

# Klondu Group Pty Ltd Terms & Conditions Of Services

## 1. Definitions

In these Terms:

**"Business Day"** means Monday to Friday, excluding NSW public holidays

**"Contract IP"** means all Intellectual Property Rights created, discovered or coming into existence as a result of, for the purpose of, or in connection with the provision of the Works or the work under the Contract (including all Intellectual Property Rights in anything developed by Klondu in providing the Works and any Intellectual Property Rights in Your Information provided by You to Klondu);

**"Do and Charge Basis"** means the performance of Work by Klondu:

- (a) on an hourly rate being an amount determined by Klondu; and
- (b) where Klondu exercises its discretion on what has to be done and in when it has to be completed by;

unless otherwise agreed by You and Klondu in writing before the Work is started.

**"Force Majeure"** means any event or circumstance not within the control of a party and which by the exercise of due diligence, that party is not reasonably able to prevent or overcome, including without limiting the generality of the nature of those events or circumstances:

- (a) acts of God, including without limitation, earthquakes, floods, washouts, landslides, lightning, storms and the elements;
- (b) strikes, lockouts, bans, slowdowns or other industrial disturbances;
- (c) fire or explosion;
- (d) equipment breakdown, accident, breakages, or accidents to machinery and the necessity for making repairs and or alterations in machinery;
- (e) acts of enemy, wars, blockades or insurrections, riots and civil disturbances, arrest and restraint of rulers and peoples; or
- (f) any requirement of any government or other lawful authority;
- (g) inability to obtain suitable raw materials from Sellers usual sources of supply;
- (h) energy shortages; or
- (i) acts of war and or terrorism.

**"Guarantor(s)"** means the persons as Guarantors in the Credit Application completed and submitted by You or as described in the Quote;

**"Intellectual Property Rights"** means (in the context of a party) all industrial and intellectual property rights whether protectable by statute, at common law or in equity, including all copyright and similar rights which may subsist or may hereafter subsist in works or any subject matter, rights in relation to inventions (including all patents and patent applications), trade secrets and know-how, rights in relation to designs (whether or not registerable), rights in relation to registered or unregistered trade

marks, circuit layout designs and rights in relation to circuit layouts, but excludes non-assignable moral rights and similar non-assignable personal rights of authors and producers;

**"Item"** or **"Items"** includes a good that You request Klondu to manufacture, or any, good, plant, equipment or chattel real that you request Klondu to modify or repair for You.

**"Klondu"** means Klondu Group Pty Ltd ABN 91 141 174 610, its directors, officers, employees and sub-contractors all Related Companies and subsidiaries;

**"Klondu IP"** means the Intellectual Property Rights that are owned or licensed by Klondu which:

- (a) exists at the date of the Contract; or
- (b) comes into existence after the date of the Contract.

**"Non-Refundable Payment"** means the amount of the Price that You are to pay to Klondu before Klondu commences to perform the Work.

**"Price"** means the charges, fees and costs that Klondu is to be paid for the Work as determined in accordance with clause 8.

**"Quote"** means the document headed Quote issued by Klondu to You for the manufacture of the Works.

**"Terms"** means these terms and conditions of contract as they appear at [www.klondu.com](http://www.klondu.com)

**"Time Frame"** means the estimated period from commencing Work concerning an Item as specified in the Quote, and if the Work is on a Do and Charge Basis such time as Klondu requires to complete the Work unless You and Klondu in writing have agreed to a specified period of time that the Work is to be completed.

**"Work"** or **"Works"** means the manufacture, modification or repair of an Item or product, relying upon Your Information, by Klondu described in a Quote, or on a Do and Charge Basis.

**"You"** means the person, persons or entity whose name and address appears in the Quote, in a Credit Application, or the person that leaves Items with Klondu to perform Work on a Do and Charge Basis.

**"Your Information"** includes but is not limited to drawings, samples, text, code, graphics, and photos (design style guides - logo's, font styles, colour pantones etc, copy & images/photo's (in the required formats) & access to any necessary formulas, algorithms, API's or web services) of the Work to be performed by Klondu as specified on the Quote. Your Information, containing specifications, drawings and documents which together constitute the Contract shall be taken as mutually explanatory (and, in particular, any detailed provisions shall be taken to be in elaboration of any general provisions) and anything contained in one but not in another shall unless a conflict necessarily exists be equally binding as if contained in all. Your Information express excludes any verbal instructions that may be issued by You to Klondu at any time.

## 2. Work by Quote

- (a) A Quote issued by Klondu is prepared on the basis of Your Information and remains valid for the term specified in the Quote, or if no term is specified for the term of fourteen (14) days. If You make any changes, amendments or alterations to Your Information, You must instantly notify Klondu, and Klondu will prepare a variation to the Quote.
- (b) All Quotes issued by Klondu to you are subject to these Terms.
- (c) While a Quote will remain open for acceptance for the time stated on the Quote or where no time is stated, for 14 days, it may be withdrawn by Klondu earlier.
- (d) A Quote may be accepted by signing and returning the Quote, or by issuing a Purchase Order within the term provided by the Quote.
- (e) If you accept a Quote, you are also accepting all of these Terms without amendment.

## 3. Work on a Do and Charge Basis

- (a) You may engage Klondu to undertake Work for you in the following manner:
  - (i) Delivering Items to Klondu's premises and leaving the Items there with written instructions as to the nature of the Work to be performed by Klondu; or
  - (ii) Instruct Klondu to collect Items from Your premises, or any other location and providing at the time of collection of the Item written instructions as to the nature of the Work to be performed by Klondu.
- (b) If no written instructions are issued, and You make verbal representations You accept that Klondu's interpretation of those representations is correct and that any misunderstanding is a consequence of You choosing not to provide written instructions to Klondu but to rely upon Klondu interpreting Work has to be performed on the Item delivered to Klondu without any written instructions or without You obtaining a Quote.

## 4. Acceptance Of Works

### Acceptance of Works where a Quote is given

- (a) Klondu reserves the right to refuse any order placed by acceptance of a Quote within 7 days of receipt of the acceptance.
- (b) Klondu may in our absolute discretion accept a purchase order from you in respect of the supply of Works. These Terms apply to any such purchase order accepted to the exclusion of any terms stated on the Purchase Order.
- (c) If You are an individual, by signing the acceptance of a Quote, You warrant that You are authorised to accept these Terms on behalf of the relevant entity. If You sign as a director or

trustee of a customer then in addition to that entity you agree to be personally liable to guarantee performance of this Contract by the contracting entity.

### **Acceptance of Works on a Do and Charge Basis**

- (d) Klondu reserves the right to refuse any order placed for Work on a Do and Charge Basis within 7 days of the Items being delivered to the premises of Klondu or Klondu collecting the Items and taking them back to its premises for inspection.
- (e) You agree that Work undertaken by Klondu on a Do and Charge Basis does not require Klondu to issue or provide You with a Quote before You are liable to pay the Price for the Work.
- (f) You agree that by leaving Items with Klondu or having Klondu collect Items these Terms apply to the Work on the Items to the exclusion of any written purchase order or instructions You may issue.
- (g) If You are an individual, by leaving Items with Klondu or having Klondu collect Items you are agreeing to these Terms. If You are a corporation or other form of legal entity You warrant that You are authorised to accept these Terms on behalf of the relevant entity and that Items left to have Work undertaken on a Do and Charge Basis express incorporates these Terms as if You signed a piece of paper that repeated these Terms.

### **5. Your Information**

You promise that the specifications, drawings or other particulars contained within Your Information given to Klondu is accurate and sufficient for Klondu to manufacture the Works. You warrant the accuracy, sufficiency or otherwise in relation thereto to manufacture the Works. You release and indemnify Klondu from all responsibility whatsoever therefore including (without limiting the generality of the foregoing) pursuant to contract and in tort (including negligence). You acknowledge that Your Information is provided as a contractual obligation and is part of the Contract.

### **6. Liability to Perform Contract**

- (a) Klondu is not liable for and is relieved of its liability to perform the Contract in accordance with these Terms, including if Your Information is not accurate or is deficient in any respect that results in the Works not being fit for Your purpose or do not meet Your specifications.
- (b) Where any drawings or plans are provided by You; To the maximum extent permitted by law, Klondu does not warrant or guarantee the fitness for purpose of any Work as it is relying on You to have ensured this for Yourself.
- (c) Where Items are to be modified or repaired and You issue written or verbal instructions; To the maximum extent permitted by law, Klondu does not warrant or guarantee the fitness for purpose of any Work as it is relying on You to have ensured this for Yourself.

- (d) In its sole discretion, Klondu may subcontract part or whole of the manufacture of any Work to another entity. Should this occur, You may make no requisition or impose any extra requirement on Klondu, although Klondu will use its best endeavours to ensure that any such subcontractor will perform their manufacture of Works to a standard consistent with their own.
- (e) Klondu warrants that it will perform the Work in reliance of Your Information and that it will do so to produce, modify or repair Items to a workman like product. This warranty over Work:
  - i. Continues for a term of six (6) weeks after delivery of the Item(s) in question; and
  - ii. Is for replacement of faulty material, parts and workmanship only, and does not extend to any consequential or other damage that is caused by the Works.

## **7. Your Obligations**

- (a) You must ensure that all of Your Information provided to Klondu is true, accurate and not misleading, and respond promptly to and comply with, all requests for information or any other supply or service, which Klondu requests of You.
- (b) You must ensure that all of Your Information provided to Klondu is Your Intellectual Property or that You have a license to use the Intellectual Property in respect of the Items the subject of the Work.
- (c) You must act reasonably and take reasonable care to protect Your own interests, including managing all safety risks associated with the operation of the Works, properly reading and following any instruction or training manuals, following any reasonable direction Klondu may give and appropriately directing Your own employees, servants and agents in relation to these things.
- (d) Any failure or delay by You or Your employees, servants or agents gives Klondu the right to recover any costs incurred by Klondu as a result of such failure or delay. In the case of any delay in performing the Works as a result of any such failure or delay by You or Your employees, servants or agents then Klondu is not liable in any way whatsoever for such delay in performing the Works.
- (e) You acknowledge that all IP in Your Information is either Yours or that You are licensed to use it and that it does not infringe the rights of any third party. You indemnify, hold and save harmless Klondu against any loss, damages, penalties, costs or expenses arising as a consequence of your being in breach of this term.

## **8. Determination of Price**

### **Price for Quoted Work**

- (a) The Price for the Works appears in the Quote.

- (b) The Price shall only be valid for the matters to be performed by Klondu as specified in the Quote.
- (c) Any additional matters to be undertaken by Klondu not contained in the Quote shall be subject to further quotation(s) and You shall be bound to each subsequent quotation.
- (d) The Price unless otherwise stated in the Quote is exclusive of Goods and Services Tax (GST) and other consumption tax and Klondu will provide to You invoices pursuant to GST and its regulations including those regulations which may be amended from time to time.

### **Do and Charge Pricing of Work**

- (e) Unless otherwise agreed in writing before any Work on a Do and Charge Basis is undertaken by Klondu you agree to pay the Price for Work performed on a Do and Charge Basis at such rates and prices as Klondu charges You in its absolute and unfettered discretion.
- (f) Do and Charge Basis Work is not subject to any quotation or Price estimation.
- (g) Materials consumed in Do and Charge Basis Work will be charged to You at cost to Klondu plus 20%.
- (h) In some but by no means all instances, Klondu may provide You for a Do and Charge Basis Work an estimate of the Price based on present information and instructions and Klondu's understanding from You as to what Work is required. Klondu's Price may exceed the estimate if further information becomes available or circumstances change which affect the Work. In this event even if there is a significant change in the Work to be performed You will pay the increased costs. Where an estimate has been provided for a Do and Charge Basis Work and the scope of the Works changes, Klondu will as far as possible attempt to advise You of the cost impact of such change in the scope of Work but may not and will not in most cases be able to do so. You agree to pay the Do and Charge Price as determined by clause 8(e) above.
- (i) If Klondu collects or delivers Items from You, You agree to pay either:
  - (i) If Klondu collects the Items: Klondu's hourly rates to from the time Klondu's staff leave Klondu's premises until the time they return with the Item(s).
  - (ii) If Klondu has a courier or transport company collect the Items from You the actual costs incurred by Klondu plus 20% as an administration and handling fee to Klondu.
  - (iii) Such insurance premiums if any that Klondu pays on Your behalf to insure the Items whilst in transit or whilst in the custody or possession of Klondu plus 20% as an administration and handling fee to Klondu.

You will pay this fee even if Klondu does not agree to undertake the Work in accordance with clause 4(d).

### **Storage Costs**

- (j) If You fail to collect Your Items after being notified they are available for collection in accordance with clause 15(e) by Klondu, You will pay the costs of Klondu storing the Items at the rate of \$150.00 per square meter of space occupied per month.
- (k) The costs of storing Items shall accrue daily and be invoiced to You at regular intervals not more than once each month.
- (l) For the sake of clarity, interest will be charged on unpaid storage charges.

### **9. Payment of Price**

Full payment is to be made for any Invoice issued by Klondu, and Klondu will accept no negotiations on the Price or any aspect or component part of the Price.

### **10. Price may be paid by progress payments**

- (a) Klondu reserves the right to include in any Quote the requirement that You pay the Price by progress payments before the Work is complete and You agree to make any requested progress payment within 5 days of being invoiced by Klondu.
- (b) Where Klondu has provide a Time Frame for the Work to be completed, any time delay caused by You not paying a progress payment will be an extension of time to the Time Frame and You agree that Klondu is not liable for any breach arising as consequence of any delay for this reason.
- (c) Having regard to the uncertainty of carry out Do and Charge Basis Work, Klondu reserves the right to require that You pay the Price of Do and Charge Work weekly. Klondu will invoice You weekly or at a longer interval of time in its absolute and You agree to make any requested progress payment within 5 days of being invoiced by Klondu.
- (d) You acknowledge that if You fail to pay an invoiced progress payment as required by clause 10(a), Klondu can cease carrying out the Work.

### **11. Non-Refundable Payment**

- (a) Where a Non-Refundable Payment is:
  - (i) Contained in a Quote; or
  - (ii) Advised by Klondu as being a condition precedent to it starting any Work on a Do and Charge Basis;

Klondu will not commence the Work until the Non-Refundable Payment has been received by Klondu in cleared funds and the Time Frame shall not start until two Business Days after the Non-Refundable Payment has been received in cleared funds.

## 12. Price increases

### Quoted Work Price Increases

- (a) Amounts and prices stated on any Quote are those at the date of the Quote. If you require any changes to the Quote which affect the cost or rates for insurance, freight, cartage or shipping expenses, duties, exchange rates, sorting and stacking costs, costs of materials or any other amounts used to calculate the price or amounts stated on the Quote, or if those inputs increase in cost before acceptance or during the currency of our contract, any increase in those amounts are for your account and will increase the price accordingly.

## 13. Accounts and interest

- (a) Upon delivery of the Items or any Invoice, You must pay within 10 Business Days from the month end of the date of Invoice the balance of the Price and any additional amounts less the Non-Refundable Payment to Klondu. If the amount is not paid within 10 Business Days from the relevant month end, You will pay to Klondu as liquidated damages interest from that date until payment is made.
- (b) The interest rate payable is calculated at a rate of 12% per annum compounded monthly.

## 14. Set-Off

- (a) You will make all payments due to Klondu without set-off or counterclaim.
- (b) As long as any of the Price remains owing to Klondu You will not, in reduction of Your liability under these Terms, raise a defence, set-off or counterclaim available to You or an Guarantor or any other person, against Klondu.
- (c) Klondu may without notice to You set off against any debt due for payment by Klondu to You, any debt due for payment by You to Klondu.

## 15. Completion

- (a) Unless otherwise contained in a Quote, any dates specified by Klondu for delivery of the Works are approximate only.
- (b) If no dates are so specified, delivery will be within a reasonable time, as arranged between You and Klondu.

### Time Frames for Quoted Work

- (c) Klondu will endeavour to perform the Works within any Time Frame given to You. Unless otherwise stated in the Quote the Time Frame estimates commence from the time Klondu accepts the obligation to perform the Works in accordance with this Contract. The Time Frame periods are estimates of time to be taken. Klondu does not guarantee that the Works can be developed within the Time Frame or at all. Consequently Klondu takes no responsibility and cannot be held liable for any damage (including consequential loss or



damage) whatsoever if Time Frame estimates are exceeded for any reason, or if the Works are not performed within the Time Frame.

### **Time Frames for Do and Charge Basis Work**

- (d) Klondu will endeavour to perform Do and Charge Basis Work in a reasonable period of time. Unless Klondu in writing agrees to completing any Do and Charge Basis Work within a Time Frame, Klondu takes no responsibility and cannot be held liable for any damage (including consequential loss or damage) whatsoever for the length of time Klondu requires to perform Do and Charge Basis Work.

### **Completion of Works**

- (e) Klondu will advise You by email when the Works have been performed and the Items are available for collection.
- (f) You will within 3 Business Days of being notified under clause 15(e) collect a sample of an Item, or the Item (as the case maybe), test the sample or Item and advise Klondu of your acceptance (the "Acceptance Notice") or advise Klondu of your reasons why the Work has not been accepted and if applicable what elements of Your Information the Work did not meet (the "Amendment Notice").
- (g) Klondu will upon receipt of any Amendment Notice, either accept that the Works have not been completed or issue a notice advising why Klondu disagrees with Your Amendment Notice (a "Reply Notice").
- (h) The parties will continue to issue Amendment Notices and Reply Notices until, this Contract is terminated, You issue an Acceptance Notice, or either party seeks determination by an expert pursuant to clause 16.

## **16. Expert Determination of Works**

- (a) If the parties do not agree on the proposed amendments in an Amendment Notice and Reply Notice within 30 Business Days of serving the Amendment Notice, the actions to address the non performance must be decided by an expert as follows:
  - (i) An expert is to be appointed by the parties. If they do not agree on who to appoint within 10 Business Days after the Reply Notice is given, the expert is to be nominated at either party's request by the President of the Law Society of New South Wales.
  - (ii) The expert appointed under Clause 16(a)(i) must be a full member of not less than 5 years' standing of a body that has the necessary qualifications to deal with the matter requiring expert determination as an engineer/scientist/valuer/accountant/lawyer or such other body of knowledge as the issue requires.
  - (iii) In determining if the Works have been performed in accordance, as the case may be: with Your Information or in a workmanlike manner, the expert must:
    - (1) have regard to the provisions of this Contract;

- (2) have regard to the proposed Work and or amendments of the parties in the Amendment Notice and Reply Notice;
  - (3) have regard to the Price paid under this Contract for the performance of the Works;
  - (4) if applicable, have regard to the adequacy of the information supplied in Your Information; and
  - (5) determine if all covenants on the part of each party contained in these Terms have been fully performed and observed.
- (b) The expert must be instructed to determine if the Works have been performed in accordance with these Terms and whether the amendments, if any, in the Amendment Notice are valid or not within 1 month after being appointed.
  - (c) The expert must give a written report setting out in detail the reason for the expert's decision and the matters to which the expert had regard in making the decision.
  - (d) The expert acts as an expert and not as an arbitrator and the expert's decision is final and binding.
  - (e) The expert must have regard to any evidence in writing submitted by the parties as to their assessment of need for and the Work/amendments, if any, to be undertaken to complete the Works.
  - (f) The costs incurred in the determination of the expert must be borne by the parties equally.
  - (g) Until the expert issues his/her written determination under clause 16(c), the parties must continue to abide by these Terms.
  - (h) Immediately following the expert issuing his/her written determination under clause 16(c) any amendments as determined will apply to these Terms the parties will adhere to and follow the determination arrived at.

## **17. Delivery and Storage**

- (a) Once completed Items may be delivered in batches or in instalments, and Klondu will advise You when the Items are ready to be collected. For the avoidance of doubt, unless otherwise agreed in writing, You are responsible for the delivery of all Items and are to make all necessary arrangements for the collection of Items from Klondu's premises.
- (b) You have no right of action for damages or otherwise against Klondu and release Klondu from any claim for loss or damage occurring by reason of any failure or delay in delivery for taking delivery in batches.
- (c) If You fail to take delivery of any of Items or to provide any instructions to enable the Items to be delivered, without prejudice to any other rights, we must store or arrange for the storage of the Items pending delivery but as it relates to the timing of payment for the Works under these Terms, delivery shall be deemed to have taken place at the date we store or arrange storage of the Items.

- (d) You shall pay the Price of storing the Items until You collect Your Items or they are disposed on in accordance with the Storage Liens Act 1935 (NSW).
- (e) In storing any Items You acknowledge that Klondu is a person lawfully engaged in the business of amongst other activities storing goods as a bailee for hire and as such is a Storer for the purposes and within the definition of the Storage Liens Act 1935 (NSW).

## **18. Outstanding accounts**

- (a) If any account remains outstanding for a period of 45 days or more, without limitation to any other rights and remedies Klondu may have, You and the Guarantor(s) hereby charge in favour of Klondu any real or personal property in which You and or the Guarantor(s) have an interest with payment of any outstanding account and You and each Guarantor(s) irrevocably authorise Klondu to lodge caveats to notify and protect that charge in relation to any real property in which You or a Guarantor(s) have an interest at Your cost.
- (b) If an account remains outstanding for more than 60 days, You authorise Klondu to provide Your particulars and the particulars of the unpaid debt to any credit reporting agency to have the default in payment listed. All costs and disbursements incurred by Klondu in recovering payment of any overdue account or in enforcing our rights under these Terms including, without limitation, legal costs on a solicitor and client basis are payable by You.
- (c) Klondu may retain any documents (for instance Your Information) or Works held on Your behalf pending payment of any outstanding account.

## **19. Contract Documents**

- (a) Unless otherwise stated in the Details Schedule if there is any conflict between the documents comprising the Contract the documents shall rank in order of precedence as follows:
  - (i) Any Quote issued by Klondu;
  - (ii) These Terms; and
  - (iii) Your Information.

## **20. Dimensions**

Figured dimensions on drawings in Your Information shall be followed.

## **21. Units of Measurement**

All measurements of physical quantities shall be in Commonwealth legal metric units of measurement within the meaning of the National Measurement Act 1960 of the Commonwealth of Australia or that Act as amended or re-enacted with or without modification.

## 22. Discrepancies

- (a) Should Klondu discover any discrepancy, mistake omissions or reference to an amended or revised in Your Information it will, within 48 hours of discovering such discrepancy, notify You of the discrepancy and seek instructions (and 22(b) shall apply thereto).
- (b) You shall be responsible for and shall pay for all alterations of the Works and/or work under the Contract due to any discrepancies, mistakes or omissions in or from Your Information, whether such drawings or information have been approved by Klondu or not.

## 23. Minor Items

Minor items not expressly mentioned in Your Information but which are necessary for the satisfactory manufacture of the Works shall be performed by Klondu as Klondu thinks fit.

## 24. Additional Drawings or Information

Any additional material provided or supplied by You as part of Your Information from time to time shall, unless stated to be supplied for information only, and not to be acted upon unless expressly requested by You and after Klondu has considered if a revised Quote is to be issued to attend to the changes contained in the additional information supplied as Your Information. Until any uncertainty is clarified Klondu may cease manufacturing of the Works without being in breach of the Time Frame or any other term of the Contract.

## 25. Variations

- (a) Variations may be initiated by You at any time prior to the issuing of the Acceptance Notice.
- (b) A variation request must be made by You in writing to Klondu specifying the Quote and the details of the variation to the works You are requesting.
- (c) If Klondu receives a variation request Klondu shall prepare at Your costs a revised Quote or shall in writing as soon as practicable, in writing give reason why Klondu cannot comply (if this is the case) or by submitting:
  - (i) a proposal for any necessary modifications to the Works and to the Time Frame; and
  - (ii) Klondu's proposal for adjustment to the Price.
- (d) You shall within five (5) days after receiving the proposal respond with approval, disapproval or comments. Klondu may delay any manufacturing or repair whilst awaiting a response from You.
- (e) Each instruction to execute a variation, with any requirements for the recording an adjustment in the Price, and or an extension of time to complete the varied Works shall be issued by Klondu to You and You are to acknowledge receipt.
- (f) Upon approving Klondu to proceed with a variation You agree to pay the adjusted Price, and

or accept the additional time to complete the Works in accordance with these Terms including increasing the amount of progress payments or to pay a Non-Refundable Payment.

- (g) Whether You agree to accept a revised Quote or not, by requesting a Variation You agree to pay Klondu's costs of providing a revised Quote. You must pay the Klondu's costs of providing the revised Quote. At Klondu's option You must either pay Klondu's costs of providing the revised Quote on the earlier of when invoiced any time prior to Klondu providing its revised Quote to You or within Five Business Days of Klondu issuing a revised Quote and invoicing You for the costs of providing the revised Quote.

## **26. No Partnership**

This Contract does not create any partnership or joint venture relationship between You and Klondu.

## **27. No Assignment**

You may assign Your rights, but not your obligations under this Contract without the consent of Klondu.

## **28. Cancellation/Termination**

- (a) If You advise Klondu that You no longer require the Works, then You acknowledge that all payments made or due prior to the termination of this Contract are not refundable.
- (b) You must give fourteen (14) days written notice to terminate this Contract. Klondu reserves the right to obtain all further outstanding payments then payable by You to Klondu as Klondu deems fit.
- (c) If You do not pay such outstanding amounts, You will be held liable for breach of contract.
- (d) Klondu reserves the right to suspend or terminate services provided to You if You owe outstanding payments or You fail to comply with the provisions of these terms and conditions or any other policy, directive or requirement notified to You by Klondu.
- (e) Reasonable notice of fourteen (14) days to suspend/cancel will be given by Klondu where possible. If the service is cancelled You must pay all outstanding accounts immediately.

## **29. Intellectual Property**

### ***Klondu IP***

- (a) You acknowledge that Klondu remains the owner of all Klondu IP and that nothing in the Contract prevents, limits or restricts Klondu's subsequent use or exploitation of Klondu IP.
- (b) Klondu grants to You a non-exclusive, transferable, royalty free, irrevocable and perpetual licence to use all Contractor IP for the purposes of or in connection with the Project or to the extent necessary to enable You to use the use, maintain, repair, develop, amend or improve the Works.

**Contract IP**

- (c) You acknowledge that all Contract IP will be vested in Klondu and will be the property of Klondu as and when created.
  
- (d) On Klondu's request, You must execute any formal assignment or other document required to give effect to 29(c).

**30. Liability and Disclaimer**

All terms conditions, warranties, undertakings inducements and representations, whether express or implied, statutory or otherwise relating to the provision of services by Klondu not contained in the Contract are excluded. Klondu will not accept liability for any loss or damage (including consequential loss or damage) however caused (whether by negligence or otherwise) which may be suffered or incurred or which may arise directly or indirectly and which may be suffered by You or any other third party with respect to its obligations to perform this Contract. Where any applicable legislation implies any term, condition or warranty into this Contract or in respect of Klondu's relationship with You, or otherwise gives You or any other party a particular remedy against Klondu and the legislation or any other legislation renders void or prohibits provisions excluding or modifying the application of, exercise of, or liability under such implied term, condition, warranty or remedy will be deemed to be included in the Contract or as the case may require, apply to the relationship between Klondu and You or any other party. However, Klondu's liability for any such breach of such implied term, condition or warranty or under such remedy, will be limited, at Klondu's option, any one or more of the ways permitted in that legislation, including, where so permitted if the breach relates to the resupply of Works or the payment of the cost of having those Works supplied again.

**31. Indemnity**

You acknowledge and agree that Your use of the Works is at Your own risk and You agree to indemnify, save and hold Klondu completely harmless for any and all demands, liabilities, costs, losses and claims, however suffered, including but not limited to legal fees incurred by Klondu that may arise directly or indirectly from any service provided or agreed to be provided by Klondu to You of any product or service offered or sold by You to any other parties. You acknowledge that this indemnification extends to all aspects of the Works. You also agree to defend, indemnify and hold harmless Klondu against any liabilities arising out of an injury or loss (whether economic or otherwise) to any third party, caused by the Works or Your use or mis-use of the Works, or caused by any Work or service provided, or agreed to be provided by Klondu including but not limited to infringement of intellectual property rights, misinformation, delivery of defective products or services which are harmful to any person, business, company or organisation.

**32. Confidentiality**

Klondu agrees that except as directed by You, Klondu will not any time during or after the term of its engagement disclose any confidential information belonging to You. You also agree not to disclose or otherwise convey any confidential information about Klondu including but not limited to documentation provided to You by Klondu or by using any Klondu process relating to the Works.

### 33. Guarantee of Directors

- (a) If the Quote so provides but not otherwise, the parties acknowledge that Klondu has entered into this Contract at the request of the Guarantors.
- (b) The Guarantors hereby guarantee and indemnify Klondu the due and punctual performance of the obligations of You owed by You to Klondu under this Contract. Without limiting the generality of this clause the Guarantors acknowledge and agree that:
  - (i) this Guarantee shall be a continuing Guarantee and shall not be determined by the death of any Guarantor or, in the case where the Guarantor is a company, by its liquidation;
  - (ii) all payments received by Klondu shall be taken as payments in gross and the Guarantors' rights to be subrogated in respect thereof shall not arise until Klondu has received the full amount of Your indebtedness to Klondu or the full and proper performance of Your obligations owed to Klondu;
  - (iii) no time or other indulgence granted to You nor any variation in the terms of any contract, agreement or arrangement between Klondu and You nor the release by Klondu of any guarantee of security held by Klondu shall in any way affect the liability of the Guarantor and as between Klondu and the Guarantor no cheque, bill of exchange or promissory note received by Klondu in respect of Your indebtedness to it shall be regarded as whole or part satisfaction of the obligations in respect of which it is given unless and until the same shall have been met;
  - (iv) the discharge, extinguishment or postponement by bankruptcy, operation of law, act of parties or otherwise of any part of the indebtedness of You shall not impair or affect the liability of the Guarantor;
  - (v) if any payment made to Klondu by or on behalf of You or the Guarantor shall subsequently be avoided by any statutory provision or otherwise howsoever such payment shall be deemed not to have discharged the Guarantor's liability and in such event Klondu and the Guarantor shall be restored to the position in which they would have been if such payment had not been made; and
- (c) Klondu shall be entitled to recover from any Guarantor without first taking any steps or proceedings against You.

### 34. Retention of Title

Until You have paid the Price for and as specified in any Invoice, then ownership of all Works in that Invoice remains with Klondu, and You;

- (a) Shall hold all such Works in Your possession or that of Your employees or agent, as Bailee for Klondu;
- (b) Shall in the event that any of the Works are sold by You, then such sale shall be as agent of Klondu and You shall hold the proceeds of sale on behalf of Klondu and shall pay them to Klondu on request, and any agreement by Klondu to extend credit or allow any other indulgence to You shall not affect Your liability to account to Klondu for the ownership

of the Works by Klondu.

- (c) Shall if Klondu so requires, agree to store the Works so as to show clearly that it is Klondu's property and shall keep the Works fully insured at Your own expense and shall hold the proceeds of any insurance claim in respect of the Works (to the extent of Your indebtedness to Klondu) in trust for Klondu.
- (d) Upon any default by You to pay any interest due to Klondu, You authorise Klondu by its employees or agents to enter into any premises owned, leased or otherwise occupied by You, any agent or associate of You for the purpose of taking possession of the Works and authorise Klondu by its employees or agents to use all appropriate or necessary force to obtain such possession.

Notwithstanding anything in this clause, risk in the Works passes to You upon delivery of the Works to You, Your employees or agents.

### **35. Personal Property And Securities Act 2009 ("PPSA")**

- (a) In this clause, "PPSA" means the *Personal Property and Securities Act 2009* (Cth), and financing statement, financing change statement, security agreement, and security interest has the meaning given to it by the PPSA.
- (b) Upon assenting to this Contract You acknowledge and agree that this Contract constitutes a security agreement for the purposes of the PPSA and creates a security interest in all Incidental Items that have previously been supplied and that will be supplied in the future by Klondu under this Contract to You.
- (c) You undertake to:
  - (i) 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 Klondu may reasonably require to;
  - (ii) register a financing statement or financing change statement in relation to a security interest on the Personal Property Securities Register;
  - (iii) register any other document required to be registered by the PPSA; or
  - (iv) correct a defect in a statement referred to in clause 28(c)(ii) or 28(c)(iii);
  - (v) indemnify, and upon demand reimburse, Klondu 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 Incidental Items charged thereby;
  - (vi) not register a financing change statement in respect of a security interest without the prior written consent of Klondu;
  - (vii) not register, or permit to be registered, a financing statement or a financing change



statement in relation to the Incidental Items in favour of a third party without the prior written consent of Klondu.

- (d) Klondu and You agree that sections 96, 115 and 125 of the PPSA do not apply to the security agreement created by these terms and conditions.
- (e) You waive Your right to receive notices under sections 95, 118, 121(4), 130, 132(3)(d) and 132(4) of the PPSA.
- (f) You waive Your right as a grantor and/or a debtor under sections 142 and 143 of the PPSA.
- (g) Unless otherwise agreed to in writing by Klondu, You waive Your right to receive a verification statement in accordance with section 157 of the PPSA.
- (h) You must unconditionally ratify any actions taken by Klondu under clauses 28(c)(iii) to 28(e).
- (i) Subject to any express provisions to the contrary nothing in these terms and conditions is intended to have the effect of contracting out of any of the provisions of the PPSA.

### **36. Severability**

If any provision of these terms and conditions is invalid and not enforceable in accordance with its terms, other provisions which are self-sustaining or otherwise capable of separate enforcement with regard to the invalid provision, are and continue to be valid and enforceable in accordance with these terms.

### **37. Waiver**

The failure, delay, relaxation or indulgence on the part of Klondu in exercising any power or right conferred upon Klondu by these terms and conditions does not operate as a waiver of that power or right, nor does any single exercise of power or right preclude any other or further exercise of any other power or right under these terms and conditions.

### **38. Force Majeure**

- (a) Neither party shall be responsible for any failure to fulfil any obligation imposed upon it under this Contract if fulfilment is, delayed, prevented restricted or interfered with by reason of Force majeure.
- (b) If either party claims Force Majeure, it shall immediately notify the other party in writing at the commencement and finish of such a claim.
- (c) A party invoking Force Majeure shall use due diligence in minimising any loss to the other party and upon notification the parties shall confer with a view to adjusting their interests in a mutually satisfactory manner.
- (d) If the event, which constitutes Force Majeure, is, in the opinion of either party, incapable of resolution, then either party may give to the other Notice to terminate this Contract, such

termination to become effective 60 days from the date that such notice was sent to the other party.

- (e) The terms and conditions of this Contract shall remain in full force and effect until so terminated.

### **39. Exclusion of Implied Law**

The parties acknowledge and agree that all implied conditions arising from any law, act, legislation, regulation or by-law or howsoever arising to the extent permissible by law are excluded from being implied into this Contract.

### **40. Governing Law**

These terms and conditions are governed by the law of the State of NSW and each party irrevocably submits to the law of that jurisdiction.