

# Quotation and Trading Terms

Landmark Products Pty Ltd

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## 1. Definitions

### 1.1 In these Terms:

“Australian Consumer Law” means Schedule 2 of the *Competition and Consumer Act 2010* (Cth).

“Customer” means the person or entity, outlined in the ‘Client’ item on the quotation, to which Landmark has agreed to supply Products or Services (or both).

“Customer’s Property” means any property of the Customer delivered to Landmark for the performance by Landmark of Services.

“GST Law” has the meaning given to it in *A New Tax Systems (Goods and Services Tax) Act 1999* (Cth).

“Intellectual Property Rights” means all current and future registered and unregistered rights in respect of copyright, circuit layouts, designs, trademarks, know-how, confidential information, patents, inventions and discoveries and all other intellectual property as defined in article 2 of the convention establishing the World Intellectual Property Organisation 1967.

“Item” means one (1) of the following products, Shelter, Restroom including Bridge, Pedestrian Access Structure including but not limited to boardwalk or platform type structures, and BBQ. It also includes Furniture (including but not limited to Furphy Furniture and Santa & Cole pieces).

“Landmark” means Landmark Products Ltd ACN 112 000 843, Landmark Installation Pty Ltd ACN 129 595 044 or PML-Landmark Products Pty Ltd ACN 140 458 322 (as set out in the quotation) and in relation to the benefit of the warranties, in clauses 9.1 to 9.7 of these Terms, includes, without limitation, Landmarks Related Entities (including Furphy Foundry Sales Pty Ltd ACN 082 694 880) employees, agents, representatives and sub-contractors.

“Products” means all goods outlined in the quotation including those to be supplied in the provision of Services.

“Related Entity” has the meaning given to it in the *Corporations Act 2001* (Cth).

“Remanufactured” means a Product Landmark has altered or modified, which was originally produced by another entity or individual.

“Services” means all services which Landmark supplies and provides to the Customer, including but not limited to the manufacture and installation of Products.

“Terms” means these terms and conditions and any amendments to them.

“You/Your” refers to the person, firm, organisation, partnership, corporation, trust or other entity purchasing our Services. The reference to “You/Your” includes any of your employees, agents and contractors.

- 1.2 Expressions defined in brackets in these Terms will be given the meaning where defined throughout these Terms whether or not the definition is used again before or after where the expression is defined.

## 2. Application of terms

2.1 These Terms apply to all Products sold and all Services rendered by Landmark.

2.2 Unless otherwise agreed in writing, these Terms override all terms proposed by any Customer including terms set out on any order or other document. If Landmark agrees in writing that any other trading agreement exists between the Customer and Landmark (“Other Agreement”), then these Terms will prevail over the Other Agreement to the extent of any inconsistency.

## 3. Ordering

3.1 Landmark may, if requested by the Customer, give the Customer a quote setting out:

- (a) the work required to be done in order to fulfil the Customer’s instructions; and
- (b) an estimate of the amount payable to perform such work.

3.2 Any quote provided by Landmark, made in writing, will remain open for acceptance by the Customer for the period specified in the quote or, if no period is specified, a period of 30 days from the date noted at the top of the quotation, unless otherwise specified and agreed to in writing.

3.3 The Customer will have accepted the quote if it:

- (a) signs and returns a copy of the quote; or
- (b) orally agrees to the quote; or
- (c) provides instructions (orally or in writing) to Landmark to commence work after receiving the quote.

3.4 Each quotation accepted by the parties forms part of, and is deemed to be incorporated into, these Terms.

3.5 Landmark need not commence work until the quote has been accepted by the Customer in accordance with clause 3.3.

3.6 Once the quotation has been accepted by the Customer, it is irrevocable and cannot be deferred, cancelled or suspended by the Customer unless agreed to in writing by Landmark.

3.7 The Customer indemnifies Landmark for any costs or loss of profits (or both) from the deferral, cancellation or suspension of a quotation that has been accepted by the Customer.

3.8 Any quotation by Landmark (whether accepted or not) may be varied or withdrawn by Landmark at any time up to the time of delivery of the Products or provision of the Services. Landmark expressly excludes any liability for any costs or damages incurred by the Customer or their Related Entities, employers and agents due to Landmark varying or withdrawing a quote at any time.

3.9 If for any reason the Products are unavailable or Landmark, acting reasonably, considers it necessary to make changes to the Products to improve the Products, Landmark has the right to substitute alternative Products provided they are reasonably equivalent in all respects without notice to the Customer (unless the Customer’s accepted quotation specifies in writing otherwise). If quantity and pack sizes vary from the date of quotation, Landmark may substitute alternative sizes but not so that the Customer is required to purchase in aggregate more Products than ordered.

3.10 Landmark takes no responsibility for errors in respect of the Products or Services, quantity or price described in any quotation.

## 4. Price

4.1 The price payable by the Customer shall be:

- (a) where a quotation indicates that the price for the Products and Services is an estimate only, the amount claimed by Landmark upon the provision of an invoice to the Customer from time to time based on method of calculating the price as set out in the quotation which may be based on the actual work done, materials or Products supplied by or on behalf of Landmark and Landmark’s standard margins and hourly rates for labour; or
- (b) the price set out in the quotation; or
- (c) a combination of the above.

4.2 Landmark shall be entitled to vary the price payable by the Customer of any Products and Services at any time prior to the provision of the invoice for the Products or completion of the Services, if the cost to Landmark of performing its obligations is increased or reduced including without limitation by:

- (a) any new or amended legislation, regulation, order, directive, by-law, licence or approval;
- (b) any fluctuations in currency value;
- (c) any rise or fall in the amounts payable for labour, charges, in the amounts charged to Landmark by its suppliers;
- (d) any cause beyond the direct control of Landmark; and
- (e) any variation in quantity or in pack sizes.

- 4.3 No variation to the price in accordance with clause 4.2 shall entitle a Customer to cancel an accepted quotation.
- 4.4 Unless expressly stated to the contrary, all prices quoted or advised for Products and Services are exclusive of GST and for Products, are strictly net based on the quantity and pack sizes (as applicable) at the date of quotation or order.
- 4.5 If a party ("Supplier") is obliged under the GST Law to pay an amount of GST for a taxable supply made by the Supplier to another party ("Recipient") under these Terms, the Recipient must pay the Supplier an amount equal to the GST payable on the supply by the Supplier.
- 4.6 The Customer is responsible for the following costs and charges in addition to the price specified in the quotation unless otherwise specified in Landmark's quotation:
- (a) Special packaging or tooling requirements;
  - (b) Insurance for Products in transit from Landmark's premises;
  - (c) Service charge where the invoice value is below the minimum determined by Landmark from time to time;
  - (d) Additional fees as specified in clause 4.7 below apply in relation to the processing of credit card transaction, including without limitation for any declined transactions;
  - (e) Expenses incurred by Landmark due to deferral of delivery at the Customer's request beyond the delivery date specified or cancellation of the Customer's invoice;
  - (f) Storage charges pursuant to clause 4.8 below;
  - (g) GST and all other statutory taxes and charges; and
  - (h) Pursuant to clause 11.10(d).
- 4.7 Landmark charges the following processing fees for each credit card transaction, unless otherwise outlined in the quotation:
- (a) MasterCard and VISA transactions – 1.5% of the invoice amount paid; and

The above fees are payable in addition to any fees charged by the Customer's credit card issuer / financial institution and are the responsibility of the Customer or owner of the nominated credit card used to pay the invoice. These fees are payable in relation to any successful or declined transactions.

- 4.8 Storage charges will apply on all deliveries of Products which are delayed by Customer request at a rate of \$100.00 per individual Item purchased per week or part thereof. These charges will commence 7 days after Landmark notifies the Customer in writing that the Products are ready for dispatch, or from completion of the manufacture of the Products, if delayed dispatching requested by the Customer, prior to notification from Landmark. Notification is deemed to be provided if Landmark issues an invoice to the Customer for the Products.

## 5. Invoicing and Payment

- 5.1 Unless a specific time for invoicing is set out in the quotation accepted by the Customer, Landmark will invoice the Customer for Products and Services from time to time as it sees fit.
- 5.2 Payment of the invoices issued under clause 5.1 must at all times be made and received by Landmark by the due date as outlined on the invoice.
- 5.3 In the event payment is not made by the due date as outlined on the invoice, Landmark reserves the right to, without prejudice to any other remedy:
- (a) suspend or cancel performance and delivery of all Products and Services until all outstanding payments are made and to adjust the amount payable by the Customer to compensate Landmark for any extra expense or loss, without limiting any right to take proceedings for recovery; and
  - (b) charge the Customer interest equal to 0.05% per day, or other rate advised in writing, to be compounded upon the amount owing and to be billed at the end of each month following the due date or at settlement of overdue accounts.
- 5.4 Landmark reserves the right to require progress claims on orders placed to cover a reasonable percentage of the cost to be incurred for each successive interval until the next progress claim. Progress claims will be made prior to the commencement of manufacture, during manufacture, prior to delivery, prior to installation and on completion. Each project will be treated individually.

## 5.5 Claim for Payment

The customer agrees all invoices or a claim for payment are (depending on where the said services are delivered) under the Building and Construction Industry Security of Payment Act 1999 (NSW), or the Building and Construction Industry Security of Payment Act 2002 (VIC), or the Building and Construction Industry Payments Act 2004 (QLD), or the Building and Construction Industry Security of Payment Act 2009 (SA), or the Construction Contracts Act 2004 (WA), or the Building and Construction Industry (Security of Payment) Act 2009 (ACT), or the Building and Construction Industry Security of Payment Act 2009 (TAS), or the Construction Contracts (Security of Payments) Act 2009 (NT).

## 6. Security for payment

- 6.1 The Customer must provide the security for payment (if any) if indicated on the quotation accepted by the Customer ("Security"). The Security may take the form of a cash deposit, bank guarantee or other security and must be provided by the Customer as set out in the quotation. If the Security is not provided as set out in the Quotation, Landmark is not required to undertake work until such Security is provided.
- 6.2 If the Customer defaults under these Terms, Landmark may, not less than 14 days after written notice to the Customer and without limiting any rights of Landmark, resort to and otherwise apply the Security towards satisfaction of the default, or otherwise to compensate Landmark for any claim because of that default. However, Landmark is not obliged to resort to the Security.
- 6.3 The Customer must within 14 days after written demand by Landmark, pay to Landmark (as a liquidated debt) the amount resorted to by Landmark. That amount must be held as the Security in accordance with this clause 6.
- 6.4 Landmark must return the Security to the Customer (to the extent not resorted to) no later than one month after the date on which all obligations of the Customer have been performed, if the Customer is not then in default under these Terms.
- 6.5 If Landmark transfers these Terms to any person as transferee, then:
- (a) Landmark may transfer the Customer's Security to the transferee; and
  - (b) if the Customer's Security comprises a bank guarantee that is not transferable, Landmark may on not less than 14 days' written notice to the Customer, require the Customer to provide a replacement bank guarantee to the transferee, and failing that Landmark may convert the Customer's Security into cash and pay it to the transferee.

## 7. Delivery

- 7.1 Landmark reserves the right to supply or deliver Products by instalments, and each instalment will be deemed to be sold under a separate contract. Failure to supply or deliver any instalment will not entitle the Customer to repudiate any order.
- 7.2 The dates given for delivery of Products or the provision of Services are estimates only and Landmark is not liable for any delay in delivery of the Products or Services howsoever arising.
- 7.3 Where there is no one present at the Customer's allocated delivery location at the time of delivery, the Customer will be deemed to have signed the delivery docket acknowledging receipt of the Products invoiced to the Customer.

- 7.4 The Customer must inspect all Goods on arrival and within forty-eight (48) hours of arrival give notice with full details and description to the Supplier if the customer alleges that the Goods are not in accordance with the Customer's order, as described on the quotation and order form or as varied by agreement between the parties. Failing such notice, the Goods shall be deemed to have been accepted by the Customer. When the Supplier agrees that any Goods are not in accordance with the Customer's order, the Supplier may at its option replace the Goods or refund the price of the Goods

**8. Australian Consumer Law**

- 8.1 If the Customer is a Consumer (as defined within the Competition and Consumer Act 2010), the Products and Services come with guarantees that cannot be excluded under the Australian Consumer Law.

**9. Warranties**

- 9.1 The Customer acknowledges that in relation to Products manufactured by Landmark, Landmark provides the following warranties:
- (a) In relation Products referred to in a specific warranty policy as set out on Landmark's website (currently at this address <http://landmarkpro.com.au/about/policy-statements-certification.html>, Landmark provides a warranty to the Customer for those Products on the terms set out in the relevant warranty policy from time to time;
  - (b) In relation to Products for which there is no warranty policy on the above website and that are manufactured by Landmark, Landmark warrants that all Products supplied by it will be free from defects in workmanship under normal use and service for a period of three (3) months from the date of invoice; and
  - (c) In relation to Products for which there is no warranty policy on the above website and that are made from goods Remanufactured by Landmark, Landmark warrants that all Products which are made from goods Remanufactured by Landmark will be free from defects in workmanship under normal use and service for a period of six (6) months from the date of invoice.
- 9.2 Other than provided for in clause 9.1 and Australian Consumer Law, the Products supplied by Landmark (but not manufactured by Landmark) are subject only to the then applicable manufacturer's written warranty. The warranty in this clause will apply to the extent of repair or replacement of any defect at the option of Landmark at a service facility elected by Landmark and the Customer will bear all transportation costs to and from that service facility.
- 9.3 To the extent permitted by the Australian Consumer Law and other legislation, warranties and provisions that may be implied by the Australian Consumer Law and any other legislation are expressly excluded.
- 9.4 Other than as expressly set out in clauses 8 and 9 and to the extent permitted by the Australian Consumer Law, Landmark gives no warranty whatsoever in relation to the Products sold to the Customer or the Services provides, whether in regard to the quality of the Products or the Services, the fitness of the Products or the Services for any purpose or the compliance of the Products or Services sold with any description or sample produced by either party to the other at any time, whether prior to, at the time of or subsequent to the Customer placing an order for the Products with Landmark, or otherwise.
- 9.5 If the Services are performed on Landmark's behalf by a sub-contractor, those Services are subject only to the then applicable sub-contractor's warranty, details of which will be made available to the Customer upon request to Landmark in writing and except to the extent prohibited by law, all other warranties in relation to the Products and Services provided on Landmark's behalf by are sub-contractor are excluded.
- 9.6 No warranty, representation or statement by any employee, representative or agent of Landmark, relating to these Terms, the Products or Services shall bind Landmark and Landmark shall not incur any obligation whatsoever for any such promise, representation or statement.
- 9.7 All limitations of liability contained in these Terms shall continue to have full force and effect in all circumstances, including on termination of an order, notwithstanding any breach of these Terms, breach of contract, or negligence by Landmark, their Related Entities, employees, representatives or agents.

**10. Return of the Products**

- 10.1 If the Customer considers that the Products do not comply with the clauses 8 and 9, the Customer must provide written notice to Landmark making such claim within the relevant warranty period referred to in clause 9.1 which provides the appropriate invoice numbers, part numbers and purchase dates and such other reasonable details as required by Landmark.
- 10.2 If the Customer does not provide any notice in accordance with clause 10.1 the Customer is deemed to have accepted the condition and correctness of the Products ordered and received.
- 10.3 If notice is provided by the Customer in accordance with clause 10.1, Landmark may determine, at its sole discretion, to accept the return of the Products for its own assessment or determine that the Products should be returned to the manufacturer for its determination.
- 10.4 Where any Products are returned to Landmark or the manufacturer in accordance with clause 10.3, the Products remain at the Customer's risk pending acceptance of liability by Landmark or the manufacturer. The Customer is to pay the freight and other cost of returning the Products unless the reason for return is directly and wholly caused by an error of Landmark or the manufacturer in which case only the freight for the return will be paid for by Landmark or the manufacturer, respectively.
- 10.5 Any acceptance of delivery back from the Customer by Landmark or the manufacturer prior to Landmark or the manufacturer (as the case may be) accepting responsibility in relation to the Products, will be by Landmark or the manufacturer (as the case may be) as agent for the Customer and is not to be taken as any acceptance of any liability by Landmark or the manufacturer.
- 10.6 Subject to clause 8 and the warranties provided in clause 9 and without limitation to Landmark's discretion to accept the return of the Products, Landmark is not required to accept Products that:
- (a) are not returned within 30 days of the date of the notice provided by the Customer in clause 10.1;
  - (b) are obsolete, incomplete, damaged by the someone other than Landmark (save for the defect causing the return) or otherwise imperfect;
  - (c) were specially procured or cut to length by Landmark;
  - (d) are not in the original undamaged/unmarked packaging, or as supplied and remain in good condition and with all documentation such as instructions;
- 10.7 The amount of credit allowed in respect of Products returned, if any, may be subject to a service charge at Landmark's rate currently in effect, unless these Terms specifically state otherwise.
- 10.8 The Customer is responsible for Products lost or damaged in transit during return to Landmark or the manufacturer and the risk remains with the Customer until the Products are received by Landmark.
- 10.9 Any dispute relating to this clause is to be determined in accordance with clause 16.

**11. Customer's acknowledgements**

- 11.1 The Customer acknowledges that:
- (a) it is not induced by any misrepresentation made by or on behalf of Landmark;
  - (b) the Customer has not relied on Landmark's skill or judgement; and
  - (c) the Customer has satisfied itself that the Products and Services are suitable for the Customer's purposes.

- 11.2 The Customer warrants that the Products will be installed and used:
- (a) only in applications for which the Products were manufactured and are able to be satisfied by the Products specifications; and
  - (b) in accordance with all manufacturer's instructions and good and usual industry standards including being fully tested as safe prior to use.
- 11.3 The Customer must comply with all instructions provided in connection with the Products or Services (or both) and if there is any uncertainty regarding those instructions or use of the Products, they must seek prompt advice from Landmark or the manufacturer.
- 11.4 Any liability of Landmark, if any, to the Customer arising from the supply of Products or Services (or both) by Landmark or pursuant to any contract with Landmark is limited to the following, as is deemed appropriate by Landmark in each instance:
- (a) the repair by Landmark of the Products,
  - (b) the resupply by Landmark of replacement Products at no additional charge to the Customer; or
  - (c) the refund of the invoice price paid by the Customer,
- for the Products giving rise to the liability, whether the liability arises for breach of contract or at common law, or by a negligent act or omission or recklessness of Landmark, a Related Entity, or employees, sub-contractor, representatives or agents of either Landmark or a Related Entity.
- 11.5 In no case will Landmark incur liability for any of the following, which exceed, either wholly or separately, the invoice price of the Products, paid to Landmark by the Customer by the due date for the Products:
- (a) loss, damage or cost suffered or incurred by the Customer; or
  - (b) on account of losses or damages suffered by the Customer including loss of profit, damage to property or personal injury arising from that supply of Products or Services or otherwise, under these Terms, whether arising directly, incidentally or consequentially.
- 11.6 Subject to clause 9.4, all information contained in any documents, catalogues, price lists, photographs, brochures and other illustrations or advertising material and drawings generally describe the subject matter of the Products and Services and should not be taken by the Customer as a representation of the Products or Services the subject of any quotation or order and will not form part of any contract or agreement for supply.
- 11.7 Except as otherwise expressly provided in these Terms, the Customer releases and indemnifies Landmark and its Related Entities from all actions, claims, demands, losses, liabilities, damages and expenses arising from or in relation to the supply of the Products or Services, including without limitation for loss of profit and consequential losses and indemnifies Landmark for any loss or liability that Landmark may suffer (including without limitation the legal costs on an indemnity basis in defending or prosecuting any claim) arising from the use by the Customer of the Products or Services, or from a breach of these Terms including warranties by the Customer.
- 11.8 Prior to any order and at delivery, the Customer must ensure it and / or its agents have all documents and information regarding all Products which may be supplied by Landmark, as required under all health and safety and environmental laws and standards.
- 11.9 The Customer acknowledges and agrees that the Products or Services may be supplied or provided, in full or in part, by a Related Entity of Landmark either under the quotation or a separate quotation.
- 11.10 The Customer acknowledges that:
- (a) specifications, including without limitation, performance, dimensions and weight are approximate only and Landmark shall not be liable for any error or inaccuracy in the specifications provided;
  - (b) errors and misprints in computation, typing or otherwise in Landmark's documents including catalogues, price lists, delivery dockets, invoice or statements or credit notes shall be subject to correction by Landmark by means of reissue of the document or by adjusting dockets with reference to the original transaction;
  - (c) if Landmark agrees to make available any Products for the carrying out of any tests or certification processes, then those tests or processes will be carried out by the Customer at the Customer's sole cost and risk. By providing Products for the undertaking of testing or certification processes pursuant to this clause 11.10(c), Landmark expressly excludes any responsibility for the Products whatsoever including any liability from the tests or certification processes being carried out; and
  - (d) where the Customer requests Landmark to provide Services, the Customer authorises such additional Services and tests as may be necessary in connection with the Services and agrees to pay Landmark its invoiced charges for the additional Services.
- 11.11 The Customer agrees that:
- (a) if Landmark agrees to provide a Customer a retention amount then, unless otherwise agreed in writing by Landmark, the retention amount may be paid by Landmark in the form of a bank guarantee with an expiry date determined by Landmark unless otherwise agreed;
  - (b) the Customer may only resort to the retention amount in the event that Landmark is in default of these terms; and
  - (c) the Customer must return the bank guarantee to Landmark (to the extent not resorted to) no later than one month after the date on which all obligations of Landmark have been performed, if Landmark is not then in default under these Terms.

## 12. Privacy

- 12.1 Landmark agrees to comply with the terms of its Privacy Policy which can be found on its website and the provisions of the *Privacy Act 1988* (Cth).

## 13. Intellectual Property

- 13.1 Landmark owns the Intellectual Property Rights in all documents, drawings, specifications and any other materials produced by Landmark or on Landmark's behalf in connection with the Products or Services, and these shall not be reproduced without the written consent of Landmark.
- 13.2 The Customer acknowledges and agrees that any and all Intellectual Property rights created in the Products and/or Services provided by Landmark are, unless there is an agreement to the contrary, owned by and, if necessary, assigned to Landmark.
- 13.3 The Customer agrees that it will not make any representations to the contrary of clauses 13.1 and 13.2, and that it will not infringe the Intellectual Property Rights of Landmark or its licensors.
- 13.4 The Customer acknowledges that any trademarks or logos which appear on any Products or in the promotion of any Services are owned by or licensed to Landmark or its licensors, and that the Customer must not do anything to prejudice the rights of the trademark owner or licensee to such trademarks or logos.

## 14. Title and Risk

- 14.1 Notwithstanding delivery or freight arrangements, risk (including but not limited to deterioration, loss, theft or damage) passes to the Customer either at:
- (a) in relation to Products supplied by Landmark:
    - (1) if shipped directly to the Customer from the manufacturer's premises, from preloading at the manufacturer's premises; or
    - (2) if shipped directly to the Customer from outside Australia, preloading at the port of entry into Australia; or
    - (3) in all other circumstances, when the product is dispatched from Landmark premises; or
    - (4) if stored by Landmark at the customer's request; and
  - (c) in relation to Services provided by Landmark, when the Services are completed as determined by Landmark.

- 14.2 The Customer is responsible for all insurance of the Products from the point when risk passes pursuant to clause 14.1.
- 14.3 Title in the Products passes to the Customer when Landmark has been paid in full for all Products supplied by it to the Customer.
- 14.4 If Landmark has provided Products to the Customer in instalments, property and title in the Products will not pass to the Customer in any or all instalments of the Products until payment has been made by the Customer for all Products invoiced to the Customer.
- 14.5 Until Landmark has been paid in full for all Products supplied by it to the Customer:
- (a) Landmark remains the owner of the Products and the Customer holds the Products as bailee only;
  - (b) the Customer must store the Products separately from any other Products, keep them readily identifiable as Landmark's Products and maintain proper records of any sale or disposal of the Products;
  - (c) the Customer has a duty to safely and securely store the Products;
  - (d) the Customer bears all risk in respect of the Products from delivery and must fully insure them against all insurable risks;
  - (e) the Customer will not sell the Products except in the ordinary course of business; and
  - (f) where the Customer does sell the Products in the ordinary course of business, the Customer will hold the proceeds of any sale or disposal to the extent of the amount due to Landmark in a separate account for Landmark's benefit, as trustee for Landmark, and will promptly pay the amount owing under this clause and clause 5 to Landmark.
- 14.6 If the Customer:
- (a) makes a new object using the Products; or
  - (b) mixes the Products with other Products or another object to create a new object; or
  - (c) the Products become part of the other Products or other objects owned by the Customer,
- (in each case referred to as "New Products"), the Customer agrees that ownership of the New Products immediately passes to Landmark upon commencement of any operation or event by which the Products would be converted into New Products. Until Landmark is paid all amounts due by the Customer (whether for the Products or otherwise), the Customer will hold the New Products as a bailee and fiduciary for Landmark and clause 14.5 shall apply.
- 14.7 Notwithstanding clause 14.6, the Customer may sell Products and New Products to a third party in the ordinary course of business and deliver them to that third party provided however that:
- (a) if the Customer is paid by the third party, the Customer holds the whole of the proceeds of sale on trust for Landmark and shall not mingle any of the proceeds of sale with other money and shall ensure that all such receipts are kept separate and identifiable. Immediately on receipt of the proceeds of sale, the Customer shall remit from the proceeds received an amount equal to the amount owing by the Customer to Landmark; or
  - (b) if the Customer is not paid by a third party, the Customer agrees at Landmark's option, to assign the Customer's claim against the third party to Landmark upon written request by Landmark. The Customer irrevocably appoints Landmark as the Customer's attorney with the power to do all things necessary for the purpose of giving effect to this clause.
- 14.8 If:
- (a) the Customer is insolvent, commits an act of bankruptcy, is unable to pay its debts or states that it is unable to pay its debts; or
  - (b) an order is made, an application for an Order is lodged with a court regarding the Customer or a meeting is convened for the appointment of an administrator, receiver, manager or a liquidator to the Customer; or
  - (c) payment of an invoice is not made by the Customer on or before a due date,
- then immediately upon the written request by Landmark, the Customer shall deliver all Products to Landmark failing which Landmark by its servants and agents is hereby irrevocably authorised at any time to enter the place where the Products are located and to remove the Products regardless of whether the Products have become fixed to any place, vehicle, vessel or object and for this purpose Landmark is appointed the Customer's agent. The Customer shall indemnify Landmark and keep Landmark indemnified against all costs incurred by Landmark and all claims made against Landmark or the Customer arising from such removal.
- 14.9 At all times the Customer will allow Landmark access to the premises occupied by the Customer and the Products during normal business hours, in order to inspect the Products and retake possession of the Products at any time prior to payment in full of the price payable for all Products supplied by Landmark to the Customer and for other monies payable by the Customer to Landmark. The Customer acknowledges that this access shall be full, free and unhindered and shall not be or constitute trespass by Landmark. The Customer indemnifies Landmark for any liability or loss it suffers seeking to exercise its rights of access and retaking possession.
- 15. Personal Property Securities Act 2009 (Cth) ("PPSA")**
- 15.1 For the purposes of clauses 15.1 to 15.7 of these Terms, the terms accession, account, amendment demand, commingled, control, financing change statement, financing statement, perfected, possession, proceeds, purchase money security interest, security interest and verification statement have the meanings given to them in the PPSA.
- 15.2 The Customer acknowledges and agrees that any security interest created by these Terms, or the transactions contemplated by them:
- (a) extends to, and acts as a security interest in respect of, any:
    - (1) proceeds (including any account) derived from, or from a dealing with, any Product;
    - (2) accession to any Product or any goods to which a Product is commingled; and
  - (b) continues in any Product if the Product becomes an accession or is commingled with other goods.
- 15.3 The Customer agrees to do (or procure anyone else who has an interest in any Product or New Product, or who claims under or as trustee for the Customer to do) anything which Landmark requires from time to time to:
- (a) ensure that any security interest which is purported to be reserved or created under or in connection with these Terms is a first ranking perfected security interest and, if applicable, recorded as a purchase money security interest on the Personal Property Securities Register established under the PPSA ("PPSR");
  - (b) if requested by Landmark, ensure that any security interest which is purported to be reserved or created under or in connection with these Terms is perfected by possession or control;
  - (c) enable Landmark to register and maintain (including to renew before expiry) fully valid and effective financing statements or financing change statements with respect to any security interest which is purported to be reserved or created under or in connection with these Terms;
  - (d) remove any financing statement which is registered in respect of any Product; and
  - (e) otherwise protect Landmark's position as the holder of security interests under or in connection with these Terms.
- 15.4 Without limiting any other provision of these Terms, the Customer waives its right to receive any verification statement (or notice of any verification statement) in respect of any financing statement or financing change statement relating to any security interest created under or in connection with these Terms.
- 15.5 The Customer undertakes and agrees:

- (a) to not, without first giving Landmark 10 business days' written notice, change its name, ABN, address, email address, facsimile number or any other details that have been, or are required to be, recorded on the PPSR in relation to any security interest created under or in connection with these Terms;
- (b) to pay all costs in connection with the registration, discharge or amendment of any financing statement or financing change statement;
- (c) to not, without the prior written consent of Landmark, lodge or serve a financing change statement or an amendment demand in relation to any security interest created under or in connection with these Terms;
- (d) that the Products supplied to the Customer under these Terms are not intended, and shall not be used, for personal, household or domestic purposes.

15.6 The Customer and Landmark agree that:

- (a) to the extent that section 115(1) of the PPSA allows them to be excluded, sections 95, 118, 121(4), 125, 130, 132(3)(d), 132(4), 135, 138B(4), 142 and 143; and  
to the extent that section 115(7) of the PPSA allows them to be excluded, sections 127, 129(2), 129(3), 132, 134(2), 135, 136(5) and 137, do not apply to any enforcement by Landmark of any security interest created under or in connection with these Terms.

15.7 The Customer waives its right to receive anything from Landmark under section 275 of the PPSA and agrees not to make a request of Landmark under that section. The Customer and Landmark agree for the purposes of section 275(6) of the PPSA that neither the Customer nor Landmark will disclose any information in the nature of that mentioned in section 275(1) of the PPSA.

## 16. Dispute resolution

- 16.1 If a dispute arises between the parties in relation to the interpretation of these Terms or the rights of any party under this agreement ("Dispute"), a party must not commence court or arbitration proceedings relating to the Dispute unless that party has participated in the dispute resolution procedures set out in this clause 16.
- 16.2 Nothing in this clause 16 will prevent a party instituting proceedings for the purposes of seeking urgent injunctive or similar interim relief from a court.
- 16.3 A party claiming that a Dispute has arisen must give a written notice specifying the nature of the Dispute ("Dispute Notice") to each other party.
- 16.4 As soon as practicable after the giving of a Dispute Notice, the parties must attempt to resolve the Dispute by negotiation.
- 16.5 If the parties are unable to reach a resolution of the Dispute within ten business days of the giving of a Dispute Notice, any party may, by notice in writing ("Mediation Notice"), inform each other party that it seeks to have the Dispute resolved by mediation.
- 16.6 On the giving of a Mediation Notice, the parties may refer the Dispute to a mediator agreed by them. If no agreement is reached on an appropriate mediator within ten business days of the giving of a Mediation Notice, any party may ask the President of the Queensland Law Society Inc to appoint a mediator in relation to the Dispute.
- 16.7 A mediator appointed in relation to a Dispute:
  - (a) has the right to determine:
    - (1) the time, place and procedures for the mediation; and
    - (2) whether to allow the appearance of lawyers on behalf of the parties; and
  - (b) may engage other expert assistance to assist in the mediation.
- 16.8 Each party must attend the mediation and make a determined and genuine effort to resolve the Dispute.
- 16.9 Proceedings of the mediator will be as informal as is consistent with the proper conduct of the matter and will allow the mediator to communicate privately with the parties or with their lawyers.
- 16.10 The parties agree that:
  - (a) everything that occurs before the mediator will be in confidence;
  - (b) no documents brought into existence specifically for the purpose for the mediation process will be called into evidence in any subsequent litigation by any party;
  - (c) it will be the role of the mediator to act fairly, in good faith and without bias with the purpose of seeking a resolution of the Dispute and to treat all matters in confidence;
  - (d) the parties to the mediation will bear the mediation costs on an equal basis and grant immunity from liability to the mediator;
  - (e) no party will have any cause of action against the mediator or arising out of the conduct of the mediation; and
  - (f) the mediator will not have any power to make any decision, determination or recommendation binding on the parties to resolve the Dispute.
- 16.11 Notwithstanding the existence of a Dispute, each party must continue to perform its obligations under this agreement.

## 17. Company Connection

- 17.1 The Customer must not advertise or publish that the Customer and Landmark have a contract for the supply of Products or Services or refer to Landmark in any advertising and/or merchandising material without first obtaining the prior written consent of Landmark. The Customer must not reproduce, modify, amend or publish, or allow to be reproduced, modified, amended or published by any of its employees, agents or servants, Landmark's registered or unregistered trademarks, names or logos without first obtaining the prior written consent of Landmark.

## 18. General

- 18.1 These Terms will be governed by and construed in accordance with the laws of a State or Territory of Australia as Landmark directs and the Customer irrevocably submits to the exclusive jurisdiction of a competent court in the capital city of that State or Territory.
- 18.2 Failure by Landmark to insist on performance of these Terms or exercise any right or remedy for breach, is not a waiver of any other non-performance or breach.
- 18.3 If any of these Terms are or later become void, illegal or unenforceable, the void, illegal or unenforceable part of these Terms are taken to be severed from these Terms, but all other terms remain in place.
- 18.4 The Terms constitutes the entire agreement between the parties. No additional terms and conditions (including any terms contained in any purchase order supplied by You) apply to the purchase of our Services unless agreed in writing or purchase orders supplied by You stating that the purchase is under Standards Australia "General Conditions of Contract" AS4000-1997 or AS2124.
- 18.5 In accepting these Terms, the Customer agrees that no other representations have been made by or on behalf of Landmark in relation to the supply of the Products or Services (or both). These Terms may only be varied, including by the addition of terms or clauses, in writing and any variation must be signed by a director of Landmark.
- 18.6 Unless agreed in writing by Landmark and in accordance with Clause 11.1 the Customer is not entitled to any retention or otherwise retain any amount due to Landmark. All payments are to be made without deduction or equitable or other set off whatsoever.