

TERMS AND CONDITIONS

1 INTERPRETATION

1.1 Definitions

Unless the context otherwise requires:

- (a) **Agreement** means this agreement, including the Particulars and these terms and conditions, as varied pursuant to clause 15;
- (b) **AWM** means AW Marine Pty Ltd ACN 142 370 410, its employees and subcontractors;
- (c) **ACL** means the Australian Consumer Law which is contained in Schedule 2 of the *Competition and Consumer Act 2010 (Cth)*;
- (d) **Claims** includes all actions, suits, causes of action, arbitrations, debts, dues, costs, expenses (including reasonable legal costs on a solicitor and own client basis and tax of any kind), claims, demands, proceedings, appeals, complaints, objections, investigations, obligations, liabilities, interest, verdicts, orders and judgments either at law or in equity, arising under a statute and whether or not the matter giving rise to those claims are known to the parties as at the date of this Agreement;
- (e) **Consumer Guarantees** means the guarantees relating to the supply of goods and services contained in the ACL;
- (f) **Customer** means the person named in the Particulars, and who has requested AWM to provide the Services;
- (g) **Goods** means the parts and items identified in the Particulars to be supplied by AWM to the Customer, and any other items requested by the Customer which AWM agrees to supply;
- (h) **Force Majeure** means any act, omission or circumstance over which AWM could not have reasonably exercised control including, without limitation, acts of God, war, terrorism, mobilisation, civil commotion, riots, embargoes, orders or regulations of governments of any relevant jurisdiction, fires, floods, strikes, lockouts or other labour difficulties, shortages of or inability to services, materials, labour or fuel;
- (i) **Particulars** means the quote or estimate for the Services and Goods, which is attached to, or provided with, these terms and conditions;
- (j) **Price** means the amount stated in the Particulars, exclusive of GST. Where the amount is stated as a range, the final price payable may be any amount within that range, as determined by AWM.
- (k) **PPSA** means the *Personal Property Securities Act 2009 (Cth)* (as amended) and any other legislation and regulations in respect of it and the following words in clause 5 have the respective meanings given to them in the PPS Act: collateral, financing change statement, financing statement, interested person, register, security agreement, security interest and verification statement;
- (l) **Related Body Corporate** has the same meaning as in the *Corporations Act 2001 (Cth)*;
- (m) **Services** means the services specified in the Particulars and all other work requested by the Customer which AWM agrees to carry out, including:
 - (i) repairs, maintenance and improvements to the Customer's vessel; and
 - (ii) supply of Goods, machinery, materials, equipment and labour, as required for the repairs, maintenance and improvements.
- (n) **Vessel** means the boat or watercraft described in the Particulars, and which is the subject of the Services including all fixtures and fittings located in or attached to the Vessel;

1.2 Interpretation

In the interpretation of this Deed, unless the context otherwise requires:

- (a) words and expressions defined in clause 1.2 or elsewhere have the meaning so given to them;
- (b) where a word or phrase is given a particular meaning, other parts of speech and grammatical forms of that word or phrase have corresponding meanings;
- (c) headings are inserted for convenience only and are not to be used in the interpretation or construction of this Deed;
- (d) words importing any gender include all other genders;
- (e) words importing the singular include the plural and vice versa;
- (f) "includes", "including" and similar expressions are not words of limitation;
- (g) all monetary amounts are in Australian dollars;
- (h) a reference to dates and times are to local time in Brisbane, Queensland, Australia;
- (i) a reference to sections, paragraphs, clauses, recitals, schedules and annexures are to sections, paragraphs and clauses of and recitals, schedules and annexures to this Deed;
- (j) a reference to a document or instrument (including a reference to this Deed), is to the document or instrument as amended, supplemented, novated, replaced or varied from time to time;
- (k) a reference to a person includes a natural person, body corporate, unincorporated association, trust, partnership, joint venture, Government Agency and statutory body or authority;
- (l) a reference to a party or person includes its employees, agents, officers, successors, substitutes (including, but not limited to, a party or person taking by novation), executors, administrators and assigns;
- (m) unless application is mandatory by law, any legislation present or future will not apply to this Deed so as to abrogate, extinguish, impair, delay or otherwise prejudicially affect the exercise or enjoyment of any right given or accruing to any Party;
- (n) unless otherwise specifically provided in this Deed, references to indemnify and indemnifying any person

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against any matter or circumstances, includes indemnifying and keeping the person harmless from all Claims made, suffered or incurred by that person as a consequence of or which would not have arisen but for that matter or circumstance.

2 SERVICES

- 2.1 AWM agrees to provide the Services and Goods, in exchange for the payment of the Price by the Customer, subject to the terms in this Agreement.
- 2.2 The Customer warrants that it is the owner of the Vessel, or the Vessel owner's agent, and that it has the authority to request that AWM perform the Services.
- 2.3 The Customer authorises AWM to move and store the Vessel by whatever means and to do every act, matter and thing in whatever circumstances that AWM considering desirable, necessary or appropriate in order for AWM to provide the Services to the Customer with respect to the Vessel, including:
 - (a) entering the Vessel; and
 - (b) performing tests and trial on the Vessel (including moving the Vessel to another location).

3 INSURANCE

- 3.1 The Customer must ensure that the Vessel is insured at all times against all possible damage (including for the risk of accident, fire, theft and burglary and all other usual risks) whilst in the Vessel is held or stored by AWM.
- 3.2 If requested, the Customer will provide AWM with a certificate of currency for insurance in respect of the Vessel.
- 3.3 In the event that the Vessel or any Goods are held by AWM (for repair or otherwise), AWM undertakes to exercise a reasonable duty of care towards the Vessel and Goods but risk (including, but not limited to, insurance risk) in the Goods and Vessel remains with the Customer, notwithstanding that property in the Goods may remain with AWM under clause 13.1.

4 PAYMENT

- 4.1 AWM may, in its sole discretion, require the Customer to pay a deposit of up to 50% of the Price, prior to AWM providing the Services (including the ordering of any necessary Goods).
- 4.2 All invoices, unless otherwise agreed in writing with AWM, must be paid by the Customer within seven (7) days of the date AWM issues an invoice, without discount, retention, set-off or any other deduction.
- 4.3 All unpaid invoices will incur interest on the unpaid amounts at the rate of 15% from the due date until payment is received.
- 4.4 All invoices will be regarded as accepted by the Customer, unless they are disputed by the Customer in writing within seven (7) days of the date of issue of the invoice.
- 4.5 The Customer acknowledges and agrees, that unless expressly stated otherwise in the Particulars, the Price does not include any fees or charges with respect to transportation of or raising or lowering the Vessel into the water, which may be charged by AWM or any third party.

5 SECURITY INTEREST

- 5.1 The Customer grants a security interest over all its right, title and interest in the Goods, the Vessel, and all fixtures and fittings located in or attached to the Vessel (the **Collateral**) as security for the performance of its obligations under this Agreement.
 - 5.2 The Customer indemnifies AWM from and against all costs and disbursements, including legal costs on a solicitor and own client basis, incurred by AWM in exercising its rights under this clause.
 - 5.3 AWM may register any actual or impending security interest (in any manner AWM considers appropriate) in relation to any security interest contemplated or constituted by this Agreement in the Goods and the Vessel.
 - 5.4 The Customer undertakes to:
 - (a) do anything that is required by AWM:
 - (i) so that AWM acquires and maintains one or more perfected security interests under the PPSA in respect of the Vessel or the Goods (or both);
 - (ii) to register a financing statement or financing change statement; and
 - (iii) to ensure that AWM's security position, and rights and obligations, are not adversely affected by the PPSA;
 - (b) not register a financing change statement in respect of a security interest contemplated or constituted by this Agreement without the prior written consent of AWM; and
 - (c) not create or purport to create any security interest in the Vessel or Goods, nor register, or permit to be registered, a financing statement or a financing change statement in relation to the Vessel or Goods in favour of a third party without the prior written consent of AWM.
 - 5.5 The Customer waives, to the extent permitted under the PPSA, its right to receive any notices the AWM is required to give under the PPSA (including a notice of verification statement).
 - 5.6 Unless otherwise agreed and to the extent permitted by the PPSA, the Customer and AWM agree not to disclose information of the kind referred to in section 275(1) of the PPSA to an interested person, or any other person requested by an interested person. The Customer waives any right it may have, or but for this clause may have had, under section 275(7)(c) of the PPSA to authorise the disclosure of the above information.
 - 5.7 For the purposes of section 20(2) of the PPSA, the collateral is the Goods, the Vessel, and all fixtures and fittings located in or attached to the Vessel, and this Agreement is a security agreement for the purposes of the PPSA.
- ### 6 INDEMNITIES AND EXCLUSION OF LIABILITIES
- 6.1 Subject to clause 6.3, and except as expressly provided to the contrary in this Agreement, all guarantees, terms, conditions, warranties, undertakings, inducements or representations whether express or implied, statutory or

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otherwise, relating to this Agreement or its subject matter are excluded to the maximum extent permitted by law.

6.2 Nothing in this Agreement excludes, restricts or modifies any right or remedy, or any guarantee, term, condition, warranty, undertaking, inducement or representation, implied or imposed by any legislation which cannot lawfully be excluded or limited. This may include the Consumer Guarantees.

6.3 Where AWM is not able to exclude a guarantee, term, condition, warranty, undertaking, inducement or representation imposed by legislation in relation to this Agreement, (**'Non-Excludable Provision'**), and AWM is able to limit the Customer's remedy for a breach of the Non-Excludable Provision, then AWM's liability for breach of the Non-Excludable Provision is limited to (at AWM's election):

- (a) in the case of goods, the repair or replacement of the goods or the supply of substitute goods (or the cost of doing so); or
- (b) in the case of services, the supplying of the services again, or the payment of the cost of having the services supplied again.

6.4 Subject to AWM's obligations under the Non-Excludable Provisions and to the maximum extent permitted by law, AWM's maximum aggregate liability for all Claims under or relating to this Agreement or its subject matter, is limited to an amount equal to the Price paid by the Customer under this Agreement. In calculating AWM's aggregate liability under this clause, the parties must include any amounts paid or the value of any goods or services replaced, repaired or supplied by AWM for a breach of any Non-Excludable Provisions.

6.5 Subject to clauses 6.3 and 6.4, AWM will not be liable to the Customer for any consequential, indirect or special loss or damage, loss of actual or anticipated profits or revenue, loss of business, business interruption, wasted costs the Customer has incurred, or for any loss suffered by third parties under or relating to this Agreement or its subject matter, whether or not such loss or damage was foreseeable and even if advised of the possibility of the loss or damage.

6.6 The Customer indemnifies AWM for any Claim suffered by AWM as a result of or in connection with:

- (a) any negligent acts or omissions of the Customer; and
- (b) any breach of this Agreement by the Customer.

6.7 Each indemnity in this Agreement is a continuing obligation, separate and independent from the other obligations of the parties and survives termination, completion and expiration of this Agreement. It is not necessary for a party to incur an expense or make any payment before enforcing a right of indemnity conferred by this Agreement.

7 DELAY

7.1 AWM shall not be liable for any delay or failure to perform its obligations under this Agreement, if such failure or delay is due to Force Majeure.

7.2 AWM shall notify the Customer as soon as practicable of any anticipated delay due to Force Majeure, and the performance of AWM's obligations shall be suspended during the period of delay due to such Force Majeure.

7.3 AWM will use all reasonable endeavours to comply with time limitations and schedules agreed between the Customer and AWM. However, AWM shall not be liable for any loss or damage resulting from any delay in performing the Services or supplying the Goods, or for Services being only partly performed by proposed dates or schedules, including (without limitation) any indirect, consequential, special or economic loss or damage, or loss of profits.

8 BREACH OF AGREEMENT BY THE CUSTOMER

8.1 If the Customer:

- (a) breaches any term of this Agreement and fails to remedy the breach within seven (7) days; or
- (b) if the Customer becomes bankrupt or insolvent, executes a personal insolvency agreement, enters into liquidation, administration, receivership or cease to carry on business,

then, AWM shall be entitled to:

- (c) terminate this Agreement; and/or
- (d) sue for damages and recovery of all monies owing by the Customer.

8.2 These rights are in addition to any other rights AWM has under this Agreement and do not exclude any right or remedy under law or equity.

9 GST

9.1 Unless the context requires otherwise, words and phrases used in this clause that have a specific meaning in the GST law will have the same meaning in this clause.

9.2 Unless specifically stated otherwise, all amounts payable or to be provided under or in connection with this Deed are exclusive of GST.

9.3 If GST is payable, or notionally payable, on a supply made under or in connection with this Deed, the party providing the consideration for that supply must pay as additional consideration an amount equal to the amount of GST payable, or notionally payable, on that supply (the **GST Amount**). Subject to the prior receipt of a tax invoice, the GST Amount is payable at the same time that the other consideration for the supply is provided. This clause does not apply to the extent that the consideration for the supply is expressly stated to be GST inclusive or the supply is subject to reverse charge.

9.4 Where any indemnity, reimbursement or similar payment under this Agreement is based on any cost, expense or other liability, it will be reduced by any input tax credit entitlement, or notional input tax credit entitlement, in relation to the relevant cost, expense or other liability.

9.5 If an adjustment event occurs in relation to a supply made under or in connection with this Agreement, the GST Amount will be recalculated to reflect that adjustment and an appropriate payment will be made between the parties.

9.6 This clause will not merge upon completion and will continue to apply after expiration or termination of this Agreement.

10 TIME BAR AND NOTICE OF LOSS

10.1 AWM will not in any circumstances be liable for any claim for loss, damage or injury (including any economic or

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consequential loss) arising out of or in any way connected with the performance of the Services or the supply of the Goods, whether involving negligence of AWM or otherwise, unless notification is received in writing to the AWM within three (3) months of the earliest of the following occurring;

- (a) the Services being completed; or
- (b) the Vessel leaving the care, custody or control of AWM.

10.2 Failing receipt of which notice AWM shall be forever discharged from any and all liability to any person (including the Customer) in respect of the Goods and the Services provided by AWM.

11 NO RELIANCE

11.1 Subject to clauses 6.1 and 6.3, the Customer acknowledges that neither AWM nor any person acting on behalf of AWM have made any representation or other inducement the Customer to enter into this Agreement and the Customer has not entered into this Agreement in reliance on any representations or inducements except for those representations contained in this Agreement.

12 LIEN AND SET-OFF

12.1 In addition to any rights under the PPSA, the Customer grants AWM a right of retention and lien on the Vessel, in connection with the provision of Services under this Agreement.

12.2 AWM may, at its discretion, exercise the lien in respect of any due and unpaid amounts outstanding by the Customer and may retain the Vessel and any goods in the Vessel, and serve notice on the Customer requiring immediate payment of the amounts outstanding by the Customer.

12.3 If the amounts outstanding by the Customer have not been paid within 90 days of AWM providing notice to the Customer, AWM may sell the Customer's Vessel and/or all goods in or attached to the Vessel and apply the proceeds in the first instance to the satisfaction of the amounts outstanding by the Customer and the costs of exercising the right of sale.

12.4 Any balance of the proceeds of the sale will be returned to the Customer, where possible.

13 PASSING OF PROPERTY AND TITLE

13.1 Property and title in the Goods shall not pass until full payment of all outstanding invoices together with any interest, charges or other costs payable have been paid in full by the Customer. If the Customer resells the Vessel prior to making full payment to AWM, the Customer shall hold the proceeds of such sale on trust for AWM.

14 ASSIGNMENT

14.1 AWM may assign this Agreement to any third party without the Customers consent (including a Related Body Corporate).

15 VARIATION

15.1 This Agreement, and in particular the scope of the Services and the Price, may be varied by written agreement between the parties.

16 SEVERABILITY

16.1 If any part of this Agreement becomes void or unenforceable for any reason then that part will be severed with the intent that all remaining parts will continue to be in full force and effect and be unaffected by the severance of any other parts.

17 GOVERNING LAW

17.1 This Agreement is executed pursuant to and governed by the laws of Queensland and each party submits to the non-exclusive jurisdiction of the courts of that State in respect of any proceedings arising in connection with this Agreement. Each party waives any objection to the venue of any legal process in these courts on the basis that the process has been brought in an inconvenient forum.

18 NO WAIVER OF RIGHTS

18.1 Any waiver in regard to the performance of this Agreement operates only if in writing and applies only to the specified instance, and must not affect the existence and continued applicability of the terms of it thereafter.

18.2 The failure of a party to this Agreement to enforce a provision or the granting of any time or indulgence will not be construed as a waiver of the provision nor a waiver of the party's right to enforce the provision at a later time.

19 AUTHORITY TO SIGN

19.1 The person signing any document which forms part of this Agreement for and on behalf the Customer hereby warrants that he or she has the Customer's authority to enter into this Agreement on behalf of the Customer and grant the security interests in connection with it and is empowered to bind the Customer to this Agreement and each security interest granted in connection with it.

19.2 The person signing this Agreement on behalf of the Customer indemnifies AWM against all losses, costs and claims incurred by AWM arising from that person not in fact having such power and/or authority.

20 ELECTRONIC SIGNING

20.1 In this clause, "Electronic Signature" means an electronic method of signing that identifies the person and indicates their intention to sign the Agreement.

20.2 If this Agreement is signed by any person using an Electronic Signature, the parties:

- (a) consent to the use of electronic communication to give any notice or information required by law to be given before signing this Agreement;
- (b) agree to enter into this Agreement in electronic form; and
- (c) consent to either or both parties signing the Agreement using an Electronic Signature.

21 ENTIRE AGREEMENT

21.1 This Agreement and the documents referred to in this Agreement represent the entire agreement between the parties and superseded all prior representation, agreements, statements and understandings between the parties.