

# AUSTRALIAN WATERSLIDES AND LEISURE PTY LTD - TERMS AND CONDITIONS

## 1 General

These terms and conditions ("Agreement"), plus any implied terms which cannot be excluded and the terms included in the Quotation, are the whole agreement between the customer named in the quotation ("you/your") and Australian Waterslides and Leisure Pty Ltd ABN 11 003 242 153 ("we/us/our"). No other contractual terms provided by you (such as on a purchase order or otherwise) shall apply and, if provided, do not constitute a counter-offer. If you accept delivery or supply of all or part of the goods and/or services supplied under this Agreement, you will be deemed to have accepted this Agreement and its terms shall apply to the exclusion of all others.

## 2 Definitions

"AWL *Operations and Maintenance Manual*" means the *Operation and Maintenance Manual* provided to the Operator at the Completion Date.

"Claims" means all claims, obligations, demands, complaints, actions, suits, proceedings, and causes of action of any description whatsoever, both at law and in equity, including for damages, interest, and the costs thereof, and includes any legal, administrative, government, arbitral, or other proceedings or investigations, whether or not the facts, matters, and circumstances giving rise to those same claims, demands, complaints, actions, suits, proceedings, or causes of action are known to the parties as at the date of this Agreement.

"Contract Works" means the work required by the scope of works described in the Quotation.

"Contract Sum" means such amount specified in the Quotation as payment for the Contract Works, exclusive of GST.

"Commencement Date" means the date of commencement of the Contract Works, including as varied by clause 3.1.

"Completion Date" means the date determined under clause 6.

"Latent Condition" means any physical condition above or below the Site which is materially different from that which could have been reasonably expected by us at the time of the Quotation.

"Quotation" means the quotation in respect of the Contract Works provided by us to you.

"Site" means the site on which the Contract Works are to be completed.

"Variation" means variation of the Contract Works by changing the nature or scope of the work that we are required to carry out under this Agreement, including the omission of work, or changing the manner or timing of work to be performed under this Agreement.

## 3 Commencement

3.1 We will commence the Contract Works on the Commencement Date, unless varied by you by notice in writing to us at least seven (7) days prior to the Commencement Date and provided that all works necessary for us to be able to commence the Contract Works have been completed prior to the Commencement Date.

3.2 You will grant or procure access for us to the Site from on or before the Commencement Date until the Completion Date to allow us to perform the Contract Works.

## 4 Payment

4.1 You will pay us the Contract Sum for performing the Contract Works.

4.2 Unless otherwise specified, payment is due immediately on the day we provide you with our invoice.

4.3 We will invoice you in the amounts and at the times detailed in the Quotation.

4.4 If we do not receive payment on the due date, we may charge interest (as liquidated damages) at the rate of two percent (2%) above the rate of interest fixed from time to time under section 2 of the *Penalty Interest Rates Act 1983* (Vic).

4.5 We can set off any money amounts owed to us by you against money amounts owed by us to you on any account whatsoever.

4.6 Any payments received from you for overdue accounts will be applied firstly to satisfy interest costs which may have accrued, secondly to pay reasonable expenses and legal costs, and then to principal.

4.7 You must not withhold any amounts due to us under this Agreement.

4.8 You are liable for all reasonable expenses (including contingent expenses such as debt collection commissions) and legal costs (on a full indemnity basis) incurred by us for enforcement of obligations and recovery of monies due from you to us.

4.9 All sums outstanding become immediately due and payable by you to us if you default on paying any sums due to us, become bankrupt or commit any act of bankruptcy, compound with your creditors, have judgment entered against you in any court or, being a company, have a provisional liquidator, liquidator, receiver, receiver manager, or administrator appointed, notwithstanding the provisions of any other clause in this Agreement.

## 5 Variations

5.1 If you wish to make a Variation to the terms included in the Quotation, then you must provide written notice of the proposed Variation.

5.2 We will then provide you with written notice of the reasonable price (including an allowance for overheads and profits) of the Variation within fourteen (14) days of receiving notice from you under this clause.

5.3 The Contract Sum is deemed to be adjusted by the amount referred to in clause 5.2 on the date of notice from us, unless you notify us in writing within seven (7) business days that you do not accept the price of the Variation.

5.4 If the Variation is an omission, then the Contract Sum will be reduced by the net deduction less any allowances for overheads and profit.

## 6 Date for Completion

6.1 The Completion Date is the date specified in the Quotation or the date determined by the schedule of works identified in the Quotation.

6.2 We shall endeavour to ensure that the Contract Works are completed by the Completion Date.

6.3 The Completion Date is an estimate and may be extended by such reasonable time period as is determined by us if the Contract Works are affected by:

6.3.1 A Latent Condition.

6.3.2 Third-party works not being completed which are necessary to allow the Contract Works to be completed.

6.3.3 Industrial action or any other third-party action which affects our access to the Site to complete the Contract Works.

6.3.4 A force majeure event.

6.4 We must endeavour to ensure that the Contract Works are completed by the Completion Date, however we shall not be liable for a failure to complete the Contract Works by the Completion Date.

6.5 We will send you written notice stating that the Contract Works have been completed.

## 7 Dispute Resolution

7.1 If a dispute arises in connection with this Agreement (other than for the payment of monies due under this Agreement), then the parties agree that prior to commencing litigation they will follow the processes set out in this clause.

7.2 Either party may send the other party written notice setting out the details of the dispute. Within fourteen (14) days of receipt of the notice, the parties (or their authorised representatives) must meet to attempt to resolve the dispute ("Conference"). The Conference and any communication relating to the Conference and issues in dispute is on a without prejudice basis.

7.3 If the parties do not resolve the dispute at the Conference, then the dispute shall be submitted to mediation in accordance with, and subject to, The Institute of Arbitrators & Mediators Australia *Mediation and Conciliation Rules*.

## 8 Special Conditions

This Agreement is subject to any special conditions referred to in the Quotation and such conditions will prevail over these terms and conditions to the extent of any inconsistency.

## 9 Indemnity and Claims

9.1 You indemnify us, and will keep us indemnified, against any claim, loss, expense, or liability, including loss of profits, suffered by us in respect of a breach of this Agreement by you or any negligent act or omission by you or any of your consultants, employees, agents, or contractors.

9.2 You indemnify us and hold us harmless against all liability, claims, loss, damage, costs, or expense incurred by us arising directly or indirectly from, contributed to by, or in connection with, any actual or alleged acts or omissions of you or any of your consultants, employees, agents or contractors in not complying with the terms, directions or requirements outlined in the AWL Maintenance and Operations Manual.

9.3 You acknowledge that AWL is entitled to claim damages from you in relation to any reputational damage suffered by it arising directly or indirectly from any actual or alleged acts or omissions of you or any of your consultants, employees, agents, or contractors in not complying with the terms, directions, or requirements outlined in the AWL Operations and Maintenance Manual.

## 10 Quotations and Pricing

10.1 The Quotation will only remain valid for thirty (30) days from its date. Documents requiring signature may be signed in electronic form and are binding from the time a person affixes a signature on your behalf.

10.2 Prices in the Quotation do not include (unless specified): (1) Any statutory tax, including any GST, duty, or impost levied in respect of the Goods and not allowed for by us in calculating the price; or (2) Costs and charges in relation to insurance, packing (other than our standard packing), crating, delivery (whether by road, rail, ship, or air), and export of the Goods.

10.3 You shall pay any variations in the Contract Sum caused by currency fluctuations.

10.4 This Agreement shall not be affected by any impositions or alterations of customs duties or by decisions of the Customs Department with regard to either classification or value of duty or landing charges. Any such impositions shall be payable by you.

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10.5 The Quotation is confidential and must be kept confidential by you. You agree to take all steps necessary to protect the confidentiality of the Quotation.

## 11 Property

11.1 Until full payment has been made for all goods forming part of the Contract Works ("Goods") and any other sums in any way outstanding from you from time to time:

11.1.1 Title to the Goods shall not pass to you and you shall hold the Goods as bailee for us (returning the same to us on request). The Goods shall nevertheless be at your risk from the time of delivery/supply and you must insure the Goods from the time of delivery/supply.

11.1.2 If you incorporate or transform the Goods (or any portion of them) into any other goods or products produced by you or a third party, then you must hold for us on trust a proportion of any payment ("relevant proportion") received by you for such goods or products. You expressly acknowledge that the relevant proportion shall be equal to the dollar value of the Goods incorporated or transformed.

11.1.3 We are irrevocably authorised to enter any premises where the Goods are kept and to use your name and to act on your behalf, if necessary, to recover possession of the Goods without liability for trespass or any resulting damage.

11.2 In addition to any lien to which we may, by statute or otherwise, be entitled, we shall in the event of your insolvency, bankruptcy, or winding-up be entitled to a general lien over all property or goods belonging to you in our possession (although all or some of such property or goods may have been paid for by you) for the unpaid price of any Goods sold or delivered to you under this or any other Agreement.

## 12 Personal Property Security Interest

12.1 You grant a security interest in the Goods and the proceeds (as defined in the *Personal Property Securities Act 2009* (Cth) ("PPSA")) to secure the obligation to pay the purchase price of the Goods and any other of your obligations to us under this Agreement (together, the "Indebtedness"). You warrant that the Goods are not purchased for personal, domestic, or household purposes.

12.2 Where the Goods and/or proceeds are not readily identifiable and/or traceable or their recoverable value is insufficient to pay the Indebtedness, the security interest shall also extend to all the Goods presently held or afterwards acquired by the Customer, of which the Goods form part, to the extent required to secure the Indebtedness.

12.3 You waive any right to receive notice in relation to any registration or amendment to a registration on the Personal Property Security Register ("PPSR"). At your own expense, you will provide all reasonable assistance and relevant information to enable us to register on the PPSR and generally to obtain, maintain, register, and enforce the security interests created by this Agreement.

12.4 Any payments received from you shall be deemed to be made and applied by us in the following order (unless we otherwise determine): (1) to any obligation owed by you which is unsecured, in the order in which the obligations were incurred; (2) to any obligations that are secured, but not by a purchase money security interest ("PMSI"), in the order in which those obligations were incurred; (3) to obligations that are secured by a PMSI, in the order in which those obligations were incurred.

12.5 Until you have paid all money owing to us, you must at all times ensure that (1) all Goods, while in your possession, can be readily identified and distinguished, and/or (2) all proceeds (in whatever form) that you receive from the sale of any of the Goods are readily identifiable and traceable.

12.6 To the extent permissible by law, you agree that the following provisions of the PPSA will not apply and you will have no rights under them: section 95 (to the extent that it requires the secured party to give notices to the grantor); section 96; section 118 (to the extent that it allows a secured party to give notice to the grantor); section 121(4); section 125; section 130; section 132(3)(d); section 132(4); section 135; section 142; section 143.

12.7 Section 115(7) of the PPSA allows for contracting out of provisions of the PPSA. The following provisions of the PPSA will not apply and the Customer will not have any rights under them: section 127; section 129(2), (3); section 130(1); section 132; section 134(2); section 135; section 136(3), (4), (5); and section 137.

12.8 Unless otherwise agreed, and to the extent permitted by the PPSA, the parties agree not to disclose any information of a kind referred to in section 275(1) of the PPSA to an interested person or any other person. You waive any right you may have, or may have had, but for this clause under section 275(7)(c) of the PPSA to authorise the disclosure of the above information.

## 13 Privacy Act 1988 (Cth) ("Privacy Act")

13.1 You authorise us to: (1) obtain from a credit reporting agency/body a consumer or commercial credit report containing personal information about you and any guarantors; (2) obtain a report from a credit reporting agency/body or other information in relation to your commercial credit

activities; and (3) give to a credit reporting agency/body information including your identity particulars and application details.

13.3 You authorise us to give to and obtain information from any credit provider named in the accompanying credit application or from credit providers that may be named in a credit report issued by a credit reporting agency/body information about your credit arrangements. You understand that this information can include any information about your credit-worthiness.

13.4 You understand that such information can be used for the purpose of assisting you to avoid defaulting on your credit obligations, assessing your credit-worthiness, and notifying other credit providers and credit reporting agencies of a default by you under this Agreement.

13.5 We take privacy seriously and any personal information about you provided to us or held by us will be collected and managed in accordance with our *Privacy Policy*.

## 14 Notification

You must notify us in writing within seven (7) days of: (1) any alteration of your name or ownership; (2) the issuance of any legal proceedings against you; (3) the appointment of any provisional liquidator, liquidator, receiver, receiver manager, or administrator to you; or (4) any change in the ownership of your business name. You agree that you shall be liable to us for all Goods supplied to the new owner by us until notice of any such change is received.

## 15 Warranties

15.1 Other than any warranties provided in the Quotation, no warranties except those implied and that by law cannot be excluded are given by us in respect of the Contract Works. Where it is lawful to do so, our liability for a breach of a condition or warranty is limited to the repair or replacement of the Goods or services, the supply of equivalent Goods or services, the payment of the cost of repairing or replacing the Goods or resupply of the services, or acquiring equivalent Goods, as determined by us.

15.2 You acknowledge and warrant that you have relied on your own skill and judgment or alternatively on the skill and judgment of tradesmen and professional advisers retained by you to provide advice and assistance on the suitability of the Goods for specific purposes and procedures and, in this respect, you shall indemnify us from and against any suit, claim, demand, or compensation which, but for this Agreement, you may have had against us.

15.3 You warrant to us that you are purchasing Goods as a principal and not as an agent.

## 16 Force Majeure

We shall be released from our obligations in the event of national emergency, war, prohibitive governmental regulation, or any other cause beyond the control of the parties which renders provision of the Contract Works impossible, where all money due to us shall be payable immediately and, unless prohibited by law, we may elect to terminate the Agreement.

## 17 Equitable Charge

You as beneficial owner and/or registered proprietor now charge in favour of us all of your estate and interest in any real property (including but not limited to any applicable land owned by you or described as your Street Address in the Credit Application if applicable) ("Land") to secure payment of accounts rendered by us to you for the delivery and/or supply of Contract Works, including interest payable on these accounts and costs and legal costs on a full indemnity basis, incurred by us and including the costs of preparing and lodging a Caveat against the Land or removing the Caveat.

## 18 Failure to Act

Our failure to enforce or insist upon the timely performance of any term, condition, covenant, or provision in this Agreement or our failure to exercise any right or remedy available under this Agreement or at law, or our failure to insist upon timely payment of monies when due or to demand payment of any charges or fees which accrue or any extension of creditor forbearance under this Agreement shall not constitute a waiver of any subsequent default or a waiver of our right to demand timely payment of future obligations or strict compliance with the Terms of this Agreement.

## 19 Legal Construction

19.1 This Agreement shall be governed by and interpreted according to the laws of New South Wales and the parties consent and submit to the jurisdiction of the Courts of New South Wales.

Notwithstanding that any provision of this Agreement may prove to be illegal or unenforceable pursuant to any statute or rule of law or for any other reason, that provision is deemed omitted without affecting the legality of the remaining provisions and the remaining provisions of this Agreement shall continue in full force and effect.

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