licence referred to in clauses 7.1 and 7.2, the *builder* has exclusive control over the *land*. This includes – but is not restricted to – responsibility for complying with all applicable health-and-safety and security requirements.
- 7.4.2 No person may enter the *land* at any time during this period without the *builder's* prior knowledge and approval. Such approval is subject to strict compliance with any reasonable conditions or instructions the *builder* may attach to it.
- 7.4.3 All visitors (who, for these purposes, include the *owner* and all *persons for whom the owner is responsible*) must comply with the *builder's* reasonable directions at all times while they are on the *land*.
- 7.4.4 Subject to the above, and on receipt of a request by the *owner* on reasonable notice, the *builder* will give the *owner*, or any named *persons for whom the owner is responsible* reasonable access, during working hours, to view the whole or specific part or parts (as may be specified by the *builder*) of the *Works*.
- 7.4.5 The *owner* hereby accepts liability for and indemnifies the *builder* against all adverse consequences of any failure or refusal by the *owner* or by any *person for whom the owner is responsible* to comply with any of the *builder's* conditions of entry, directions or instructions.
- 7.4.6 For these purposes, the *person(s) for whom the owner is responsible* include (without limitation) each *land owner* and persons acting for any of the *owner's* lenders.

7.5 Identification of the Land

Before entering the *Contract*, the *owner* must clearly, correctly and unmistakably identify the *land* with a sign stating the name of the *owner* and the lot or street number.

7.6 Evidence of boundaries or position

- 7.6.1 The *owner* must, no later than seven (7) *days* after signing the *Contract*, give to the *builder* satisfactory evidence of the boundaries, or the position, of the *land*. The *owner* hereby warrants that all such evidence will be complete, accurate and correct.
- 7.6.2 If the *owner* fails to give the *builder* satisfactory evidence in accordance with this *clause*, the *builder* may give the *owner* a written request to obtain a survey of the *land*. If the *owner* neglects or fails to do so within seven (7) *days* of the date of receiving that request, the *builder* may arrange for a survey of the *land*. The cost of obtaining such survey shall be a *direct cost*.

Clause 7.6.2 is a cost adjustment clause to which Section 33 of the Act applies. The *owner* acknowledges receipt of **WARNING 2** given by the *builder* in Item 11.3 of the *Appendix* explaining the effect of this *clause*.

.....
signature/s of owner/s



Owner(s) Initials

Builder's Initials

7.7 Indemnity

- 7.7.1 The *owner* hereby indemnifies the *builder* in respect of all costs, expenses, losses and damages the *builder* may incur or suffer if the *owner* refuses, neglects or fails to identify the *land* to the *builder* as required in *clause* 7.5.
- 7.7.2 The *owner* hereby indemnifies the *builder* in respect of all costs, expenses, losses and damages the *builder* may incur or suffer if the evidence that the *owner* supplies under *clause* 7.5 or 7.6 is, in any way, incomplete, inaccurate, incorrect, deceptive or misleading.

CLAUSE 8 Commencement and completion

8.1 Commencement date

- 8.1.1 Subject to any extensions to which the *builder* may be or become entitled and subject to the provisions of *clauses* 4.5.1 and 8.1.2, the *builder* will commence *work* on the *Works* of the *Contract* on the date (if any) specified in item 9.1(a) of the *Appendix*.
- 8.1.2 Despite *clause* 8.1.1 the *builder* may not and is not required to commence or to carry out any building work under this *Contract* until and unless: –
 - a) any applicable cooling-off period has expired; and
 - b) all of the following original documents (or their satisfactory copies) have been obtained by or supplied to the *builder* (as the case may require)
 - (i) all permits required under *clauses* 4.1(a) and 4.1(b);
 - (ii) satisfactory evidence of the ownership of, and matters affecting, the *land*; as required by *clause* 7.1;
 - (iii) where applicable, the consent of each *land owner*, as required by *clause* 7.1(b)(i);
 - (iv) where applicable, all the licence(s) in accordance with *clause* 7.1(b)(ii); and
 - (v) satisfactory evidence of the *owner's* capacity to pay the *contract price* in accordance with *clause* 12.1; and
 - c) all lawful stipulations made by any *authorities* as conditions precedent to the *builder's* entitlement to commence work on the *site* have been complied with and satisfied; and
- 8.1.3 The *builder's* obligation is to commence the *Works* on the date (if any) specified in item 9.1(a) of the *Appendix*, or as soon as reasonably possible following the satisfaction of all of the applicable conditions referred to in *clause* 8.1.2 – whichever is the later.
- 8.1.4 Despite *clause* 8.1.1 the *builder* may not commence or carry out any building work under this *Contract* until and unless the *builder* has taken out the insurances referred to in *clauses* 6.2.1 and 6.3 and (where applicable) the insurance referred to in *clauses* 6.2.3 and 6.2.4



Owner(s) Initials

Builder's Initials

General Conditions

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8.2 Commencement notice

Within seven (7) days after commencing to carry out the Works, the builder must give to the owner a written notice stating:

- (a) that the builder has commenced to carry out the Works under the Contract; and
- (b) the date on which the builder commenced to carry out the Works; and
- (c) the anticipated completion date having regard to the above date and the construction period specified in Item 9.2 K of the Appendix to this Contract.

8.3 Completion date

Subject to extensions of the construction period to which the builder is entitled under the Contract or at law, the Works are to reach completion on the date referred to in clause 8.2(c).

8.4 Certain delays included

In calculating the number of days required to complete the Works, the builder has made reasonable allowances for the events stated in Items 9.2 A to H of the Appendix. These allowances are included in the construction period.

CLAUSE 9 Prime cost items and provisional sums

THIS CONTRACT CONTAINS NO
PRIME COST ITEMS OR PROVISIONAL SUMS.

CLAUSE 10 The builder's obligations

10.1 Builder's warranties

The builder gives to the owner the following warranties, contained in Section 8 of the Act:

- The builder will carry out the Works in a proper and workmanlike manner, and in accordance with the plans and specifications, as set out in the Contract.
- Materials supplied by the builder for use in the Works will be good and suitable for the purpose for which they are to be used and, unless otherwise stated in the Contract (refer to Item 25 of the Appendix), those materials will be new.
- The builder will carry out the Works in accordance with all laws and legal requirements including, without limiting the generality of this warranty, the Building Act 1993 and regulations made under that Act.
- The builder will carry out the Works with reasonable care and skill, and will achieve completion by the completion date, or within the period, specified in the Contract.
- If the Works consist of the erection or construction of a home, or the intention is to renovate, alter, extend, improve or repair a home to a stage suitable for occupation, the builder will carry out the work so that the home will be suitable for occupation at the time the Works achieve completion; and

- If the Contract states the particular purpose for which the Works are required, or the result which the owner wishes the Works to achieve, so as to show that the owner relies on the builder's skill and judgment, the builder warrants that the Works including any materials used will be reasonably fit for that purpose, or be of such a nature and quality, as might reasonably be expected to achieve that result.

10.2 Limitations

Despite clause 10.1 the builder is not responsible or liable for breaching any of the warranties contained in that clause or in section 8 of the Act, if the relevant breach was known, or ought reasonably to have been known, to the owner to exist at the time the Contract was entered into.

10.3 Exclusions

The builder's warranties under clause 10.1 or under section 8 of the Act, do not apply to any materials or other items (including workmanship) which

- (a) are to be supplied and/or carried out by the owner or by any persons for whom the owner is responsible, (as specified in Item 23 of the Appendix); or
- (b) are outside the scope of the Contract, (including – but not restricted to – the items specified in Item 22 of the Appendix)

10.4 Unavailability of materials

- 10.4.1 If any material specified in the Contract is or becomes unavailable, the builder will notify the owner of such unavailability as soon as practicable.
- 10.4.2 The builder may submit a written variation notice to the owner, in accordance with clause 14.1, proposing an appropriate substitute material. If the owner agrees to the proposed substitution using the procedure set out in clause 14 the work is to be varied accordingly.
- 10.4.3 Alternatively, the owner may submit a written request to the builder in accordance with clause 13.1, proposing a substitute material. If the parties agree to the proposed substitution using the procedure set out in clause 13, the work is to be varied accordingly.
- 10.4.4 If any materials cannot be reasonably obtained with characteristics that exactly and fully match those of a specified, implied or agreed product, sample or prototype in all respects, the builder's obligation shall be discharged by supplying a reasonably close match with respect to the varied characteristics.

General
Conditions

General
Conditions



Owner(s) Initials

Builder's Initials



Owner(s) Initials

Builder's Initials

CLAUSE 11 Progress claims and payments

**WARNING No. 1
SECURITY OF PAYMENT LEGISLATION**

Most, but not all, domestic building contracts are exempt from the *Security of Payment Act*. The *owner* and the *builder* are each strongly urged to obtain their respective independent legal advices as to whether the *Security of Payment Act* does or does not apply to the *Contract*.

**WARNING No. 2
"METHOD B" MUST BE USED IN COST-PLUS CONTRACTS**

The progress payment provisions of this *clause 11* are based on the use of "Method B". A "cost-plus" contract is one of the "exceptional cases" to which the statutory warning notice in Item 27 of the *Appendix* refers. For this reason "Method B" shall be used as the framework for the progress payment regime in the *Contract* pending the *owner's* informed consent in Item 27 of the *Appendix*.

If the *owner* is unable or unwilling to give such consent, a "cost plus" contract is unworkable and a fixed price contract must be used.

11.1 Claims procedure

PLEASE READ AND SIGN BOTH BOXES IN ITEM 27 of the *APPENDIX* to the *CONTRACT*:
"WARNING TO THE OWNER – CHANGE OF LEGAL RIGHTS" and
"FORM 2 UNDER REGULATION 6(b): PROGRESS PAYMENTS"

- 11.1.1 Unless otherwise agreed, the *builder* may serve *payment claims* on the *owner* at the following times:
 - (a) *Deposit*:
 - where no warranty insurance is required by the Ministerial Order: upon the signing of the *Contract*;
 - in all other cases: as soon as the *builder* has produced the copies evidencing the required *warranty insurance policy* (refer to *clause 5.2*)
 - (b) *First progress payment claim*:
 - on or after the date specified in Item 16(b) of the *Appendix*;
 - (c) *Subsequent progress payment claims* may be served by the *builder* or on after the dates specified in Item 16l of the *Appendix*
 - (d) A written *final payment claim* may, and may only, be served in accordance with *clause 19.1*
- 11.1.2 Unless the parties agree otherwise in writing, the *builder's* entitlements to *progress payments* (other than the *deposit*) are restricted to

- the *direct costs* of :
- *materials*, equipment and components that have been permanently attached to the land; and
- work necessarily performed, and plant, equipment and services necessarily provided in bringing the above items to the *land* and attaching them to same;

during the period between the date of the last previous *payment claim* served by the *builder* and the date of the *payment claim* in question

- (b) together with the applicable *builder's margin* and *GST* associated with those *direct costs*; and
- (c) (where applicable) amounts previously claimed but unpaid.

11.1.3 Each *payment claim* must be accompanied by satisfactory evidence of the *direct costs* referred to in *clause 11.1.2 (a)*.

11.2 Due dates for payments

- 11.2.1 *Payment claims* (other than the *final payment claim*) become due and payable as specified in Item 17(b) of the *Appendix*.
- 11.2.2 The *final claim* becomes due and payable as specified in Item 17(c) of the *Appendix*.

11.3 Failure to pay as and when required

- 11.3.1 Any failure by the *owner* to meet any of its statutory or contractual obligations concerning the amount or timing of payments to the *builder* shall constitute a breach of the *owner's* fundamental obligations under the *Contract*.
- 11.3.2 Without affecting any of the *builder's* other rights or remedies, interest at the rate specified in Item 19 of the *Appendix* shall be payable by the *owner* in respect of all late payments. The interest applies to all amounts not paid on the due date, from the due date until the date that the amount in question is paid in full.

Clause 11.3.2 is a cost adjustment clause to which **Section 33** of the *Act* applies. The *owner* acknowledges receipt of **WARNING 2** given by the *builder* in Item 11.3 of the *Appendix* explaining the effect of this *clause*.

.....
signature/s of owner/s

NOTE

If the *Security of Payment Act* applies to the *Contract* and its operation has been triggered by the *builder* by submitting a "valid *payment claim* under [that] *Act*", then the assessment and payment scheme set out in the *Security of Payment Act* will apply to that *payment claim*.

The *builder's* rights and remedies for the *owner's* failure or failures to comply with that scheme will include – without prejudice to any of the *builder's* other rights or remedies – those set out in the *Security of Payment Act*.

Note that those rights and remedies include the right to suspend work and/or to obtain summary judgment in certain circumstances.



Owner(s) Initials

Builder's Initials



Owner(s) Initials

Builder's Initials

General Conditions

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CLAUSE 12 Owner's obligations

12.1 Capacity to pay

The *owner* must, within fourteen (14) *days* of the signing of the *Contract*, provide satisfactory written evidence to the *builder* that the *owner* has the financial capacity to pay the *contract price* in accordance with the provisions of this *Contract*.

12.2 Repeated evidence of capacity to pay

The *builder* may, at any time until all monies payable under the *Contract* have been duly paid by or on behalf of the *owner*, request that the *owner* provide satisfactory written evidence of his, her or its capacity to pay the balance of the *contract price*, or any proposed or agreed variation price. Such a request may be made even if the *owner* has previously provided such evidence to the *builder* under the *Contract*. Within fourteen (14) *days* of each such request, the *owner* must provide the necessary evidence.

12.3 Reduced capacity to pay

The *owner* must immediately notify the *builder* if, at any time during the currency of the *Contract*, the *owner's* capacity to pay the *contract price*, or the balance of the *contract price*, is or becomes – or is likely to become – in any way impaired, reduced, placed at risk or lost.

12.4 Obligation to pay

The *owner* must pay the *builder* the *contract price* in accordance with the *Contract*. Without limitation, the *owner* must

- 12.4.1 pay the *deposit* immediately at the applicable time specified in *clause* 11.1.1(a); and
- 12.4.2 make *progress payments* to the *builder* in accordance with the applicable provisions of *clause* 11; and
- 12.4.3 pay all other amounts due under the *Contract* no later than at the times they are, or become, due and payable.

12.5 Foundations data

If the *owner* provides any *foundations data* to the *builder*, the *owner* hereby:

- 12.5.1 warrants that
 - (a) those *foundations data* are adequate, accurate and correct, and that they are good and suitable for the purposes for which they are to be used, and
 - (b) they include all relevant information in the *owner's* possession or control; and
- 12.5.2 acknowledges that:
 - (a) the *builder* intends to rely on those *foundations data* for the purposes of relevant structural computations and designs, and for the purpose of carrying out the *Works*; and
 - (b) it is reasonable for the *builder* to rely on those *foundations data* for those purposes.

12.6 No interference

- 12.6.1 Neither the *owner*, nor any *person for whom the owner is responsible*, may at any time obstruct, interfere with or hinder the carrying out of the *Works*.
- 12.6.2 The *owner* must also take all reasonable steps to prevent all *persons for whom the owner is responsible* (as well as any animals for which the *owner* may be responsible), from obstructing, interfering with or hindering the carrying out of the *Works*.

12.7 Communications

- 12.7.1 Except as and when authorised by the *builder*, neither the *owner*, nor any *person for whom the owner is responsible*, may at any time directly communicate with, or give any directions to, any of the *builder's* employees, subcontractors or suppliers.
- 12.7.2 Whenever an *owner's agent* has been appointed under *clause* 27.10, communications concerning the *Works* and the administration of the *Contract* must pass between the *owner's agent* and the *builder* – and only between those persons. Without limitation these communications include all directions, instructions, notices, queries, requests and approvals.
- 12.7.3 Despite *clause* 12.7.2, certain notices must always be given by the *builder* directly to the *owner* and directly by the *owner* to the *builder*.
These include (without limitation):
 - notices with respect to suspension and/or termination of the *Contract*;
 - decision to impose (or vary) liquidated damages;
 - documents to be served under the *Security of Payment Act* – as set out in that statute.

12.8 Assist builder

Whenever the *owner* is required to make any decision, or to provide any direction, approval, authorisation, information, instruction or advice, or to supply any *materials* equipment or labour, or to perform any similar acts, the *owner* must ensure that those are done at the time and in the manner the *builder* requires in order to meet all his obligations under the *Contract*.

The *builder* must give reasonable notice to the *owner* of the *builder's* timing and any other requirements in respect of these items and acts.

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Owner(s) Initials

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CLAUSE 13 Variations by the owner

13.1 Written request

If the *owner* wishes to vary the *Works* of the *Contract*, the *owner* must give to the *builder* a written request describing the proposed variation.

13.2 Builder is not obliged to vary

The *builder* may decline or refuse to vary the *Contract* in any particular case. In such an event, the *builder* will give the *owner* a written notice stating that the *builder* is unable or unwilling to carry out the variation, and giving reason(s) for such inability or refusal.

13.3 Builder may vary in certain circumstances

If the *builder* :

- (a) has no objection to varying the *Contract* in accordance with the *owner's* written request; and
- (b) reasonably believes that the variation will not
 - require a change to any permit; and
 - cause any delay; and
 - add more than 2% to the *original contract price*,

the *builder* may carry out the variation and advise the *owner* of the amount of the variation in writing as soon as practicable.

Clause 13.3 is a cost adjustment clause to which Section 33 of the *Act* applies. The *owner* acknowledges receipt of **WARNING 2** given by the *builder* in Item 11.3 of the *Appendix* explaining the effect of this *clause*.

.....
signature/s of owner/s

13.4 Offer to vary in other circumstances

13.4.1 If the *builder*

- (a) has no objection to varying the *Contract* in accordance with the *owner's* written request; but
- (b) has reason to believe that the relevant variation will
 - require change(s) to the permit(s); or
 - will cause delay; or
 - will add more than 2% to the *original contract price*;

the *builder* may offer to vary the *Contract*, as specified below.



Owner(s) Initials/.....

Builder's Initials

13.4.2 In such a case the *builder* will, within a reasonable time after receipt of the request referred to in *clause* 13.1, give the *owner* a written notice stating all of the following:

- (a) a description of the variation in sufficient detail to identify the work to be done (or to be omitted);
- (b) whether, in the *builder's* opinion, any amendment/s will be required to any permit(s);
- (c) a reasonable estimate of the overall delays (if any) which the variation is likely to cause in reaching *completion*;
- (d) subject to *clause* 13.5, the *builder's* firm price for proceeding with and carrying out the variation;
- (e) the effect of that price on the *contract price*;
- (f) any other effects the variation may have on the *Works*;
- (g) whether a *deposit* is required prior to any work proceeding on the variation. (Such *deposit* may not exceed 10% of the value of the variation where that value is less than \$20,000.00, and it may not exceed 5% for values of \$20,000.00 or more); and
- (h) the latest date on which the *builder* needs to receive the *owner's* written response.

13.4.3 The above notice is hereby agreed to be an offer to vary the *Contract* in accordance with the terms of the offer. Until and unless the *builder* receives, within the period stated in that notice, the *owner's* full written acceptance of all of the terms of that offer (which acceptance must comply with *clause* 13.6), no variation will come into being; and the *builder* shall not proceed with implementing any of the proposed changes.

13.5 If firm price is not practicable

Whenever it is not practicable for the *builder* to submit a firm price in compliance with *clause* 13.4.2(d) for any item(s) of variation, the *builder* will submit a reasonable estimate of that price. In all other respects the notice will be as in *clause* 13.4.2.

13.6 Acceptance by owner

13.6.1 The *owner* may, within the period stated in the notice, expressly accept the offer referred to in *clause* 13.4.2.

13.6.2 The acceptance must be in the form of a signed written note instructing the *builder* to proceed with the variation, attached to a copy of the *builder's* offer referred to in *clause* 13.4.2.

13.6.3 The acceptance binds the parties to vary the *Contract* in accordance with all details set out in the notice of offer.

13.6.4 If, under *clause* 13.5, a reasonable estimate has been provided for the price of any component or item or work involved in a variation, the cost of that component or item or work will be a *direct cost*.

Clauses 13.5 and 13.6.4 are cost escalation clauses to which Section 15 of the *Act* applies. The *owner* acknowledges receipt of **WARNING 1** given by the *builder* in Item 11.3 of the *Appendix* explaining the effect of this *clause*.

.....
signature/s of owner/s



Owner(s) Initials/.....

Builder's Initials

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Clauses 13.4, 13.6.1, 13.6.2 and 13.6.3 are cost adjustment clauses to which Section 33 of the Act applies. The owner acknowledges receipt of WARNING 2 given by the builder in Item 11.3 of the Appendix explaining the effect of this clause.

signature/s of owner/s

13.7 If no acceptance by owner

- 13.7.1 If the owner rejects or objects to, or otherwise refuses, fails or neglects to accept the offer made within the period stated in the notice referred to in clause 13.4.2, the builder may in his/her/its absolute discretion:
(a) either proceed with the Works of the Contract as previously documented; that is: without implementing the variation proposed by the owner;
(b) or negotiate with the owner the scope of and the price for the variation the subject of the offer under clause 13.4.2
13.7.2 If and when negotiations referred to in sub-clause (b) above result in an agreement with respect to the matters concerned, the details of the agreement must be documented and signed by both parties and dealt with as an approved variation.

Clauses 13.7.1(a) and 13.7.2 are cost adjustment clauses to which Section 33 of the Act applies. The owner acknowledges receipt of WARNING 2 given by the builder in Item 11.3 of the Appendix explaining the effect of this clause.

signature/s of owner/s

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CLAUSE 14 Variations by the builder

14.1 Written notice required

If the builder wishes to vary the plans or specifications, the builder must first give the owner a written notice stating all of the following:

- (a) a description of the proposed variation;
(b) the builder's reason(s) for proposing the variation;
(c) whether any amendment/s will be required to any permit(s);
(d) a reasonable estimate of the length of the delays (if any) which the variation is likely to cause;
(e) the cost of the variation;
(f) any other effects the variation may have on the Works as a whole;
(g) whether a deposit is required prior to any work proceeding on the variation. (Such deposit may not exceed 10% of the value of the variation where that value is less than \$20,000.00, and it may not exceed 5% for values of \$20,000.00 or more); and
(h) the latest date on which the builder needs to receive the owner's written response.

14.2 Authorisation required

The builder will not give effect to any variation of this kind until it has been authorised. Authorisation will not be deemed to occur until and unless:

- 14.2.1 either the owner gives the builder a written and signed consent to the variation, and attaches the consent to a copy of the notice referred to in clause 14.1; or
14.2.2 all of the following circumstances apply:
(a) a building surveyor or other authorised person under the Building Act 1993, has issued a building notice or order under that Act, requiring the variation to be made; and
(b) the variation has arisen as a result of circumstances beyond the control of the builder; and
(c) the builder has given the owner a copy of the above notice or order, as well as a builder's notice as specified in clause 14.1; and
(d) at the end of the fifth (5th) business day after receipt of the documents referred to in sub-clause 1 the owner has not given a written notice stating that the owner wishes to dispute the building notice or building order (as the case may be).

Clause 14 is a cost adjustment clause to which Section 33 of the Act applies. The owner acknowledges receipt of WARNING 2 given by the builder in Item 11.3 of the Appendix explaining the effect of this clause.

signature/s of owner/s

General Conditions



Owner(s) Initials

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CLAUSE 15 Variations generally

15.1 Unauthorised variations

The *builder* will not and may not implement any *variation* until and unless it has been

- duly accepted under *clause* 13.6 or
- authorised under *clause* 13.3; or
- authorised under *clause* 14.2,

whichever is applicable.

15.2 Adjustments for variations

15.2.1 If any accepted or authorised variation results in a decrease to the *contract price*, the amount of the net credit will be deducted from the *original contract price* or the previous *adjusted contract price* (whichever applies at the time).

15.2.2 If any accepted or authorised variation results in an increase to the *contract price*, the amount of the variation will be added to the *original contract price* or the previous *adjusted contract price* (whichever applies at the time).

15.3 Variations: deposit, capacity to pay

15.3.1 Regardless of any other provision, the *builder* is under no obligation to commence any *variation* work until such time as the *owner*:

- (a) has paid to the *builder* a deposit for the variation, [if such a deposit was requested by the *builder* under *clause* 14.1(g)]; and
- (b) produces satisfactory written or other evidence showing that the *owner* has the financial capacity to pay the cost of the variation [if the *builder* requests it under *clause* 12.2],

15.3.2 Delays that may occur due to any failure by the *owner* to comply – or to comply promptly – with the above obligations are delays attributable to the *owner*.

Clause 15.3.2 is a cost escalation clause to which Section 15 of the Act applies. The *owner* acknowledges receipt of **WARNING 1** given by the *builder* in Item 11.3 of the *Appendix* explaining the effect of this *clause*.

.....
signature/s of owner/s

NOTE

that a 'fair value' may still be payable to the *builder* by the *owner* even where no other provision of the *Contract* applies to establish the price of a given *variation*. This may apply if the *VCAT* is satisfied that (a) exceptional circumstances exist or (b) the *builder* would suffer a significant or exceptional hardship and it would not be unfair to the *owner* for the *builder* to recover the money.

Case law suggests that the relevant "exceptional circumstances" may include situations where an *owner* has instructed or permitted to the *builder* to go ahead with a variation even though there was no prior written authorisation as required under *clause* 13.5 or 14(2)1(a).



Owner(s) Initials

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CLAUSE 16 Extras for excavations for footings

16.1 Statutory constraints

Under section 30(7) of the Act and subject only to clause 16(2), after entering into this *Contract* the *builder* cannot seek from the *owner* any amount of money not already provided for in the *original contract price* if that additional amount could have been reasonably estimated had the *builder* obtained all the *foundations data* required under the Act.

16.2 Entitlement in certain circumstances

Despite clause 16.1; the *builder* may still be entitled to additional amounts of the kind referred to in that clause, but only in the following circumstances:

16.2.1 If some of the required *foundations data* were supplied by the *owner* and those data are in any way inadequate, incomplete, inaccurate, defective, misleading or deceptive, then the *builder* may (but will not necessarily) be entitled to compensation for additional costs and losses incurred as a result of relying on such data.

16.2.2 Otherwise the *builder* will only be entitled to claim an amount of money not already provided for in the *original contract price* if, and only if, the need for the additional amount could not reasonably have been ascertained even if the *builder* had obtained all the *foundations data* required by section 30 of the Act.

Clause 16.2 is a cost adjustment clause to which Section 33 of the Act applies. The *owner* acknowledges receipt of **WARNING 2** given by the *builder* in Item 11.3 of the *Appendix* explaining the effect of this *clause*.

.....
signature/s of owner/s

16.3 Valuation

Where the *builder* is entitled to any additional amount under *clause* 16.2.1 or *clause* 16.2.2, the amount of the entitlement will be the *direct cost* incurred, plus the applicable *builder's fee* specified in Item 11.3 of the *Appendix*, plus the applicable *GST*.



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CLAUSE 17 Delays and extensions of time

17.1 Entitlement to extension of time

If, through no fault of the *builder*, the progress of the *Works* is delayed by any one or more of the following causes:

- (a) *variations* ordered, accepted or otherwise authorised under the *Contract*;
- (b) disputes with the *builder* or the *owner* by adjoining or neighbouring owners or residents;
- (c) proceedings taken or threatened by adjoining or neighbouring owners or residents against the *builder* or the *owner*;
- (d) industrial action or civil commotion affecting: the *Works*, or any of the trades employed on the *Works*, or the manufacture or supply of *materials* for the *Works*, or transport or access required for or in respect of the *Works*;
- (e) the general unavailability of any *materials* necessary to carry out the *Works*;
- (f) inclement weather or any condition resulting from inclement weather (in excess of the respective allowances stated in item 9.2A and item 9.2B of the *Appendix*);
- (g) any act, default or omission on the part of the *owner*, or any breach of the *Contract* by the *owner*.
- (h) any act, omission or conduct on the part of the *owner*, the *owner's agent*, or any other *person* for whom the *owner* is responsible, which interferes with or hinders the *builder* in the performance of its obligations under the *Contract*, and all such acts, omissions and conduct which have that effect;
- (i) a valid exercise of the *builder's* right to suspend the carrying out of the *Works* under the *Security of Payment Act*, or under any provision of the *Contract*, or at law;
- (j) any delay or refusal by any *authority* to carry out any test, or to grant or issue any necessary permit, certificate or other document which is required for the commencement, progress and/or completion of the *Works* under the *Contract* in accordance with its terms;
- (k) any delays associated with obtaining necessary certificates or permits (refer to *clause 4*); and/or
- (l) any other cause beyond the reasonable control of the *builder*,

then, in each such case, the *builder* will:

- within a reasonable time advise the *owner*, by written notice of the cause and estimated length of the delay, and
- be entitled to a fair and reasonable extension of the *construction period* and to the corresponding adjustment of the *completion date*.

17.2 Owner's response

- 17.2.1 The *owner* may, within fourteen (14) days after receipt of the *builder's* notice under *clause 17.1*, serve a written response on the *builder*, stating that the *owner* :
- (a) agrees to grant an extension equal to the length of the estimated delay and adjust the *completion date* accordingly; or
 - (b) agrees to grant an extension of a different length to that estimated by the *builder* and adjust the *completion date* accordingly; or
 - (c) disputes or rejects the *builder's* entitlement to any extension with respect to the delay in question.
- 17.2.2 In a response under options (b) or (c) above the *owner* must also state the reasons for varying, disputing or refusing (as the case may be) the claim.
- 17.2.3 If the *builder* does not accept or agree with a decision notified under option (b) or (c), a dispute exists. Either of the parties may refer the matter to one or more of the processes set out in *clause 28*.
- 17.2.4 If, within fourteen (14) days after service of the *builder's* notice under *clause 17.1*, the *owner* has failed or refused to serve on the *builder* a response under *clause 17.2.1*, the *construction period* under the *Contract* will be automatically extended by the length of the estimated delay stated in the *builder's* notice, and the *completion date* will be adjusted accordingly.

17.3 Delays attributable to the owner

Whenever the progress of the *Works* is delayed by or arising from any act or omission of the *owner*, or any *person(s)* for whom the *owner* is responsible, the *builder* is, in addition to the appropriate extension to the *construction period*, also entitled to recover the liquidated and pre-agreed amount (if any) included in Item 20 of the *Appendix* in respect of each week of such delay, and/or 1/7th (one seventh) of that amount for each day of delay.

Clause 17.3 is a cost escalation clause to which Section 15 of the *Act* applies. The *owner* acknowledges receipt of **WARNING 1** given by the *builder* in Item 11.3 of the *Appendix* explaining the effect of this *clause*.

.....
signature/s of owner/s

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CLAUSE 18 Suspension of the Works

18.1 Builder's entitlement to suspend

The *builder* may, without affecting any of the *builder's* other rights or remedies under the *Contract* or at law, suspend the carrying out of the *Works* if the *owner*, the *owner's agent*, or any *person for whom the owner is responsible*, commits any one or more of the acts or makes any one or more of the omissions listed below: -

- (a) failing or refusing to give the *builder* satisfactory written details or evidence of the ownership of the *land* in accordance with *clause 7.1(a)*;
- (b) failing or refusing to obtain any of the *land owners' consents* whenever they are required under *clause 7.1(b)(i)*;
- (c) failing or refusing to obtain any licence referred to in *clause 7.1(b)(ii)* or failing or refusing to ensure that no such licence is revoked or cancelled or in any way infringed or restricted during the period specified in *clause 7.2.2*;
- (d) taking *possession*, occupation or control of the *Works*, or any part of the *Works*, in breach of *clause 7.2*
- (e) revoking, cancelling or in any way infringing or restricting the licence granted under *clause 7.2.1*, or attempting or purporting to do any of these acts;
- (f) failing or refusing to give the *builder* written or other reasonable evidence of the *owner's* capacity to pay the *contract price* as required under *clause 12.1*, or whenever requested under *clauses 12.2* or *15.3.1(b)*;
- (g) failing or refusing to notify the *builder* in accordance with its obligations under *clause 12.3* whenever the circumstances giving rise to those obligations occur;
- (h) indicating that the *owner* is unable or unwilling to make any payment as and when required under the *Contract* or at law:
- (i) failing, refusing or being late in making any payment (including any *deposit*) to the *builder*, to which the *builder* is entitled;
- (j) failing or refusing to comply with the *Contract*, including failing or refusing to provide any directions requested by the *builder*;
- (k) obstructing, interfering with, or hindering the carrying out of the *Works*;
- (l) communicating directly with, or giving directions to, any of the *builder's* employees, subcontractors or suppliers;
- (m) failing or refusing to supply *materials* or give information as and when required to be supplied or given to the *builder* under the *Contract*;
- (n) failing or refusing to provide reasonable access to the *land* for the *builder*, or any *persons for whom the builder is responsible*, including the *builder's* employees and/or subcontractors;
- (o) breaching any other fundamental or substantial term or condition of the *Contract*.

18.2 Written notice required

Subject to *clause 18.5*, when suspending the carrying out of the *Works*, the *builder* must immediately notify the *owner* in writing of the suspension and specify the reason or the reasons for it.

This notice must be served by hand or by registered post.

18.3 Owner must remedy

The *owner* must remedy the breach or breaches stated in any suspension notice given to the *owner* under *clause 18.2*, within seven (7) *days* after receiving the notice from the *builder*.

18.4 Re-commencement after suspension

The *builder* will resume the carrying out of the *Works* of this *Contract* as soon as practicable, but in any event no later than fourteen (14) *days*, after the *owner* has remedied the breach or breaches specified in the suspension notice referred to in *clause 18.2*

18.5 Suspension under the Security of Payment Act

In addition to the matters referred to in *clauses 18.1-18.4* above, the *builder* may, in certain circumstances, also become entitled to suspend the *Works* under the *Security of Payment Act* (if that Act applies to the *Contract*).

The relevant provisions of that statute govern all procedures, rights, remedies and obligations of the parties with respect to such suspensions.

18.6 Extensions for suspension

In the event of each valid suspension of the *Works* the *builder* is entitled to an automatic extension of the *contract period* equal to the time elapsed between the commencement of the suspension and the corresponding re-commencement of work; and by the number of *days* of consequential delay (if any). The *completion date* will be adjusted accordingly.

18.7 Delays caused by suspension

All delays resulting in the extensions referred to in *clause 18.6* above are attributable to the *owner* and therefore *clause 17.3* applies to those delays.

Clause 18.7 is a cost escalation clause to which Section 15 of the Act applies. The *owner* acknowledges receipt of **WARNING 1** at Item 11.3 of the *Appendix* given by the *builder* explaining the effect of this *clause*.

.....
signature/s of owner/s

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18.8 Damages etc attributable to suspension

In the event that the *builder* validly exercises its legal or contractual right to suspend the carrying out of the *Works* (or any part of the *Works*) of the *Contract*; the following will apply:

- 18.8.1 neither the *builder* nor any of the *persons for whom the builder is responsible* will be in any way responsible or liable for any losses or damages suffered or for any costs or expenses incurred by the *owner* or by any of the *persons for whom the owner is responsible*; and
- 18.8.2 the *owner* will be responsible and liable for all losses and damages suffered and for all costs and expenses incurred by the *builder* and by the *persons for whom the owner is responsible* caused by, arising from, associated with or with respect to the suspension.

Clause 18.8 is a cost escalation clause to which Section 15 of the Act applies. The *owner* acknowledges receipt of **WARNING 1** at Item 11.3 of the *Appendix* given by the *builder* explaining the effect of this *clause*.

.....
signature/s of owner/s

CLAUSE 19 Procedure on completion

19.1 Final claim

- 19.1.1 When the *Works* of the *Contract* have reached *completion* in accordance with the *plans* and *specifications*; and the *land* and the *Works* are in a reasonably neat and tidy condition having regard to the scope of the *Contract*, the *builder* will provide to the *owner* the following documents:
 - (a) the *builder's final payment claim*; and
 - (b) copies of all applicable certificates required by law; including
 - the *Occupancy Permit* (where required in the building permit); or
 - the *Certificate of Final Inspection* (in all other cases)

unless the scope of the *Contract* is such that the obligations under (b) do not arise. (Refer to the definition of "*completion*" in *clause 1*)
- 19.1.2 Subject to *clause 19.2*, the *final claim* falls due and payable on the day specified in Item 17(c) of the *Appendix* following service of the documents referred to in *clause 19.1.1*
- 19.1.3 Upon making the *final payment*, but not before, the *owner* will be contractually entitled to
 - (a) receive the keys from the *builder*, and
 - (b) occupy the *Works*.



Owner(s) Initials

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19.2 Outstanding items list

If, on receipt of the material referred to in *clause 19.1.1* the *owner* is of the view that the *Works* of the *Contract* have not yet reached *completion*, the *owner* may give a written instruction ("*outstanding items list*") to the *builder* detailing the items of work or other obligations which, in the *owner's* opinion, require to be carried out, rectified or completed before *completion* is achieved. This list must be received by the *builder* on or before the 5th *business day* following service of the documents referred to in *clause 19.1.1*.

The parties will then proceed as follows:

- 19.2.1 The *builder* will carry out, complete or rectify (as the case may be) all those items on the outstanding items list where the *builder* agrees that they are items for which the *builder* is responsible. Unless otherwise agreed, this work is to be completed no later than twenty-eight (28) *days* after the date on which the *builder* received the outstanding items list.
- 19.2.2 The *final claim* falls due and payable on the day specified in item 17(c) of the *Appendix* following the completion of the work referred to in *clause 19.2.1*.

19.3 Builder's objections

- 19.3.1 The *builder* may also serve on the *owner* a written notice (*builder's objections*) setting out those items on the outstanding items list which in the *builder's* opinion are not defects, or which are not matters for which the *builder* is responsible, together with the reasons for those opinions.
- 19.3.2 If, and to the extent that the parties cannot agree regarding the *builder's* objections a domestic building dispute will exist; and the relevant provisions of *clause 21.4* will apply in the same way as they apply to disputes arising from defects lists issued during the *defects liability period*.

19.4 Premature occupation by the owner

- 19.4.1 Unless agreed otherwise in writing, the *owner* must not occupy or take control or *possession* of the *Works*, or any portion of the *Works*, or demand, accept or obtain any keys to the *Works*, before having made payment in full of the *final progress payment claim* to the *builder*.
- 19.4.2 If the *owner* or any *person for whom the owner is responsible* occupies or takes control or *possession* of the *Works*, or any portion of the *Works* when not entitled to do so under the *Contract* or at law, the *owner* is in breach of his/her/its fundamental obligations under this *Contract* and at law.

Note that it is also an offence under the legislation for any owner or occupier to occupy a building, or any part of it, in the absence of a valid *occupancy permit* where such a permit is required.

19.4 After occupation by the owner

As soon as the *owner*, or any *person for whom the owner is responsible*, commences or is given occupation, control or *possession* (whether prematurely or not) the *owner* acquires all responsibility and liability for all loss and damage to the *Works*, its contents and its surrounds, and for any injury or death suffered by any person or persons in or around the *Works* and/or in the occupied premises.

On the day of occupation, the *owner* is strongly advised to immediately take out insurances in respect of the liabilities and risks referred to above, unless those insurances (with the *owner* as insured) are already in place.



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CLAUSE 20 Liquidated damages for delay in completion

20.1 Owner's entitlement

20.1.1 Subject to clauses 21.5.2 and 21.5.4 if the *builder* fails to bring the *Works* to completion by the completion date (as that date may be adjusted under the *Contract*), the *builder* will pay or allow to the *owner* the pre-estimated liquidated damages at the rate (if any) stated in Item 22 of the *Appendix*. That rate shall be applied to the number of weeks (or pro-rata, to any part of a week) by which completion or occupation (whichever is earlier) is delayed.

20.1.2 In the event that the *Contract* is terminated, liquidated damages cease to accrue as of the date of termination.

20.2 Deducting the owner's entitlement

The amount of any liquidated damages to which the *owner* is entitled may only be deducted by the *owner* from the final progress payment. Any deficiency may be recovered by the *owner* as a debt due to the *owner* by the *builder*.

CLAUSE 21 Defects after completion

21.1 "Defects lists"

From time to time the *owner* may provide to the *builder* written notices or lists of alleged defects (if any); claimed to be, or to have been caused by, defective workmanship or by defective materials provided by the *builder* under the *Contract*, or by breaches of any of the warranties set out in clause 10.1.

21.2 Responsibility and liability

21.2.1 Subject to the limitations imposed by statute and by clause 21.2.2, the *builder* is and remains responsible and liable for the rectification of all defects; including all relevant defects that occur or manifest themselves after completion, after the occupation of the *Works*, and after the payment of the final claim.

21.2.2 However, the *builder* is not responsible or liable for the rectification of any of the following:

- (a) imperfect items which are, nevertheless, within allowable tolerances and/or within any tolerances called up in the plans or specifications;
- (b) items which are not themselves defective, or which are not properly attributable to defective materials or workmanship provided by the *builder* under the *Contract*;
- (c) items which are not properly attributable to any breach of any of the warranties given by the *builder* under clause 10.1;
- (d) defects that are part of, or are caused by, or arise from, or are attributable to materials or work provided by the *owner*, by any person for whom the *owner* is responsible or by any third party or parties. These also include all items supplied, or all work done – or left undone – by any party other than by or on behalf of the *builder* after the *owner's* occupation of the *Works*;

- (e) defects caused by, arising from, or attributable to, the fact that something is still to be supplied or done or completed by the *owner*, or by persons for whom the *owner* is responsible;
- (f) defects which are caused by, attributable to, or are in any other way the responsibility of the *owner* or of any third party or parties;
- (g) effects of wear and tear;
- (h) defects which are caused by or attributable to the failure or refusal by any *owner* or occupier to use or maintain the land or the buildings or any of their components or contents in a responsible and appropriate manner.
- (i) items (whether defects or not) that are not notified in writing to the *builder* within the relevant warranty period.

21.3 Access and opportunity to inspect and to rectify

The *owner* must give reasonable access during business hours to enable the *builder* to inspect any alleged defects and, to comply with any obligations arising under clause 21.2. If the *owner*, without reasonable cause, fails or refuses to give the *builder* the opportunity to rectify any defects for which the *builder* is responsible, or the *owner* or the insurer fails or refuses to give the *builder* reasonable access to do so, the *builder* will only be liable to the *owner* for the cost that the *builder* would have incurred if the *builder* had been permitted to rectify the relevant defect/s.

21.4 Disputed items

21.4.1 If any of the items on any list or notice prepared under clause 21.1 or clause 21.5 is, in the *builder's* opinion, of a type excluded under clause 21.2.2, and the parties cannot agree in this regard, a domestic building dispute exists. Either of the parties may refer the matter to VCAT or (subject to eligibility) to one or more of the processes set out in clauses 28.3 and 28.4.

21.4.2 Any dispute concerning defects or alleged defects is no justification for withholding any payment otherwise due to be paid, or for refusing the release of any retention or of any other security otherwise due to be released.

21.4.3 Only an amount corresponding to the reasonably estimated cost of fixing the disputed item or items may be withheld by the *owner* in such an event, pending resolution of the dispute concerning responsibility and liability.

21.5 Defects liability period

21.5.1 If the parties agree to a defects liability period and specify such a period in Item 18 of the *Appendix*, then that period will

- commence on
 - the date of issue of the occupancy permit (or of the Certificate of Final Inspection); or
 - the date on which the *owner* takes occupation, control or possession of the whole, or any part, of the *Works*;

whichever is earlier; and

end on

- the expiry of the period specified in Item 18 of the *Appendix*; or
- the satisfactory rectification of all bona fide defects notified to the *builder* during the above period;

whichever is later.

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- 21.5.2 Despite the above, the *builder* is not obliged to rectify any of the items excluded under clause 21.2.2, whether or not they are on any list provided under clause 21.1.
- 21.5.3 Subject to clauses 21.5.2 and 21.5.4, the *builder* will rectify, at no cost to the *owner*, all defects of which the *builder* has received written notice during the *defects liability period*. Unless otherwise agreed, the rectifications will be completed no later than twenty-eight (28) days after the expiry of the *defects liability period*.
- 21.5.4 Subject to clauses 21.2.2 and 21.4, if
 - (a) within twenty-eight (28) days after the expiry of the *defects liability period* the *builder* fails or refuses, without reasonable excuse, to rectify any defects properly notified by the *owner* during the *defects liability period*; or,
 - (b) the *builder* fails or refuses, without reasonable excuse, to rectify any defects properly notified by the *owner* during the period referred to in clause 21.5.3

the *owner* may engage or employ others to rectify those defects to the extent that the *builder* failed to do so, and recover from the *builder* the reasonable cost of doing so.

CLAUSE 22 Owner's rights to terminate

22.1 Notice of intention to terminate

- If the *builder* :
- (a) fails to provide to the *owner* a copy of the relevant insurance policy (or certificate of currency) setting out details of the required home owner's warranty insurance under the Building Act 1993, as required by clause 5; or
 - (b) fails to proceed with the *Works* with due diligence or in a competent manner; or
 - (c) unreasonably suspends the carrying out of the *Works*; or
 - (d) fails or refuses to remove or remedy defective work or *materials* for which the *builder* is responsible and liable, so that the *Works* are adversely affected by such failure or refusal; or
 - (e) fails or refuses to comply with this *Contract* (including any failure or refusal to comply with the requirements of any *authorities*); or
 - (f) is unable or unwilling to complete the *Works*, or abandons the *Works* of the *Contract*; or
 - (g) is in substantial breach of the *Contract*,

- then the *owner* may give the *builder* a written notice. The written notice must:
- specify and describe the breach(es) of the *Contract* by the *builder*; and
 - state that it is a notice given under this *clause*; and
 - state the *owner's* intention to terminate the *Contract* unless
 - the *builder* remedies the specified breach(es) of the *Contract* within a period of fourteen (14) days after service of the above notice; or
 - shows reasonable cause within the same period why the *owner* should not terminate the contract.

This notice must be served by hand.



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22.2 Owner may terminate

If the *builder* fails, within the stipulated time, to remedy the breach(es) of the *Contract* as specified in a notice served by the *owner* under clause 22.1, and also fails to show good cause why the *owner* should not terminate the *contract*, then the *owner* may, without prejudice to any other rights or remedies, give a further written notice to the *builder*; immediately terminating the *Contract*.

This notice must be served by hand or by registered post.

22.3 Right to engage others to complete

After having lawfully terminated this *Contract* under and in accordance with this *clause 22* the *owner* may, without prejudice to anyone's rights or remedies, engage others to complete the *Works*.

22.4 Adjustment of funds

- When the *Works* of the *Contract* have been completed by others under clause 22.3:
- If the reasonable cost of completing the *Works* is more than the unpaid balance of the *adjusted contract price* at the time of termination, then the excess amount will be a debt due and payable by the *builder* to the *owner*;
- and
- If the reasonable cost of completing the *Works* is less than the unpaid balance of the *adjusted contract price*, then the remaining amount of the unpaid balance will be a debt due and payable by the *owner* to the *builder*.

22.5 No right to terminate in certain circumstances

Despite the above provisions, the *owner* may not terminate the *Contract* unreasonably or vexatiously, or if the *owner* is already in substantial breach of the *Contract*.



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CLAUSE 23 Owner's statutory right to terminate

23.1 Cost or time blow-out

The owner may terminate the Contract under and in accordance with section 41 of the Act if (and only if):

- the contract price increases by fifteen per cent (15%) or more after the Contract was entered into; or
 - the works have not been completed within one-and-a-half (1½) times of the contract period in which they were to have been completed;
- and
- the reason for the increased time or cost was something that could not have been reasonably foreseen by the builder on the date the Contract was made.

The right to terminate under this clause is distinct, additional to, and separate from any other rights the owner may have to terminate under the Contract or at law.

23.2 Certain increases to be ignored

For the purposes of clause 23.1 and section 41(1) of the Act, any increase in cost or time that arises as a result of adjustments to a prime cost item or a provisional sum, or that is caused by a variation requested by the owner, is to be ignored when calculating any rise in price or increase in time.

23.3 Written notice

To end the Contract under this clause, the owner must give to the builder a signed written notice in the approved form under the Act, stating that the owner is ending the Contract under section 41 of the Act, and giving details as to why the Contract is being ended.

This notice must be served, by hand or by registered post, reasonably soon after the owner's relevant right first arises. Otherwise the right to terminate under this provision will be deemed to have been waived by the owner.

23.4 Builder entitled to reasonable price

If the Contract is ended under this clause or section 41 of the Act, the builder is entitled to a reasonable price for the work carried out under the Contract until the date on which the notice under clause 23.3 is served.

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CLAUSE 24 Builder's rights to terminate Contract

24.1 Notice of intention to terminate

If the owner, or any person for whom the owner is responsible,

- (a) within seven (7) days of service of a suspension notice by the builder under clause 18.2; fails or refuses to remedy any breach specified in the notice; or
- (b) refuses or neglects to comply with the Contract, including any failure to give the builder any direction or information requested by the builder; or
- (c) indicates to the builder that the owner is unable or unwilling to make any payment as and when required and due under the Contract, at law, or at all; or
- (d) fails or refuses to give the builder satisfactory written details or other evidence of the ownership of the land in accordance with clause 7.1(a); or
- (e) fails or refuses to obtain any of the consents or licences required under clause 7.1(b) where that sub-clause applies; or
- (f) is unable or unwilling to ensure that the consents and licences obtained under clause 7.1(b) (where applicable) are maintained in full accordance with all the requirements under the Contract; or
- (g) revokes, cancels, infringes or restricts the contractual licence provided to the builder under clause 7.2 [or 7.1(b)], or attempts or purports to do any of those acts; or
- (h) fails or refuses to give the builder written or other reasonable evidence of capacity to pay the contract price as required under clause 12.1, or whenever requested by the builder under clause 12.2, or clause 14.1(g); or
- (i) is late in making any payment to the builder (including any required deposit) as and when required by the Contract, or by law; or
- (j) without the prior written consent of the builder takes occupation, possession or control of the whole or of any part of the Works before making the final payment; or
- (k) obstructs, interferes with or hinders the progress or the carrying out of the Works; or
- (l) in breach of clause 12.7; communicates with or directs the builder's employees, subcontractors or suppliers; or
- (m) fails or refuses to supply any materials or to give any information required to be supplied or given by the owner to the builder under the Contract; or
- (n) fails or refuses to provide the builder, or any one or more of the builder's employees, subcontractors, or suppliers with reasonable access to the land; or
- (o) is in substantial breach of this Contract; or
- (p) fails or refuses to ensure that all persons for whom the owner is responsible are not committing any of the above breaches;

then the builder may serve the owner with a written notice. The written notice must:

- specify and describe the breach(es) of the Contract by the owner; and
- state that it is a notice given under this clause; and

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- state the *builder's* intention to terminate the *Contract* unless, within fourteen (14) days after service of the above notice, the *owner*
 - remedies the breach(es); or
 - provides reasonable cause why the *builder* should not terminate the contract.

This notice must be served by hand.

24.2 Builder may terminate

If the *owner* fails, within the stipulated time, to remedy the breach(es) of the *Contract* as specified in any notice served by the *builder* under clause 24.1 or fails to show good cause why the *builder* should not terminate the *Contract*, then the *builder* may, without prejudice to any other rights or remedies, give a further written notice to the *owner*; immediately terminating the *Contract*.

This notice must be served by hand or by registered post.

24.3 Right to recover

If the *builder* terminates the *Contract* in accordance with this clause 24, the *builder* is entitled to recover from the *owner* all costs, expenses, losses and damages that the *builder* may incur or suffer arising from, or as a result of, the termination, as if the *owner* had wrongfully repudiated the *Contract*.

24.4 No right to terminate in certain circumstances

Despite the above provisions, the *builder* may not terminate the *Contract* unreasonably or vexatiously, or if the *builder* is already in substantial breach of the *Contract*.

CLAUSE 25 Termination for insolvency

25.1 Right to terminate

Either the *builder* or the *owner* may terminate this *Contract* immediately, by giving a written notice served by registered post, if the other party suffers or commits any *insolvency event*.

25.2 Written reasons

The notice under clause 25.1 must state the reason or reasons for termination relied upon by the party giving the notice.



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CLAUSE 26 Service of notices

26.1 Notices from authorities

Both the *builder* and the *owner* hereby undertake to provide to each other a copy of any notice, report, order or other document given to either one of them or served on either one of them in relation to the *Works* by any *authority*, or by any person registered or authorised under the Building Act 1993 to issue or give or serve such documents.

The *builder* and the *owner* further undertake to do so as soon as practicable after receiving such a document.

26.2 Statutory notices

Despite any other provision in the *Contract*, all notices, reports, orders and other documents required by, or issued under legislation must comply with the conditions and circumstances (if any) specified under the relevant legislation.

26.3 Service

26.3.1 Written notices, reports, orders or other documents required or permitted by the *Contract* to be given or served (whether by the *builder* to the *owner*, or by the *owner* to the *builder*), must be given or served in accordance with this clause.

26.3.2 Any relevant written notice, report, order or other document given or served by the *builder* on any other party must also be given or served on the *owner*.

26.3.3 Unless otherwise stated elsewhere in the *Contract* all written notices, reports, orders or other documents required or permitted by the *Contract* to be given to or served on the other party may be given or served:

- (a) by hand (which may include messenger delivery) to the person to whom it is required to be given; or
- (b) by pre-paid or registered post to the address (stated in the *Appendix*) of the person to whom it is required to be given; or
- (c) by facsimile to the facsimile number (stated in the *Appendix*) of the person to whom it is required to be given.

26.3.4 Service by electronic mail is not acceptable.

26.3.5 Where a party has given written notice to the other party of any change to their address or facsimile number from that specified in the *Appendix* (or from that similarly notified on a previous occasion), then all notices (etc.) to that first party shall be served to the latest address or facsimile number so notified.

26.3.6 Where a party has failed or refused to notify the other party of any change to its address, facsimile number or other particulars in accordance with the provisions of clause 26.3.5, the validity of service by the other party will not be prejudiced as long as the document (etc) is posted or delivered to the last officially notified address, or faxed to the last officially notified facsimile number.

26.4 Time of service

The notices, reports, orders or other documents referred to in clause 26.3 are deemed to have been given or served as follows:

- (a) If served by hand, they are deemed to have been served on, and received by, the addressee on the date of actual delivery;



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- (b) If sent by pre-paid or registered post, they are deemed to have been served on, and received by, the addressee on the second *business day* after the date of posting;
- (c) If sent by registered post with a confirmed delivery advice, they are deemed to have been served in accordance with that delivery advice or in accordance with sub-clause (b) – whichever is earlier.
- (d) If sent by facsimile transmission, they are deemed to have been served on and received by the addressee on the date of transmission, if satisfactory confirmation of transmission can be produced by the sender.
- (e) Despite the above, any facsimile message transmitted on a non-*business day* or after 4.00 pm on a *business day* will be deemed to have been served on and received by the addressee on the next following *business day*.

NOTE: Whenever notices or other documents are served under this Contract, copies of all relevant notices and documents should be kept for record purposes.

CLAUSE 27 Miscellaneous

27.1 Unfixed and demolished materials

Unless other arrangements are made and documented as a Special Condition of the *Contract*, all demolished *materials* and all *materials* supplied by or on behalf of the *builder* are and remain the property of the *builder* for all purposes relevant to the *Contract*, until and unless they are permanently fixed to the *land* as part of the *Works* of the *Contract*.

27.2 Metric dimensions

Unless otherwise specified, all dimensions in the *Contract* are metric. The *builder* reserves the right to substitute approximate imperial equivalents if appropriate, having regard to the dimensions of any *existing building*, and/or the general availability of *materials* in metric equivalents.

27.3 Existing buildings

All dimensions in the *Contract* are approximate to the extent that they are based on dimensions referable to any *existing building* structure or other feature. The *original contract price* will not be adjusted if actual dimensions vary from estimated dimensions in such cases, unless the variances are unreasonable.

27.4 Builder's right to subcontract

The *builder* may at all times subcontract any part (but not the whole) of the *Works*. However, this does not relieve the *builder* from any obligation or liability under the *Contract* or at law.



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27.5 Assignment

Neither party may assign the *Contract*, any obligation, any payment, or any other right, benefit, interest or cause of action arising from or under the *Contract*, without the prior written approval of the other party. Such approval may not be unreasonably withheld.

27.6 Intellectual property rights

If the *plans* or *specifications* are, or if they incorporate designs or provisions that were:

- supplied by the *owner*; or
- prepared by the *builder* under instruction, supervision or direction by, or on behalf of, the *owner*; or
- prepared by the *builder* from sketches or other material supplied by the *owner*,

then the *owner* hereby:

- (i) warrants that
 - the *owner* has the legal right to use the *plans*, designs and other materials provided to the *builder* in the manner that they are being used; and
 - there is no breach of copyright or of any other intellectual property right or interest involved in incorporating or otherwise using any such designs in the *plans*, or using any such material in the *specifications* or constructing the *works* in accordance with the *plans* and the *specifications*; and
- (ii) fully indemnifies the *builder* against all suits, actions, causes of actions, proceedings, claims and demands for and in respect of any actual or alleged infringement by the *builder* of any copyright or of any other intellectual property right, and against all costs, expenses, losses or damages that the *builder* may incur or suffer, in so far as any of these arise from or with respect to the *builder's* reliance on the *owner's* above warranty in the preparation of the *plans* and/or the *specifications* and/or the carrying out of the *Works*.

27.7 Governing laws

In all respects, the *Contract* is governed by and interpreted in accordance with the laws that apply in the State of Victoria.

27.8 Delete void parts

If any provision of the *Contract* is void, voidable, unenforceable, ineffective or illegal, it is to be read down by the minimum extent required to make it legal, valid and enforceable. If this is not possible, the provision (or where possible, the offending word or words) shall be deleted from the *Contract*, without thereby affecting the validity, legality or enforceability of the remaining provisions. The remaining provisions of the *Contract* will thus continue in full force and effect.

27.9 'Joint and several' liability

Subject to statute, if more than one person is named as the *owner* under the *Contract*, the obligations and liabilities of the *owners* will be joint and several at all times.



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27.10 Owner's agent

- 27.10.1 With the prior written consent of the *builder*, which may not be unreasonably withheld, the *owner* may appoint an *owner's agent* to act on the *owner's* behalf in the administration of the *Contract*.
- 27.10.2 In all cases where the *owner* is a single natural person, an *owner's agent* may be appointed prior to the execution of the *Contract*.
- 27.10.3 In all cases where the *owner* is other than a single natural person, (that is: if there are joint owners, or if the owner is a company, trust or other legal person) an *owner's agent* must be appointed prior to the execution of the *Contract*.
- 27.10.4 The *owner's agent* must be appointed in writing. The instrument of appointment must specify all the functions which the agent is authorised to conduct, and a copy of that document must be promptly provided to the *builder*. The name and contact details of the *owner's agent* must be shown in Item 1a of the *Appendix*.
- 27.10.5 Subject to *clause* 27.10.6, once an *owner's agent* has been appointed, all contractual directions, instructions and other communications from or on behalf of the *owner* to the *builder* must be given exclusively by the *owner's agent*. Similarly, the *builder* must address all contractual communications to the *owner's agent*.
- 27.10.6 Despite *clause* 27.10.5, certain communications – including but not restricted to Notices affecting the respective contractual positions of the parties – must be given to and received by the parties themselves directly (with copies to the *owner's agent*).
- 27.10.7 Should an *owner's agent*, for any reason whatsoever, cease to act with respect to the *Contract*, the *owner* must advise the *builder* of this fact in writing within three (3) *business days* of its occurrence and, unless the *owner* is other than a single natural person, a replacement *owner's agent* must be appointed immediately.
- 27.10.8 Whenever a person appointed as *owner's agent* is replaced by another person in that role, the above provisions apply to the process of the new appointment and to the powers and obligations of the new *owner's agent*.

27.11 Agent's acts

All acts and all omissions by the *owner's agent* are hereby deemed to be acts or omissions by the *owner*.

27.12 Excluded items

In accordance with Section 28 of the *Act*, the *contract price* generally includes the supply and installation of all fixtures and fittings shown on the *plans* or in the *specifications*. However, the parties hereby agree and confirm that the supply and installation of the items listed in the table in Item 22 of the *Appendix* (whether fixtures, fittings or other items) do not form part of this *Contract*, and the associated costs are not included in the *original contract price*.

.....
 signed (and where applicable, sealed) by the *owner(s)*



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CLAUSE 28 Resolution of disputes

28.1 Disputes under the Security of Payment Act

All disputes arising under the *Security of Payment Act* (where that Act applies to the *Contract* and is activated by the *builder*) are to be dealt with in accordance with and subject to the relevant provisions of that Act.

28.2 Victorian Civil and Administrative Tribunal ("VCAT")

All other disputes arising from or under the *Contract* may, at any time, be referred by either party to VCAT, subject only to the limitations to the jurisdiction of the Tribunal.

28.3 Disagreements concerning quality of work

- 28.3.1 In accordance with and subject to the *Act*, disagreements with respect to or concerning alleged or actual defective *materials* or defective work, may be referred by the *owner* to:
 - the Building Advice and Conciliation Victoria (the "BACV") service of Consumer Affairs Victoria ("CAV") for conciliation; and/or
 - the Building Commission – for inspection and report by an independent expert to be appointed by the Commission for this purpose.
- 28.3.2 The above methods are optional and additional to the rights of the parties referred to in clause 28.2. They may be, or become, unavailable or inapplicable once an action has been commenced by one of the parties in VCAT with respect to the disagreement or dispute in question

28.4 Alternative Dispute Resolution methods ("ADR")

The parties may choose to submit any dispute to an appropriate private ADR process; such as mediation or expert determination. However, this avenue is only available to the parties if they all consent to submit to an agreed process at the time when the dispute has already arisen. Any resolution, compromise or settlement the parties may reach through negotiations or an ADR process needs to be made the subject of a legally enforceable Deed or an order of a Court or of the VCAT.



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SECTION C – APPENDIX

ITEM 1 Owner

Name(s):
Address:
ABN (if applicable):
ACN (if applicable):
Phone: Home: Work: Mobile:
Fax:
Email:

ITEM 1A Owner's Agent refer to clause 27.10

Name(s):
Address:
Contact numbers / details:

ITEM 2 Builder

Name:
Company / Registered Business Name / Individual Trader
(circle whichever applies)
Address:
Building Practitioner's Registration Number(s):
ABN (if applicable):
ACN (if applicable):
Phone: Home: Work: Mobile:
Fax:
Email:
Master Builders' Membership Number (where applicable):

Appendix



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ITEM 3 Insurances refer to clauses 5; 6

3.1 Home Owners' Warranty Insurance Policy refer to clause 5
Type:
Number (if known):
Insurer's Name & Address
3.2 Contractor's All Risk Insurance Policy refer to clause 6.2
Minimum cover: \$
(if nothing is stated, 150% of the Original Contract Price)
3.3 Public Liability Insurance Policy refer to clause 6.3
Minimum cover: \$
(if nothing is stated, \$5,000,000.00)

ITEM 4 The Land refer to clause 7

Land Address:
Title Particulars: Lot No.: Volume No.: Folio No.:
Plan of Subdivision Number:
Name/s of land owner/s:

ITEM 5 Description of Major Domestic Building Work

Description:

Appendix



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ITEM 6 Specifications refer to clause 1.2

Title (if any):

.....

.....

Date: Number of Pages:

Prepared by:

.....

Supplied by: owner or builder (cross out the option that does not apply)

The 'Standards and Tolerances Guide' published by the Building Commission, as current at the date of entering the Contract, forms part of the specifications.

Note: each party should sign or initial each page of the specifications.

ITEM 7 Plans refer to clause 1.2

Drawing Numbers:

.....

.....

.....

.....

.....

Date: Number of Pages:

Prepared by:

.....

Supplied by: owner or builder (cross out the option that does not apply)

Note: each party should sign each page of the plans.

Appendix



Owner(s) Initials

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ITEM 8 Other documents forming part of the Contract

Title(s) / Number(s)

.....

.....

.....

.....

.....

.....

Date: Number of Pages:

Prepared by:

.....

Supplied by: owner or builder (cross out the option that does not apply)

Note: each party should sign or initial each page of each of these documents.

ITEM 9 Construction period refer to clause 8

Note: the builder should not under any circumstances commence to carry out any of the Works before the expiry of the 'cooling off period'.

9.1 Anticipated commencement date

The commencement date shall be

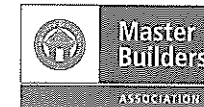
(a) refer to clause 8.1.1

or

(b) as otherwise determined under clauses 8.1.2 and 8.1.3

Note: A definite commencement date should only be specified in option (a) above if all necessary permits have been obtained prior to the date of the Contract, and all other items listed in clause 8.1.2 (b) have been, or are expected to be, received by the builder prior to that date. If no definite commencement date is specified in option (a) above, option (b) will apply: the commencement date will be determined under clauses 8.1.2 and 8.1.3.

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9.2 Construction Period – including delay days

In calculating the *construction period* (item K below), the *builder* has made the following reasonable allowances: –

TABLE 9.2 – calculation of <i>construction period</i>		Days
A	delay as a result of inclement weather	
B	subsequent delay caused by effects of inclement weather	
C	Saturdays and Sundays	
D	public holidays	
E	other foreseeable breaks in the continuity of the <i>Works</i>	
F	Rostered <i>Days Off</i>	
G	<i>builder's</i> holidays (annual or other shut-down)	
H	delay that is reasonable given the nature of the <i>Contract</i> or where – although it is not possible to adequately estimate delays likely to be caused by the nature of this <i>Contract</i> – the <i>builder</i> reasonably anticipates that a likely cause of delay will be [state likely cause(s) of delay]	
I	total delay <i>days</i> included (total of A to H above)	
J	The number of <i>working days</i> allowed by the <i>builder</i> for actual construction work (that is: not including any of the above delay <i>days</i>)	
K	total <i>construction period</i> including delay <i>days</i> (I plus J above)	

NOTE: except in item J, "days" in this Table means calendar days

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ITEM 10 Builder's fair and reasonable estimate (original contract price)

The *builder's fair and reasonable estimate* of the total amount of money that the *builder* is likely to receive under the *Contract* is

..... dollars (\$) .00

This estimate is based on the information reasonably available to the *builder* at the time the *Contract* is executed. It will be adjusted in accordance with the provisions of the *Contract*; and it is not and it does not pretend to be the *contract price*. The *contract price* is arrived at set out in **Item 11** below and it will supersede this estimate.

Item 10 is a cost escalation clause to which Section 15 of the Act applies. The *owner* acknowledges receipt of **WARNING 1** given by the *builder* in Item 11.3 of the *Appendix* explaining the effect of this *clause*.
.....
signature/s of owner/s

The *Contract price* set out in Item 11 below will supersede this price.

ITEM 11 Price payable

Item 11 is a cost escalation clause to which Section 15 of the Act applies. The *owner* acknowledges receipt of **WARNING 1** given by the *builder* in Item 11.3 of the *Appendix* explaining the effect of this *clause*.
.....
signature/s of owner/s

11.1 Contract price

refer to clause 1.2

The *contract price* payable under the *Contract* is the total of

- The *direct costs*; in accordance with Item 11.2 below
- The *builder's fee* in accordance with Item 11.3 below; and
- *GST* in accordance with *clause 29*

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11.2 Direct costs

The direct costs means the following costs and expenses reasonably incurred by the builder in carrying out and completing the Works:

- 11.2.1 the actual net cost of all materials incorporated in the Works;
11.2.2 the actual net cost of all wages, and of all insurance, compensation and other statutory contributions and costs to and in respect of all of the builder's personnel engaged in carrying out the Works;
11.2.3 the actual net cost of all subcontracts entered into by the builder for the carrying out of the Works;
11.2.4 the actual net cost of providing all items of construction plant, machinery and equipment used for the carrying out of the Works (including hire, delivery, installation, reassembly and removal charges and all operating, maintenance, repair and other costs);
11.2.5 the cost of all premiums paid for insurance required by or pursuant to the Contract;
11.2.6 the cost of advertising and recruiting incurred for labour required for the Works;
11.2.7 the cost incurred in seeking and obtaining quotations or tenders for subcontracts (which term shall include consultancy, supply, hire and other requisite contracts); evaluating same and entering subcontract agreements for discrete components of the Works with the successful tenderers;
11.2.8 the actual net cost of all freight, cartage and of all other transport incurred by the builder;
11.2.9 where the builder (or, if the builder is a company or partnership, any director, partner or other senior personnel of the builder) carries out any work directly, reasonable rates for carrying out that work;
11.2.10 the cost of all water, oil, petrol and other fuel used on the Works and of all essential services used on or in respect of the Works;
11.2.11 the cost of all requisite fees, charges and other imposts paid by the builder to any municipal, legislative, regulatory and/or supply authority;
11.2.12 the actual net cost of making good any defects or faults which are not due to material or workmanship provided by the builder under the Contract not being in accordance with the Contract;
11.2.13 the actual net cost of making good any damage caused by or resulting or arising from any of the defects or faults referred to in clause 11.2.12;
11.2.14 the cost of clearing away debris, and of replacement, repair, or rebuilding after any damage due to any cause beyond the control of the builder;
11.2.15 any other expense or cost incurred by the builder in carrying out the Works, not being a cost or expense which is expressly disallowed by the Contract.

11.3 Builder's fee

The builder's fee means one of the following; as selected and agreed by the parties:

Option "A": Percentage fee

The builder's fee shall be a fixed percentage of the Direct Costs. The applicable percentage is
..... per cent; (..... %)
[insert in words] [insert figure]

OR

Option "B": Fixed fee

The builder's fee shall be the following fixed amount :
..... dollars (\$.....)

OR

Option "C": Fixed fee to a limit plus percentage fee on excess

The builder's fee shall be calculated as follows:

- the fixed amount of
..... dollars (\$.....);
until the direct costs reach the limit amount of
..... dollars (\$.....);
and then
..... per cent (.....%) of any direct costs in excess of the above limit amount

Warning 1: Changes to the Price

Cost escalation clauses (refer s15 of the Act)

This Contract contains certain provisions, the effect of which is that the original contract price stated in Appendix Item 10 is not fixed but may be increased as a result of those provisions.

The following provisions are Cost Escalation Clauses as defined in section 15 of the Act :

- the method of calculating the contract price (refer to Item 11 in the Appendix)
liquidated damages for delays attributable to the Owner (refer to clauses 4.5, 15.3.2, 17.3 and 18.7)
the method of calculating certain variation prices (refer to clauses 13.5, 13.6.4)
damages associated with the builder's legal or contractual right to suspend work (refer to clause 18.8)

Ensure that you understand fully how the Cost Escalation Clauses affect the original contract price before you place your signature or seal or initials next to Item 11 in the Appendix and clauses 4.5, 13.5, 13.6.4, 15.3.2, 17.3, 18.7 and 18.8 as is required by law.



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Warning 2: Changes to the Price

Cost adjustment clauses (refer s33 of the Act)

This Contract contains certain provisions, the effect of which is that the original contract price stated in Appendix Item 10 is not fixed but may be increased as a result of those provisions.

The following provisions are cost adjustment clauses, which are not Cost Escalation Clauses as defined in section 15 of the Act, but which also allow for the original contract price to change as a result of:

- resolution of inconsistencies, discrepancies and ambiguities between or within the contract documents in certain circumstances (refer to clause 3.3),
• insuring existing buildings, if required to be done by the builder (refer to clause 6.2.4);
• survey of the land, if required to be done by the builder (refer to clause 7.6.2);
• interest on overdue payments (refer to clause 11.3.2);
• variations, including those required by a building surveyor or by any authorised person under the Building Act 1993 (refer to clauses 13.3, 13.4,13.6.1, 13.6.2, 13.6.3, 13.7.1(a), 13.7.2 and clause 14);
• additional amounts that may be required for footing excavations in certain circumstances (refer to clause 16.2);
• any determination by an expert or by any other decision-maker who may be validly appointed by the parties (refer to clause 27.4);
• any adjudication determination that may be lawfully made under the Security of Payment Act (refer to clause 27.2);
• any orders made by VCAT or by any court or tribunal of competent jurisdiction;

Ensure that before you enter the Contract you also understand fully how the above provisions affect the original contract price.

ITEM 12 Non-domestic work included (if any)

Details of any non-domestic work to be carried out under the Contract (such as purely commercial or business premises) are as follows:

Description:

Amount included for this work in the builder's fair and reasonable estimate: dollars (\$.....)

ITEM 13 Deposit refer to clauses 1.2, 5.2.3, 12.4, 12.4.1

The amount of the deposit is dollars (\$.....)
(being no more than 5% of the builder's fair and reasonable estimate)



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ITEM 14 Services: exclusions

14.1 Services / fees not Included

- 14.1.1 The prices referred to in the Contract do not include any allowance whatsoever for or with respect to bringing any services (mains) or other infrastructure facilities (such as roads) to the vicinity of the land, if they are not already so located.
14.1.2 Where the provision of a service (ie conveying it to the land boundary from the mains, or vice-versa) is not expressly included in the Works of the Contract, the owner must arrange and pay for those services/facilities to be brought to the land and connected to any necessary meter (including the cost of the meter where a new meter is required and including all associated fees and other imposts)
14.1.3 Where the provision of other infrastructure facilities (e.g. any road, footpath, paving or landscaping work outside the boundary of the land) is excluded from the Works of the Contract but is required, it will be done by others.
14.1.4 Where item 14.1.2 applies to a service or where item 14.1.3 applies to a facility, the builder's reasonable estimate for that service or facility by others is shown in column c of Table 14.3 below.
14.1.5 Even where provision of a service referred to in item 14.1.2 or of any other facility service referred to in item 14.1.3 is included in the Works of the Contract, the owner may still be required to pay separately for some fees associated with the provision of the services or facilities in question. These fees have been excluded from the builder's Fair and Reasonable Estimate but the builder must provide an estimate of those fees. These estimated amounts are shown in column e of Table 14.3 below.

14.2 Excluded services inside the land

Where the provision of a service within the land (installation, reticulation and/or connections to appliances or fittings) is excluded from the Works of the Contract but is required by the owner, it will be done by others. The items thus excluded and the builder's estimate for their provision is as follows

Table with 2 columns: Service or facility excluded, Estimate. The table is currently empty.



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14.3 Services outside the boundaries of the land refer to items 14.1.4, 14.1.5

The Table below sets out the responsibilities with respect to services outside the title boundaries of the land and, where required, the builder's estimates.

a	b	c	d	e
Service or facility	Is the provision of this service or facility (in the sense referred to in clauses 14.1.2 and 14.1.3 respectively) included in the Works of the Contract? <small>(circle yes or no as applicable)</small>	If the answer in column b is "no", give a reasonable assessment of the amount that the owner will need to pay for provision of the service or facility (by others or as a variation)	Describe any special fees (headworks charges etc) which has been excluded from the builder's relevant reasonable assessment in column c.	Give a reasonable assessment of the value of the special fees referred to in column d, which the owner may need to pay over and above the amount shown in column c.
Gas	yes / no	\$		\$
Sewerage	yes / no	\$		\$
Stormwater	yes / no	\$		\$
Water	yes / no	\$		\$
Electricity	yes / no	\$		\$
Telephone	yes / no	\$		\$
Roadworks	yes / no	\$		\$
Broadband	yes / no	\$		\$
Other :	yes / no	\$		\$
	yes / no	\$		\$

ITEM 15 Required Permits

(a) **Planning permit** * refer to clause 4.2

- is not required for the type of work in this Contract as advised and verified by the Municipal Planner (refer to attached copy of that advice)

OR

- is required, and
 - it has been obtained by the owner at no cost to the builder;

OR

- it will be obtained by the owner at no cost to the builder;

OR

- it must be obtained and paid for by the builder and the costs will form part of the direct costs.

* delete all options that do not apply



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(b) **Building permit** is (always) required and * refer to clause 4.3

- it has been obtained by the owner at no cost to the builder;

OR

- it will be obtained by the owner at no cost to the builder;

OR

- it must be obtained and paid for by the builder and the costs will form part of the direct costs

* delete all options that do not apply

(c) Where a **demolition** or any other **permit** is required *

- it has been obtained by the owner at no cost to the builder;

OR

- it will be obtained by the owner at no cost to the builder;

OR

- it must be obtained and paid for by the builder and the costs will form part of the direct costs

* delete all options that do not apply

ITEM 16 Service of payment claims refer to clause 11

(a) The deposit is payable at the applicable time specified in clause 11.1(a); without any need for a claim being served.

(b) The first progress payment claim may be served on or after theth business day following the date on which the deposit first becomes payable (if nothing is stated, the 10th business day)

(c) Each subsequent progress payment claim may be served on or after theth business day following the date on which service of the immediate previous progress payment claim was first permissible (whether or not the claim in question was in fact made on that date, or at all) (if nothing is stated, the 10th business day)

(d) The final claim may be served only in accordance with clause 19.1

NOTE: that any claims made or served earlier than the dates specified in items (b) or (c) above will be deemed to have been made or served on the relevant date(s) specified.

ITEM 17 Due dates for payments

(a) The deposit is payable in accordance with item 16(a) above

(b) Subsequent payments (other than the final payment) fall due on theth business day following the date of service of the corresponding progress payment claim (if nothing is stated, on the 5th business day)

(c) The final payment becomes due and payable on theth business day following completion, or following the completion of the work referred to in clause 19.2.1 (as the case may be) (if nothing is stated, on the 5th business day)



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ITEM 18 Defects liability period refer to clause 21.5

- () calendar weeks
(if nothing is stated, there will be no defects liability period)

ITEM 19 Interest for late payments refer to clause 11.3.2

-% [..... per centum] annual rate, adjusted weekly and compounding
(if nothing is stated: 20%)

ITEM 20 Liquidated damages for owner's delays refer to clause 17.3

- \$..... [..... dollars] per week, or 1/7th of this sum per day.
(if nothing is stated, no liquidated damages apply to this contract)

ITEM 21 Liquidated damages for builder's delays refer to clause 20

- \$..... [..... dollars] per week, or 1/7th of this sum per day.
(if nothing is stated, no liquidated damages apply to this contract)

ITEM 22 Items shown in the contract documents but not included in the scope of the Contract refer to clause 10.3(b) & 27.12

- strike out table if not applicable; add separate schedule if insufficient space

1	5
2	6
3	7
4	8

.....
signed (and where applicable, sealed) by the owner(s)



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ITEM 23 Materials to be supplied or work to be carried out by owner or by others refer to clause 10.3(a)

- strike out table if not applicable; add separate schedule if insufficient space

Materials to be supplied, or items of work to be carried out by the owner are to be stated in the following table. The builder gives no warranties, either express or implied, as to the suitability or otherwise of the materials or items of work in this table.

1	7
2	8
3	9
4	10
5	11
6	12

ITEM 24 Second-hand materials to be used by builder refer to clause 10.1

- strike out table if not applicable; add separate schedule if insufficient space

1	7
2	8
3	9
4	10
5	11
6	12

ITEM 25 Allowances for prime cost items

NOT APPLICABLE

ITEM 26 Allowances for provisional sums

NOT APPLICABLE



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ITEM 27 Progress payments refer to clause 11

Warning to Owners: Change of Legal Rights

Section 40 of the Act states that the *builder* cannot charge more than a fixed percentage of the total *contract price* at the completion of each stage of building.

The Act also allows the parties to agree in writing to change the stages and the percentage of the *contract price* to be paid at the completion of each *stage*.

There are several ways in which a particular *Contract* can vary from the normal, and it is these exceptional cases that have caused the law to allow for these changes.

Examples include:

- where preparation of the *land* for the building is expensive e.g. steep or rocky sites
- if the house is so large that it will take a long time to complete and intermediate *progress payments* are required
- where exceptionally expensive finishes are required, meaning the final *stage* will represent a much higher proportion of the total price
- if an architect is engaged to independently assess the value of completed work for *progress payments*

You should not agree to *progress payments* different from that provided in the Act unless your house is unusual in some way and you are sure that different *progress payments* are necessary, and you clearly understand why the change is needed in the case of your particular house. If you have any doubts, contact the following:

- Master Builders Association of Victoria
- Housing Industry Association
- Law Institute of Victoria
- Consumer Affairs Victoria
- Australian Institute of Architects

I / we acknowledge that I / we have read this warning before signing the *Contract*

.....
(signature/s of owner/s)

This form must be completed since the method of payment used in this *Contract* is different from the method set out in section 40 of the Act

Form 2 under Regulation 6(b): Progress Payments

Because of the nature of the work covered by this *Contract*, the *progress payment schedule* set out in the Act is not appropriate. The parties agree that the *progress payments* set out in Section 40 of the Act will not apply to the *Contract* and instead, payments will be made in accordance with **Clause 11** of the *Contract*.

.....
(owner)

.....
(owner)

.....
(builder)

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**SECTION D
SIGNING THIS CONTRACT**

INSTRUMENT OF AGREEMENT

BUILDER

signed by the *builder* or by a person or persons authorised to bind the *builder*:

.....
(name)

.....
(signature)

OWNER(S)

signed by the *owner(s)* or by a person or persons authorised to bind the *owner(s)*:

.....
(name)

.....
(signature)

.....
(name)

.....
(signature)

.....
(name)

.....
(signature)

DATED this day of 20.....

NOTE: It is the signing of this page that evidences the contractual agreement between the owner(s) and the builder.



Owner(s) Initials

Builder's Initials

Signing this Contract

SECTION E DEED OF GUARANTEE AND INDEMNITY

INTRODUCTION

- This is a guarantee that the *owner(s)* will perform his/her/its (their) obligations under the *Contract*. It may be given by any natural person or persons who can supply satisfactory security or securities to ensure that funds for the enforcement of the guarantee are available if and when lawfully called upon.
- If the *owner* is a company then all directors of the company must execute this Deed of Guarantee and Indemnity.
- If the *owner* is a Trust, then each of the Trustees must execute this Deed of Guarantee and Indemnity.

OPERATIVE PROVISIONS

I/We the guarantor/s stated below requested the *builder* to enter into the *Contract* with the *owner*, and the *builder* has done so, for the *contract price* and on the terms and conditions as stated in the *Contract*.

I/We the guarantor/s are hereby for ourselves, our respective executors and administrators, jointly and severally, in agreement with the *builder* undertake as follows:

If at any time the *owner*:

- is late in making any payment to the *builder* in accordance with the *Contract*,
 - or
 - fails to observe and perform any other of the *owner's* obligations in any term or condition of the *Contract*,
- then

I/We will immediately on demand from the *builder*, pay the *builder* any monies that are due and payable by the *owner*, (including, where applicable, any interest and any GST), together with any GST which may be applicable to any payment made by me/us to the *builder*

and

I/We will keep the *builder* indemnified against the loss of all monies payable under the *Contract*, and against all losses, costs and expenses that the *builder* may suffer as a result of any default by the *owner*.

This guarantee and indemnity is a continuing one. It remains in full force and effect until legally discharged, and will not be released by any of the following:

- any delay, neglect or withholding on the part of the *builder* when enforcing rights against the *owner* under the *Contract*
- any action by the *builder* against the *owner* to enforce any of the *builder's* rights under the *Contract*
- variations made to the *Contract* by agreement between the *owner* and the *builder*, including any variations which increase the liability of the *owner* to the *builder* under the *Contract*
- the *owner* being financially unable to proceed with the *Contract*, becoming insolvent, being declared bankrupt, making a proposal for a scheme of arrangement or a composition, entering into a deed of company arrangement with creditors, having a controller or administrator appointed, or being wound up
- any part of this guarantee or indemnity, or the *Contract* being void, voidable, unenforceable or illegal.



Owner(s) Initials

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Guarantee and Indemnity

EXECUTION

for execution by
guarantor No. 1

Signed, Sealed and Delivered as a Deed by

.....
(name of guarantor 1) (signature of guarantor 1)

as guarantor in the presence of:

.....
(name of witness) (signature of witness)

on this day of 20

for execution by
guarantor No. 2

Signed, Sealed and Delivered as a Deed by

.....
(name of guarantor 2) (signature of guarantor 2)

as guarantor in the presence of:

.....
(name of witness) (signature of witness)

on this day of 20

for execution by
guarantor No. 3

Signed, Sealed and Delivered as a Deed by

.....
(name of guarantor 3) (signature of guarantor 3)

as guarantor in the presence of:

.....
(name of witness) (signature of witness)

on this day of 20

WARNING:
This is not the signing page of the *Contract*.
All parties to the *Contract* must sign the instrument of agreement on page 63.



Owner(s) Initials

Builder's Initials

Guarantee and Indemnity

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