

Surefoot – Terms & Conditions of Trade

- 1. Definitions**
- 1.1 **"Contract"** means the terms and conditions contained herein, together with any quotation, order, invoice or other document or amendments expressed to be supplemental to this Contract.
- 1.2 **"Surefoot"** means Pandoe Pty Ltd T/A Surefoot, its successors and assigns or any person acting on behalf of and with the authority of Pandoe Pty Ltd T/A Surefoot.
- 1.3 **"Client"** means the person's, entities or any person acting on behalf of and with the authority of the Client requesting Surefoot to provide the Works as specified in any proposal, quotation, order, invoice or other documentation, and:
- (a) if there is more than one Client, is a reference to each Client jointly and severally; and
- (b) if the Client is a partnership, it shall bind each partner jointly and severally; and
- (c) if the Client is a part of a Trust, shall be bound in their capacity as a trustee; and
- (d) includes the Client's executors, administrators, successors and permitted assigns.
- 1.4 **"Works"** means all Works (including consultation, manufacturing and/or installation services) or Materials supplied by Surefoot to the Client at the Client's request from time to time (where the context so permits the terms 'Works' or 'Materials' shall be interchangeable for the other).
- 1.5 **"Worksites"** means the address nominated by the Client to which the Materials are to be supplied by Surefoot.
- 1.6 **"Intended Use"** means a building product and the use thereof, for which the building product is intended to be, or is reasonably likely to be, associated with a building.
- 1.7 **"Non-Conforming Building Product"** means building products that are regarded as Non-Conforming for an Intended Use if, when associated with a building:
- (a) the product is not, or will not be, safe; or
- (b) does not, or will not, comply with the relevant regulatory provisions; or
- (c) the product does not perform, or is not capable of performing, for the use to the standard it is represented to conform by or for a person in the chain of responsibility for the product.
- 1.8 **"Confidential Information"** means information of a confidential nature whether oral, written or in electronic form including, but not limited to, this Contract, either party's intellectual property, operational information, know-how, trade secrets, financial and commercial affairs, contracts, client information (including but not limited to, **"Personal Information"** such as: name, address, D.O.B, occupation, driver's license details, electronic contact (email, Facebook or Twitter details), medical insurance details or next of kin and other contact information (where applicable), previous credit applications, credit history) and pricing details.
- 1.9 **"Cookies"** means small files which are stored on a user's computer. They are designed to hold a modest amount of data (including Personal Information) specific to a particular client and website, and can be accessed either by the web server or the client's computer. **If the Client does not wish to allow Cookies to operate in the background when using Surefoot's website, then the Client shall have the right to enable / disable the Cookies first by selecting the option to enable / disable provided on the website, prior to making enquiries via the website.**
- 1.10 **"Price"** means the Price payable (plus any GST where applicable) for the Works as agreed between Surefoot and the Client in accordance with clause 5 below.
- 1.11 **"GST"** means Goods and Services Tax as defined within the "A New Tax System (Goods and Services Tax) Act 1999" (Cth).
- 2. Acceptance**
- 2.1 The Client is taken to have exclusively accepted and is immediately bound, jointly and severally, by these terms and conditions if the Client places an order for or accepts delivery of any Works.
- 2.2 In the event of any inconsistency between the terms and conditions of this Contract and any other prior document or schedule that the parties have entered into, the terms of this Contract shall prevail.
- 2.3 Any amendment to the terms and conditions contained in this Contract may only be amended in writing by the consent of both parties.
- 2.4 The Client acknowledges that the supply of Works on credit shall not take effect until the Client has completed a credit application with Surefoot and it has been approved with a credit limit established for the account.
- 2.5 In the event that the supply of Works requested exceeds the Client's credit limit and/or the account exceeds the payment terms, Surefoot reserves the right to refuse delivery.
- 2.6 Electronic signatures shall be deemed to be accepted by either party providing that the parties have complied with Section 9 of the Electronic Communications Act 2000 or any other applicable provisions of that Act or any Regulations referred to in that Act.
- 3. Errors and Omissions**
- 3.1 The Client acknowledges and accepts that Surefoot shall, without prejudice, accept no liability in respect of any alleged or actual error(s) and/or omission(s):
- (a) resulting from an inadvertent mistake made by Surefoot in the formation and/or administration of this Contract; and/or
- (b) contained in/omitted from any literature (hard copy and/or electronic) supplied by Surefoot in respect of the Works.
- 3.2 In the event such an error and/or omission occurs in accordance with clause 3.1, and is not attributable to the negligence and/or willful misconduct of Surefoot, the Client shall not be entitled to treat this Contract as repudiated nor render it invalid.
- 4. Change in Control**
- 4.1 The Client shall give Surefoot not less than fourteen (14) days prior written notice of any proposed change of ownership of the Client and/or any other change in the Client's details (including but not limited to, changes in the Client's name, address, contact phone or fax number/s, change of trustees, or business practice). The Client shall be liable for any loss incurred by Surefoot as a result of the Client's failure to comply with this clause.
- 5. Price and Payment**
- 5.1 At Surefoot's sole discretion the Price shall be either:
- (a) as indicated on invoices provided by Surefoot to the Client in respect of Works performed or Materials supplied; or
- (b) Surefoot's quoted Price (subject to clause 5.2) which shall be binding upon Surefoot provided that the Client shall accept Surefoot's quotation in writing within thirty (30) days.
- 5.2 Surefoot reserves the right to change the Price:
- (a) if a variation to the Materials which are to be supplied is requested; or
- (b) if a variation to the Works originally scheduled (including any applicable plans or specifications) is requested; or
- (c) where additional Works are required due to the discovery of hidden or unidentifiable difficulties (including, but not limited to, poor weather, limitations to accessing the Worksite, obscured building/Worksite defects, incorrect measurements, plans and/or specifications provided by the Client, safety considerations (discovery of asbestos, etc.), prerequisite work by any third party not being completed, lack of required utilities, remedial work required due to existing workmanship being of a poor quality or non-compliant to the building code, hard rock barriers below the surface, iron reinforcing rods in concrete or hidden pipes and wiring in walls, etc.) which are only discovered on commencement of the Works; or
- (d) in the event of increases to Surefoot in the cost of labour or materials (including but not limited to overseas transactions that may increase as a consequence of variations in foreign currency rates of exchange and/or international freight and insurance charges) which are beyond Surefoot's control.
- 5.3 Variations will be charged for on the basis of Surefoot's quotation, and will be detailed in writing, and shown as variations on Surefoot's invoice. The Client shall be required to respond to any variation submitted by Surefoot within ten (10) working days. Failure to do so will entitle Surefoot to add the cost of the variation to the Price. Payment for all variations must be made in full at the time of their completion.
- 5.4 Time for payment for the Works being of the essence, the Price will be payable by the Client on the date/s determined by Surefoot, which may be:
- (a) on or before completion of the Works;
- (b) by way of progress payments in accordance with Surefoot's specified progress payment schedule. Such progress payment claims may include the reasonable value of authorised variations and the value of any Materials delivered to the Worksite but not yet installed;
- (c) thirty (30) days following the end of the month in which a statement is posted to the Client's address or address for notices;
- (d) the date specified on any invoice or other form as being the date for payment; or
- (e) falling any notice to the contrary, the date which is fourteen (14) days following the date of any invoice given to the Client by Surefoot.
- 5.5 Payment may be made by cash, cheque, bank cheque, electronic/on-line banking, credit card (a surcharge may apply per transaction), or by any other method as agreed to between the Client and Surefoot.
- 5.6 Surefoot may in its discretion allocate any payment received from the Client towards any invoice that Surefoot determines and may do so at the time of receipt or at any time afterwards. On any default by the Client Surefoot may re-allocate any payments previously received and allocated. In the absence of any payment allocation by Surefoot, payment will be deemed to be allocated in such manner as preserves the maximum value of Surefoot's Purchase Money Security Interest (as defined in the PPSA) in the Materials.
- 5.7 The Client shall not be entitled to set off against, or deduct from the Price, any sums owed or claimed to be owed to the Client by Surefoot nor to withhold payment of any invoice because part of that invoice is in dispute.
- 5.8 Unless otherwise stated the Price does not include GST. In addition to the Price, the Client must pay to Surefoot an amount equal to any GST Surefoot must pay for any supply by Surefoot under this or any other contract for the sale of the Materials. The Client must pay GST, without deduction or set off of any other amounts, at the same time and on the same basis as the Client pays the Price. In addition, the Client must pay any other taxes and duties that may be applicable in addition to the Price except where they are expressly included in the Price.
- 6. Provision of the Works**
- 6.1 Subject to clause 6.2 it is Surefoot's responsibility to ensure that the Works start as soon as it is reasonably possible.
- 6.2 The Works' commencement date will be put back and/or the completion date extended by whatever time is reasonable in the event that Surefoot claims an extension of time (by giving the Client written notice) where completion is delayed by an event beyond Surefoot's control, including but not limited to any failure by the Client to:
- (a) make a selection; or
- (b) have the Worksite ready for the Works; or
- (c) notify Surefoot that the Worksite is ready.
- 6.3 At Surefoot's sole discretion, the cost of delivery is either included in the Price or is in addition to the Price.
- 6.4 Surefoot may deliver the Works by separate instalments. Each separate instalment shall be invoiced and paid in accordance with the provisions in these terms and conditions.
- 6.5 Any time specified by Surefoot for delivery of the Works is an estimate only and Surefoot will not be liable for any loss or damage incurred by the Client as a result of delivery being late. However both parties agree that they shall make every endeavour to enable the Works to be supplied at the time and place as was agreed between both parties. In the event that Surefoot is unable to supply the Works as agreed solely due to any action or inaction of the Client, then Surefoot shall be entitled to charge a reasonable fee for re-supplying the Works at a later time and date, and/or for storage of the Materials.
- 7. Worksite Access and Condition**
- 7.1 Surefoot is not responsible for the removal of rubbish from or clean-up of the building/construction Worksite's. All rubbish generated by Surefoot will be placed in a designated area appointed by the Client but the responsibility of removal of same is the Client or the Client's agent, unless otherwise agreed.
- 7.2 It is the intention of Surefoot and agreed by the Client that:
- (a) the Client shall ensure that Surefoot has clear and free access to the Worksite at all times to enable them to undertake the Works (including carrying out Worksite inspections, gain signatures for required documents, and for the delivery and installation of the Materials). Surefoot shall not be liable for any loss or damage to the Worksite (including, without limitation, damage to pathways, driveways and concreted or paved or grassed areas) unless due to the negligence of Surefoot;
- (b) it is the Client's responsibility to provide Surefoot, while at the Worksite, with adequate access to available water, electricity, toilet and washing facilities;
- (c) remove any furniture or personal items from the vicinity of the Works, and agrees that Surefoot shall not be liable for any damage caused to those items through the Client's failure to comply with this clause; and
- 7.3 The Client agrees to be present at the Worksite when and as reasonably requested by Surefoot and its employees, contractors and/or agents.
- 7.4 Worksite Inductions**
- (a) in the event the Client requires an employee or sub-contractor of Surefoot to undertake a Worksite induction during working hours, the Client will be liable to pay the hourly charges for that period. If any induction needs to be undertaken prior to the commencement date then the Client shall be liable to pay Surefoot's standard (and/or overtime, if applicable) hourly labour rate; or
- (b) where Surefoot is in control of the Worksite, the Client and/or the Client's third party contractors must initially carry out Surefoot's Health & Safety induction course before access to the Worksite will be granted. Inspection of the Worksite during the course of the Works will be by **appointment only** and unless otherwise agreed, in such an event the Client and/or third party acting on behalf of the Client must at all times be accompanied by Surefoot.
- 8. Dimensions, Plans and Specifications**
- 8.1 Surefoot shall be entitled to rely on the accuracy of any plans, specifications and other information provided by the Client. The Client acknowledges and agrees that in the event that any of this information provided by the Client is inaccurate, Surefoot accepts no responsibility for any loss, damages, or costs however resulting from these inaccurate plans, specifications or other information.
- 8.2 Where the Client is to supply Surefoot with any design specifications (including, but not limited to CAD drawings) the Client shall be responsible for providing accurate data. Surefoot shall not be liable whatsoever for any errors in the Works that are caused by incorrect or inaccurate data being supplied by the Client.
- 8.3 In the event the Client gives information relating to measurements and quantities of Materials required in completing the Works, it is the Client's responsibility to verify the accuracy of the measurements and quantities, before the Client or Surefoot places an order based on these measurements and quantities. Surefoot accepts no responsibility for any loss, damages, or costs however resulting from the Client's failure to comply with this clause.
- 9. Risk**
- 9.1 If Surefoot retains ownership of the Materials under clause 12 then:
- (a) where Surefoot is supplying Materials only, all risk for the Materials shall immediately pass to the Client on delivery and the Client must insure the Materials on or before delivery. Delivery of the Materials shall be deemed to have taken place immediately at the time that either:
- (i) the Client or the Client's nominated carrier takes possession of the Materials at Surefoot's address; or
- (ii) the Materials are delivered by Surefoot or Surefoot's nominated carrier to the Client's nominated delivery address (even if the Client is not present at the address);
- (b) where Surefoot is to both supply and install Materials then Surefoot shall maintain a contract works insurance policy until the Works are completed. Upon completion of the Works all risk for the Works shall immediately pass to the Client.
- 9.2 Notwithstanding the provisions of clause 9.1 if the Client specifically requests Surefoot to leave Materials outside Surefoot's premises for collection or to deliver the Materials to an unattended location then such materials shall always be left at sole risk of the Client and it shall be the Client's responsibility to ensure the Materials are insured adequately or at all. In the event that such Materials are lost, damaged or destroyed then replacement of the Materials shall be at the Client's expense.
- 9.3 If any of the Materials are damaged or destroyed following Delivery but prior to ownership passing to the Client, Surefoot is entitled to receive all insurance proceeds payable for the Materials. The production of these terms and conditions by Surefoot is sufficient evidence of Surefoot's rights to receive the insurance proceeds without the need for any person dealing with Surefoot to make further enquiries.
- 9.4 Where Surefoot:
- (a) gives advice or recommendations to the Client, or the Client's agent, regarding any aspect of the scope of the Works (including but not limited to, a particular course of action, design specifications requested by the Client will not meet tolerance or condition of materials supplied by the Client being inferior), and such advice or recommendations are not acted upon, then Surefoot shall require the Client or their agent to authorise commencement of the Works in writing. Surefoot shall not be liable in any way whatsoever for any damages or losses that occur after any subsequent commencement of the Works nor will such losses or damages be deemed a defect;
- (b) is required to install the Materials the Client warrants that the structure of the premises upon which these Materials are to be installed is sound and will sustain the installation and work incidental thereto. Surefoot shall not be liable for any claims, demands, losses, damages, costs and expenses however caused or arising should the premises be unable to accommodate the installation;
- (c) is only supplying the Materials and not installing the Materials, Surefoot shall not be liable for any defect or damage resulting from incorrect or faulty installation carried out by any other third party.
- 9.5 The Client acknowledges and accepts that:
- (a) Surefoot is only responsible for parts that are replaced by Surefoot and that in the event that other parts/materials, subsequently fail, the Client agrees to indemnify Surefoot against any loss or damage to the Materials, or caused by the Materials, or any part thereof however arising;
- (b) stainless steel is a textured material and can be of a porous nature. The Client accepts that products made from this material can rust and mark easily. The Client accepts that care should be taken to maintain the finish of and longevity of stainless steel products;
- (c) where an anodised surface finish has been selected, slight colour variation may occur between the main unit frame and any installation trims used due to the difference in aluminium alloys available and manufacturing standards and tolerances shall not be deemed to be a defect in the Materials;
- (d) Materials supplied may exhibit variations in shade, colour, texture, surface, finish, markings, veining, and may contain natural fissures, occlusions, lines, indentations, and may
- (i) fade or change colour over time;
- (ii) expand, contract or distort as a result of exposure to heat, cold, weather;
- (iii) mark or stain if exposed to certain substances; and
- (iv) be damaged or disfigured by impact or scratching.
- 9.6 Whilst Surefoot will make every effort to match sales samples to the finished Materials, Surefoot accepts no liability whatsoever where such samples differ to the finished Materials supplied.
- 9.7 Surefoot accepts no responsibility for:
- (a) any damage or defects in any Materials caused by movement and/or interference of the said Materials; and
- (b) painting, re-decorating, re-sealing, carpentry or any other Works required for the restoration or making good of any surface/area where any Works have been carried out.
- 9.8 Surefoot may at its discretion notify the Client that it requires to store at the Worksite Materials, fittings and appliances, or plant and tools required for the Works, in which event the Client shall supply Surefoot a safe area for storage and shall take all reasonable efforts to protect all items so stored from possible destruction, theft or damage. In the event that any such items are destroyed, stolen or damaged then the cost of repair or replacement shall be the Client's responsibility.
- 10. Underground Locations**
- 10.1 Prior to Surefoot commencing any work the Client must advise Surefoot of the precise location of all underground services on the Worksite and clearly mark the same. The underground mains and services the Client must identify include, but are not limited to, electrical services, gas services, sewer services, pumping services, sewer connections, sewer sludge mains, water mains, irrigation pipes, telephone cables, fibre optic cables, oil pumping mains, and any other services that may be on the Worksite.
- 10.2 Whilst Surefoot will take all care to avoid damage to any underground services the Client agrees to indemnify Surefoot in respect of all and any liability claims, loss, damage, costs and fines as a result of damage to services not precisely located and notified as per clause 10.1.
- 11. Compliance with Laws**
- 11.1 The Client and Surefoot shall comply with the provisions of all statutes, regulations and bylaws of government, local and other public authorities that may be applicable to the Works, including any occupational health and safety laws (OHS) relating or any other relevant safety standards or legislation pertaining to the Works.
- 11.2 Both parties acknowledge and agree:
- (a) to comply with the National Construction Code of Australia (NCC) and the Building Act 1993, in respect of all workmanship and building products to be supplied during the course of the Works; and
- (b) that Works will be provided in accordance with any current relevant Australian Standards applicable.
- 11.3 Where the Client has supplied products for Surefoot to complete the Works, the Client acknowledges that it accepts responsibility for the suitability of purpose and use for their products and the Intended Use and any faults inherent in those products. However, if in Surefoot's opinion, it is believed that the materials supplied are Non-Conforming products and will not conform with state and/or territory regulations, then Surefoot shall be entitled, without prejudice, to halt the Works until the appropriate conforming products are sourced and all costs associated with such a change to the plans and design will be invoiced in accordance with clause 5.2.
- 11.4 The Client shall obtain (at the expense of the Client) all licenses and approvals that may be required for the Works.
- 11.5 Surefoot shall comply with the terms and conditions of all such consents and approvals in so far as such consents and approvals relate to the carrying out of the Works.
- 12. Title**
- 12.1 Surefoot and the Client agree that ownership of the Materials shall not pass until:
- (a) the Client has paid Surefoot all amounts owing to Surefoot; and
- (b) the Client has met all of its other obligations to Surefoot.
- 12.2 Receipt by Surefoot of any form of payment other than cash shall not be deemed to be payment until that form of payment has been honoured, cleared or recognised.
- 12.3 It is further agreed that until ownership of the Materials passes to the Client in accordance with clause 12.1:
- (a) the Client is only a bailee of the Materials and unless the Materials have become fixtures must return the Materials to Surefoot on request;
- (b) the Client holds the benefit of the Client's insurance of the Materials on trust for Surefoot and must pay to Surefoot the proceeds of any insurance in the event of the Materials being lost, damaged or destroyed;
- (c) the production of these terms and conditions by Surefoot shall be sufficient evidence of Surefoot's rights to receive the insurance proceeds direct from the insurer without the need for any person dealing with Surefoot to make further enquiries;
- (d) the Client must not sell, dispose, or otherwise part with possession of the Materials other than in the ordinary course of business and for market value. If the Client sells, disposes or parts with possession of the Materials then the Client must hold the proceeds of any such act on trust for Surefoot and must pay or deliver the proceeds to Surefoot on demand;
- (e) the Client should not convert or process the Materials or intermix them with other goods but if the Client does so then the Client holds the resulting product on trust for the benefit of Surefoot and must sell, dispose of or return the resulting product to Surefoot as it so directs;

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- (f) unless the Materials have become fixtures the Client irrevocably authorises Surefoot to enter any premises where Surefoot believes the Materials are kept and recover possession of the Materials;
- (g) Surefoot may recover possession of any Materials in transit whether or not delivery has occurred;
- (h) the Client shall not charge or grant an encumbrance over the Materials nor grant nor otherwise give away any interest in the Materials while they remain the property of Surefoot;
- (i) Surefoot may commence proceedings to recover the Price of the Materials sold notwithstanding that ownership of the Materials has not passed to the Client.
- 13. Personal Property Securities Act 2009 (“PPSA”)**
- 13.1 In this clause financing statement, financing change statement, security agreement, and security interest has the meaning given to it by the PPSA.
- 13.2 Upon assenting to these terms and conditions in writing the Client acknowledges and agrees that these terms and conditions constitute a security agreement for the purposes of the PPSA and creates a security interest in all Materials and/or collateral (account) – being a monetary obligation of the Client to Surefoot for Works – that have previously been supplied and that will be supplied in the future by Surefoot to the Client.
- 13.3 The Client undertakes to:
- (a) promptly sign any further documents and/or provide any further information (such information to be complete, accurate and up-to-date in all respects) which Surefoot may reasonably require to:
- (i) register a financing statement or financing change statement in relation to a security interest on the Personal Property Securities Register;
- (ii) register any other document required to be registered by the PPSA; or
- (iii) correct a defect in a statement referred to in clause 13.3(a)(i) or 13.3(a)(ii);
- (b) indemnify, and upon demand reimburse, Surefoot for all expenses incurred in registering a financing statement or financing change statement on the Personal Property Securities Register established by the PPSA or releasing any Materials charged thereby;
- (c) not register a financing change statement in respect of a security interest without the prior written consent of Surefoot;
- (d) not register, or permit to be registered, a financing statement or a financing change statement in relation to the Materials and/or collateral (account) in favour of a third party without the prior written consent of Surefoot;
- (e) immediately advise Surefoot of any material change in its business practices of selling the Materials which would result in a change in the nature of proceeds derived from such sales.
- 13.4 Surefoot and the Client agree that sections 96, 115 and 125 of the PPSA do not apply to the security agreement created by these terms and conditions.
- 13.5 The Client hereby waives its rights to receive notices under sections 95, 118, 121(4), 130, 132(3)(d) and 132(4) of the PPSA.
- 13.6 The Client waives its rights as a grantor and/or a debtor under sections 142 and 143 of the PPSA.
- 13.7 Unless otherwise agreed to in writing by Surefoot, the Client waives its right to receive a verification statement in accordance with section 157 of the PPSA.
- 13.8 The Client shall unconditionally ratify any actions taken by Surefoot under clauses 13.3 to 13.5.
- 13.9 Subject to any express provisions to the contrary (including those contained in this clause 13), nothing in these terms and conditions is intended to have the effect of contracting out of any of the provisions of the PPSA.
- 14. Security and Charge**
- 14.1 In consideration of Surefoot agreeing to supply the Materials, the Client charges all of its rights, title and interest (whether joint or several) in any land, realty or other assets capable of being charged, owned by the Client either now or in the future, to secure the performance by the Client of its obligations under these terms and conditions (including, but not limited to, the payment of any money).
- 14.2 The Client indemnifies Surefoot from and against all Surefoot's costs and disbursements including legal costs on a solicitor and own client basis incurred in exercising Surefoot's rights under this clause.
- 14.3 The Client irrevocably appoints Surefoot and each director of Surefoot as the Client's true and lawful attorney/s to perform all necessary acts to give effect to the provisions of this clause 14 including, but not limited to, signing any document on the Client's behalf.
- 15. Defects, Warranties and Returns, Competition and Consumer Act 2010 (“CCA”)**
- 15.1 The Client must inspect all Materials on delivery (or the Works on completion) and must within seven (7) days of delivery notify Surefoot in writing of any evident defect/damage, shortage in quantity, or failure to comply with the description or quote. The Client must notify any other alleged defect in the Materials/Works as soon as reasonably possible after any such defect becomes evident. Upon such notification the Client must allow Surefoot to inspect the Materials or to review the Works provided.
- 15.2 Under applicable State, Territory and Commonwealth Law (including, without limitation the CCA), certain statutory implied guarantees and warranties (including, without limitation the statutory guarantees under the CCA) may be implied into these terms and conditions (**Non-Excluded Guarantees**).
- 15.3 Surefoot acknowledges that nothing in these terms and conditions purports to modify or exclude the Non-Excluded Guarantees.
- 15.4 Except as expressly set out in these terms and conditions or in respect of the Non-Excluded Guarantees, Surefoot makes no warranties or other representations under these terms and conditions including but not limited to the quality or suitability of the Materials/Works. Surefoot's liability in respect of these warranties is limited to the fullest extent permitted by law.
- 15.5 If the Client is a consumer within the meaning of the CCA, Surefoot's liability is limited to the extent permitted by section 64A of Schedule 2.
- 15.6 If Surefoot is required to replace any Materials under this clause or the CCA, but is unable to do so, Surefoot may refund any money the Client has paid for the Materials.
- 15.7 If Surefoot is required to rectify, re-supply, or pay the cost of re-supplying the Works under this clause or the CCA, but is unable to do so, then Surefoot may refund any money the Client has paid for the Works but only to the extent that such refund shall take into account the value of Works and Materials which have been provided to the Client which were not defective.
- 15.8 If the Client is not a consumer within the meaning of the CCA, Surefoot's liability for any defect or damage in the Materials is:
- (a) limited to the value of any express warranty or warranty card provided to the Client by Surefoot at Surefoot's sole discretion;
- (b) limited to any warranty to which Surefoot is entitled, if Surefoot did not manufacture the Materials;
- (c) otherwise negated absolutely.
- 15.9 Subject to this clause 15, returns will only be accepted provided that:
- (a) the Client has complied with the provisions of clause 15.1; and
- (b) Surefoot has agreed that the Materials are defective; and
- (c) the Materials are returned within a reasonable time at the Client's cost (if that cost is not significant); and
- (d) the Materials are returned in as close a condition to that in which they were delivered as is possible.
- 15.10 Notwithstanding clauses 15.1 to 15.9 but subject to the CCA, Surefoot shall not be liable for any defect or damage which may be caused or partly caused by or arise as a result of:
- (a) the Client failing to properly maintain or store any Materials;
- (b) the Client using the Materials for any purpose other than that for which they were designed;
- (c) the Client continuing to use any Materials after any defect became apparent or should have become apparent to a reasonably prudent operator or user;
- (d) interference with the Works by the Client or any third party without Surefoot's prior approval;
- (e) the Client failing to follow any instructions or guidelines provided by Surefoot;
- (f) fair wear and tear, any accident, or act of God.
- 15.11 Notwithstanding anything contained in this clause if Surefoot is required by a law to accept a return then Surefoot will only accept a return on the conditions imposed by that law.
- 15.12 Subject to clause 15.1, non-defective, customised, or non-stocklist items or Materials made or ordered to the Client's specifications are not acceptable for credit or return.
- 16. Intellectual Property**
- 16.1 Where Surefoot has designed, drawn, written plans or a schedule of Works, or created any products for the Client, then the copyright in all such designs, drawings, documents, plans, schedules and products shall remain vested in Surefoot, and shall only be used by the Client at Surefoot's discretion. Under no circumstances may such designs, drawings and documents be used without the express written approval of Surefoot.
- 16.2 The Client warrants that all designs, specifications or instructions given to Surefoot will not cause Surefoot to infringe any patent, registered design or trademark in the execution of the Client's order and the Client agrees to indemnify Surefoot against any action taken by a third party against Surefoot in respect of any such infringement.
- 16.3 The Client agrees that Surefoot may (at no cost) use for the purposes of marketing or entry into any competition, any documents, designs, drawings, plans or products which Surefoot has created for the Client.
- 17. Default and Consequences of Default**
- 17.1 Interest on overdue invoices shall accrue daily from the date when payment becomes due, until the date of payment, at a rate of two and a half percent (2.5%) per calendar month (and at Surefoot's sole discretion such interest shall compound monthly at such rate) after as well as before any judgment.
- 17.2 If the Client owes Surefoot any money the Client shall indemnify Surefoot from and against all costs and disbursements incurred by Surefoot in recovering the debt (including but not limited to internal administration fees, legal costs on a solicitor and own client basis, Surefoot's contract default fee, and bank dishonour fees).
- 17.3 Further to any other rights or remedies Surefoot may have under this Contract, if a Client has made payment to Surefoot, and the transaction is subsequently reversed, the Client shall be liable for the amount of the reversed transaction, in addition to any further costs incurred by Surefoot under this clause 17 where it can be proven that such reversal is found to be illegal, fraudulent or in contravention to the Client's obligations under this Contract.
- 17.4 Without prejudice to Surefoot's other remedies at law Surefoot shall be entitled to cancel all or any part of any order of the Client which remains unfulfilled and all amounts owing to Surefoot shall, whether or not due for payment, become immediately payable if:
- (a) any money payable to Surefoot becomes overdue, or in Surefoot's opinion the Client will be unable to make a payment when it falls due;
- (b) the Client has exceeded any applicable credit limit provided by Surefoot;
- (c) the Client becomes insolvent or bankrupt, convenes a meeting with its creditors or proposes or enters into an arrangement with creditors, or makes an assignment for the benefit of its creditors; or
- (d) a receiver, manager, liquidator (provisional or otherwise) or similar person is appointed in respect of the Client or any asset of the Client.
- 18. Cancellation**
- 18.1 Without prejudice to any other remedies Surefoot may have, if at any time the Client is in breach of any obligation (including those relating to payment) under these terms and conditions Surefoot may suspend or terminate the supply of Works to the Client. Surefoot will not be liable to the Client for any loss or damage the Client suffers because Surefoot has exercised its rights under this clause.
- 18.2 Surefoot may cancel any contract to which these terms and conditions apply or cancel delivery of Works at any time before the Works are commenced by giving written notice to the Client. On giving such notice Surefoot shall repay to the Client any sums paid in respect of the Price, less any amounts owing by the Client to Surefoot for Works already performed. Surefoot shall not be liable for any loss or damage whatsoever arising from such cancellation.
- 18.3 In the event that the Client cancels the delivery of Works the Client shall be liable for any and all loss incurred (whether direct or indirect) by Surefoot as a direct result of the cancellation (including, but not limited to, any loss of profits).
- 18.4 Cancellation of orders for products made to the Client's specifications, or for non-stocklist items, will definitely not be accepted once production has commenced, or an order has been placed.
- 19. Privacy Policy**
- 19.1 All emails, documents, images or other recorded information held or used by Surefoot is Personal Information, as defined and referred to in clause 19.3, and therefore considered Confidential Information. Surefoot acknowledges its obligation in relation to the handling, use, disclosure and processing of Personal Information pursuant to the Privacy Act 1988 (“the Act”) including the Part IIIC of the Act being Privacy Amendment (Notifiable Data Breaches) Act 2017 (NDB) and any statutory requirements, where relevant in a European Economic Area (“EEA”), under the EU Data Privacy Laws (including the General Data Protection Regulation (“GDPR”) (collectively, “EU Data Privacy Laws”). Surefoot acknowledges that in the event it becomes aware of any data breaches and/or disclosure of the Client's Personal Information, held by Surefoot that may result in serious harm to the Client, Surefoot will notify the Client in accordance with the Act and/or the GDPR. Any release of such Personal Information must be in accordance with the Act and the GDPR (where relevant) and must be approved by the Client by written consent, unless subject to an operation of law.
- 19.2 Notwithstanding clause 19.1, privacy limitations will extend to Surefoot in respect of Cookies where the Client utilises Surefoot's website to make enquiries. Surefoot agrees to display reference to such Cookies and/or similar tracking technologies, such as pixels and web beacons (if applicable), such technology allows the collection of Personal Information such as the Client's:
- (a) IP address, browser, email client type and other similar details;
- (b) tracking website usage and traffic; and
- (c) reports are available to Surefoot when Surefoot sends an email to the Client, so Surefoot may collect and review that information (“collectively Personal Information”).
- If the Client consents to Surefoot's use of Cookies on Surefoot's website and later wishes to withdraw that consent, the Client may manage and control Surefoot's privacy controls via the Client's web browser, including removing Cookies by deleting them from the browser history when exiting the site.
- 19.3 The Client agrees for Surefoot to obtain from a credit reporting body (CRB) a credit report containing personal credit information (e.g. name, address, D.O.B, occupation, driver's license details, electronic contact (email, Facebook or Twitter details), medical insurance details or next of kin and other contact information (where applicable), previous credit applications, credit history) about the Client in relation to credit provided by Surefoot.
- 19.4 The Client agrees that Surefoot may exchange information about the Client with those credit providers and with related body corporates for the following purposes:
- (a) to assess an application by the Client; and/or
- (b) to notify other credit providers of a default by the Client; and/or
- (c) to exchange information with other credit providers as to the status of this credit account, where the Client is in default with other credit providers; and/or
- (d) to assess the creditworthiness of the Client including the Client's repayment history in the preceding two (2) years.
- 19.5 The Client consents to Surefoot being given a consumer credit report to collect overdue payment on commercial credit.
- 19.6 The Client agrees that personal credit information provided may be used and retained by Surefoot for the following purposes (and for other agreed purposes or required by):
- (a) the provision of Works; and/or
- (b) analysing, verifying and/or checking the Client's credit, payment and/or status in relation to the provision of Works; and/or
- (c) processing of any payment instructions, direct debit facilities and/or credit facilities requested by the Client; and/or
- (d) enabling the collection of amounts outstanding in relation to the Works.
- 19.7 Surefoot may give information about the Client to a CRB for the following purposes:
- (a) to obtain a consumer credit report;
- (b) allow the CRB to create or maintain a credit information file about the Client including credit history.
- 19.8 The information given to the CRB may include:
- (a) Personal Information as outlined in 19.3 above;
- (b) name of the credit provider and that Surefoot is a current credit provider to the Client;
- (c) whether the credit provider is a licensee;
- (d) type of consumer credit;
- (e) details concerning the Client's application for credit or commercial credit (e.g. date of commencement/termination of the credit account and the amount requested);
- (f) advice of consumer credit defaults, overdue accounts, loan repayments or outstanding monies which are overdue by more than sixty (60) days and for which written notice for request of payment has been made and debt recovery action commenced or alternatively that the Client no longer has any overdue accounts and Surefoot has been paid or otherwise discharged and all details surrounding that discharge (e.g. dates of payments);
- (g) information that, in the opinion of Surefoot, the Client has committed a serious credit infringement;
- (h) advice that the amount of the Client's overdue payment is equal to or more than one hundred and fifty dollars (\$150).
- 19.9 The Client shall have the right to request (by e-mail) from Surefoot:
- (a) a copy of the Personal Information about the Client retained by Surefoot and the right to request that Surefoot correct any incorrect Personal Information; and
- (b) that Surefoot does not disclose any Personal Information about the Client for the purpose of direct marketing.
- 19.10 Surefoot will destroy Personal Information upon the Client's request (by e-mail) or if it is no longer required unless it is required in order to fulfil the obligations of this Contract or is required to be maintained and/or stored in accordance with the law.
- 19.11 The Client can make a privacy complaint by contacting Surefoot via e-mail. Surefoot will respond to that complaint within seven (7) days of receipt and will take all reasonable steps to make a decision as to the complaint within thirty (30) days of receipt of the complaint. In the event that the Client is not satisfied with the resolution provided, the Client can make a complaint to the Information Commissioner at www.oaic.gov.au.
- 20. Service of Notices**
- 20.1 Any written notice given under this Contract shall be deemed to have been given and received:
- (a) by handing the notice to the other party, in person;
- (b) by leaving it at the address of the other party as stated in this Contract;
- (c) by sending it by registered post to the address of the other party as stated in this Contract;
- (d) if sent by facsimile transmission to the fax number of the other party as stated in this Contract (if any), on receipt of confirmation of the transmission;
- (e) if sent by email to the other party's last known email address.
- 20.2 Any notice that is posted shall be deemed to have been served, unless the contrary is shown, at the time when by the ordinary course of post, the notice would have been delivered.
- 21. Trusts**
- 21.1 If the Client at any time upon or subsequent to entering into the Contract is acting in the capacity of trustee of any trust (“Trust”) then whether or not Surefoot has notice of the Trust, the Client covenants with Surefoot as follows:
- (a) the Contract extends to all rights of indemnity which the Client now or subsequently may have against the Trust and the trust fund;
- (b) the Client has full and complete power and authority under the Trust to enter into the Contract and the provisions of the Trust do not purport to exclude or take away the right of indemnity of the Client against the Trust or the trust fund. The Client will not release the right of indemnity or commit any breach of trust or be a party to any other action which might prejudice that right of indemnity;
- (c) the Client will not without consent in writing of Surefoot (Surefoot will not unreasonably withhold consent), cause, permit, or suffer to happen any of the following events:
- (i) the removal, replacement or retirement of the Client as trustee of the Trust;
- (ii) any alteration to or variation of the terms of the Trust;
- (iii) any advancement or distribution of capital of the Trust; or
- (iv) any resettlement of the trust property.
- 22. Building and Construction Industry Security of Payment Act 2002**
- 22.1 At Surefoot's sole discretion, if there are any disputes or claims for unpaid Materials and/or Works then the provisions of the Building and Construction Industry Security of Payment Act 2002 may apply.
- 22.2 Nothing in this agreement is intended to have the effect of contracting out of any applicable provisions of the Building and Construction Industry Security of Payment Act 2002 of Victoria, except to the extent permitted by the Act where applicable.
- 23. General**
- 23.1 Any dispute or difference arising as to the interpretation of these terms and conditions or as to any matter arising hereunder, shall be submitted to, and settled by, the relevant governing agency for the state in which the Works are performed which shall be the Domestic Building Dispute Resolution Victoria (DBDRV) in the first instance, failure to resolve then the matter will be directed to Victorian Civil & Administrative Tribunal (VCAT). Where a dispute exists, each of the parties must continue to perform its obligations under this Contract unless the other party evinces an intention not to comply with this clause.
- 23.2 The failure by either party to enforce any provision of these terms and conditions shall not be treated as a waiver of that provision, nor shall it affect that party's right to subsequently enforce that provision. If any provision of these terms and conditions shall be invalid, void, illegal or unenforceable the validity, existence, legality and enforceability of the remaining provisions shall not be affected, prejudiced or impaired.
- 23.3 These terms and conditions and any contract to which they apply shall be governed by the laws of the state of Victoria in which Surefoot has its principal place of business, and are subject to the jurisdiction of the courts in Victoria.
- 23.4 Subject to clause 15, Surefoot shall be under no liability whatsoever to the Client for any indirect and/or consequential loss and/or expense (including loss of profit) suffered by the Client arising out of a breach by Surefoot of these terms and conditions (alternatively Surefoot's liability shall be limited to damages which under no circumstances shall exceed the Price of the Works).
- 23.5 Surefoot may licence and/or assign all or any part of its rights and/or obligations under this Contract without the Client's consent.
- 23.6 The Client cannot licence or assign without the written approval of Surefoot.
- 23.7 Surefoot may elect to subcontract out any part of the Works but shall not be relieved from any liability or obligation under this Contract by so doing. Furthermore, the Client agrees and understands that they have no authority to give any instruction to any of Surefoot's sub-contractors without the authority of Surefoot.
- 23.8 The Client agrees that Surefoot may amend their general terms and conditions for subsequent future contracts with the Client by disclosing such to the Client in writing. These changes shall be deemed to take effect from the date on which the Client accepts such changes, or otherwise at such time as the Client makes a further request for Surefoot to provide Works to the Client.
- 23.9 Neither party shall be liable for any default due to any act of God, war, terrorism, strike, lock-out, industrial action, fire, flood, storm or other event beyond the reasonable control of either party.
- 23.10 Both parties warrant that they have the power to enter into this Contract and have obtained all necessary authorisations to allow them to do so, they are not insolvent and that this Contract creates binding and valid legal obligations on them.