

1. Definitions

- 1.1 “TSCW” shall mean Top Shelf Cabinets & Woodworking Pty Ltd its successors and assigns or any person acting on behalf of and with the authority of Top Shelf Cabinets & Woodworking Pty Ltd.
- 1.2 “Client” shall mean the Client (or any person acting on behalf of and with the authority of the Client) as described on any quotation, work authorisation or other form as provided by TSCW to the Client.
- 1.3 “Guarantor” means that person (or persons), or entity, who agrees to be liable for the debts of the Client on a principal debtor basis.
- 1.4 “Goods” shall mean Goods supplied by TSCW to the Client (and where the context so permits shall include any supply of Services as hereinafter defined) and are as described on the invoices, quotation, work authorisation or any other forms as provided by TSCW to the Client.
- 1.5 “Services” shall mean all Services supplied by TSCW to the Client and includes any advice or recommendations (and where the context so permits shall include any supply of Goods as defined above).
- 1.6 “Price” shall mean the price payable for the Goods as agreed between TSCW and the Client in accordance with clause 4 of this contract.

2. The Commonwealth Trade Practices Act 1974 (“TPA”) and Fair Trading Acts (“FTA”) and application of these terms and conditions to consumers

- 2.1 Nothing in this agreement is intended to have the effect of contracting out of any applicable provisions of the TPA or the FTA in each of the States and Territories of Australia, except to the extent permitted by those Acts where applicable.
- 2.2 Clause 8 (Defects), and clause 9 (Warranty) may **NOT** apply to the Client where the Client is purchasing Goods or Services not for resale or hire where the Price of the Goods or Services does not exceed \$40,000, or where the Price of the Goods or Services does exceed \$40,000 and are of a kind ordinarily acquired for personal, domestic or household use or consumption, or where the Client is in any other way a consumer within the meaning of the TPA or the FTA of the relevant state or territories of Australia.

3. Acceptance

- 3.1 Any instructions received by TSCW from the Client for the supply of Goods and/or the Client’s acceptance of Goods supplied by TSCW shall constitute acceptance of the terms and conditions contained herein.
- 3.2 Where more than one Client has entered into this agreement, the Clients shall be jointly and severally liable for all payments of the Price.
- 3.3 Upon acceptance of these terms and conditions by the Client the terms and conditions are binding and can only be amended with the written consent of TSCW.
- 3.4 The Client shall give TSCW not less than fourteen (14) days prior written notice of any proposed change of ownership of the Client or any change in the Client’s name and/or any other change in the Client’s details (including but not limited to, changes in the Client’s address, facsimile number, or business practice). The Client shall be liable for any loss incurred by TSCW as a result of the Client’s failure to comply with this clause.
- 3.5 Goods are supplied by TSCW only on the terms and conditions of trade herein to the exclusion of anything to the contrary in the terms of the Client’s order notwithstanding that any such order is placed on terms that purport to override these terms and conditions of trade.

4. Price And Payment

- 4.1 At TSCW’s sole discretion the Price shall be either:
 - (a) as indicated on invoices provided by TSCW to the Client in respect of Goods supplied; or
 - (b) TSCW’s current price at the date of delivery of the Goods according to TSCW’s current Price list; or
 - (c) TSCW’s quoted Price (subject to clause 4.2) which shall be binding upon TSCW provided that the Client shall accept TSCW’s quotation in writing within thirty (30) days.
- 4.2 TSCW reserves the right to change the Price in the event of a variation to TSCW’s quotation. Any variation from the plan of scheduled works or specifications (including, but not limited to, any variation as a result of additional works required due to hidden or unidentifiable difficulties beyond the reasonable control of TSCW such as electrical, plumbing, tiling, walls, floors or ceilings) will be detailed in writing and charged for on the basis of TSCW’s quotation and will be shown as variations on the invoice. Payment for all variations must be made in full at their time of completion.
- 4.3 The cost of installation is included in the original quotation based on the Goods supplied and installed at one time, in the event that the installation is staggered due to delay of Goods or the Client changes the installation time, TSCW reverse the right to charge and additional cost for the time involved for this variation based on TSCW’s hourly rate and shall be detailed on the invoice as per clause 4.2.
- 4.4 At TSCW’s sole discretion a deposit may be required.
- 4.5 At TSCW’s sole discretion:
 - (a) payment shall be due on delivery of the Goods; or
 - (b) payment for approved Clients shall be made by instalments in accordance with TSCW’s payment schedule;or

- (c) payment for approved Clients shall be due thirty (30) days following the end of the month in which a statement is posted to the Client's address or address for notices.
- 4.6 Time for payment for the Goods shall be of the essence and will be stated on the invoice or any other forms. If no time is stated then payment shall be due seven (7) days following the date of the invoice.
- 4.7 Payment will be made by cash, or by cheque, or by bank cheque, or by direct credit, or by any other method as agreed to between the Client and TSCW.
- 4.8 GST and other taxes and duties that may be applicable shall be added to the Price except when they are expressly included in the Price.

5. Delivery Of Goods

- 5.1 At TSCW's sole discretion delivery of the Goods shall take place when the Client takes possession of the Goods at the Client's nominated address (in the event that the Goods are delivered by TSCW or TSCW's nominated carrier).
- 5.2 At TSCW's sole discretion the costs of delivery is included in the Price.
- 5.3 The Client shall make all arrangements necessary to take delivery of the Goods whenever they are tendered for delivery. In the event that the Client is unable to take delivery of the Goods as arranged then TSCW shall be entitled to charge a reasonable fee for redelivery.
- 5.4 The failure of TSCW to deliver shall not entitle either party to treat this contract as repudiated.
- 5.5 TSCW shall not be liable for any loss or damage whatever due to failure by TSCW to deliver the Goods (or any of them) promptly or at all where due to circumstances beyond the control of TSCW.

6. Risk

- 6.1 If TSCW retains ownership of the Goods nonetheless, all risk for the Goods passes to the Client on delivery.
- 6.2 If any of the Goods are damaged or destroyed following delivery but prior to ownership passing to the Client, TSCW is entitled to receive all insurance proceeds payable for the Goods. The production of these terms and conditions by TSCW is sufficient evidence of TSCW's rights to receive the insurance proceeds without the need for any person dealing with TSCW to make further enquiries.
- 6.3 Stone is a natural colour and shade tone, markings, and veining may vary from colour samples provided. TSCW will make every effort to match colour samples to the Goods supplied but will not be liable in any way whatsoever for colour samples differing from the Goods supplied.
- 6.4 Timber is a natural product and as such colour, shade tone, markings, and veining may vary from samples provided. Whilst TSCW will make every effort to match sales samples to the finished Goods TSCW accepts no liability whatsoever where the samples differ to the finished Goods.
- 6.5 The Client acknowledges that Goods supplied may:
- (a) exhibit variations in shade, colour, texture, surface, finish, markings and may contain natural fissures, occlusions, lines, indentations and may fade or change colour over time; and
 - (b) expand, contract or distort as a result of exposure to heat, cold, weather; and
 - (c) mark or stain if exposed to certain substances; and
 - (d) be damaged or disfigured by impact or scratching.

7. Title

- 7.1 TSCW and the Client agree that ownership of the Goods shall not pass until:
- (a) the Client has paid TSCW all amounts owing for the particular Goods; and
 - (b) the Client has met all other obligations due by the Client to TSCW in respect of all contracts between TSCW and the Client.
- 7.2 Receipt by TSCW 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 and until then TSCW's ownership or rights in respect of the Goods shall continue.
- 7.3 It is further agreed that:
- (a) where practicable the Goods shall be kept separate and identifiable until TSCW shall have received payment and all other obligations of the Client are met; and
 - (b) until such time as ownership of the Goods shall pass from TSCW to the Client TSCW may give notice in writing to the Client to return the Goods or any of them to TSCW. Upon such notice the rights of the Client to obtain ownership or any other interest in the Goods shall cease; and
 - (c) TSCW shall have the right of stopping the Goods in transit whether or not delivery has been made; and
 - (d) if the Client fails to return the Goods to TSCW then TSCW or TSCW's agent may enter upon and into land and premises owned, occupied or used by the Client, or any premises as the invitee of the Client, where the Goods are situated and take possession of the Goods; and
 - (e) the Client is only a bailee of the Goods and until such time as TSCW has received payment in full for the Goods then the Client shall hold any proceeds from the sale or disposal of the Goods, up to and including the amount the Client owes to TSCW for the Goods, on trust for TSCW; and
 - (f) the Client shall not deal with the money of TSCW in any way which may be adverse to TSCW; and

- (g) the Client shall not charge the Goods in any way nor grant nor otherwise give any interest in the Goods while they remain the property of TSCW; and
- (h) TSCW can issue proceedings to recover the Price of the Goods sold notwithstanding that ownership of the Goods may not have passed to the Client; and
- (i) until such time that ownership in the Goods passes to the Client, if the Goods are converted into other products, the parties agree that TSCW will be the owner of the end products.

8. Defects

- 8.1 The Client shall inspect the Goods on delivery and shall within seven (7) days of delivery (time being of the essence) notify TSCW of any alleged defect, shortage in quantity, damage or failure to comply with the description or quote. The Client shall afford TSCW an opportunity to inspect the Goods within a reasonable time following delivery if the Client believes the Goods are defective in any way. If the Client shall fail to comply with these provisions the Goods shall be presumed to be free from any defect or damage. For defective Goods, which TSCW has agreed in writing that the Client is entitled to reject, TSCW's liability is limited to either (at TSCW's discretion) replacing the Goods or repairing the Goods except where the Client has acquired Goods as a consumer within the meaning of the Trade Practices Act 1974 (Cwlth) or the Fair Trading Acts of the relevant state or territories of Australia, and is therefore also entitled to, at the consumer's discretion either a refund of the purchase price of the Goods, or repair of the Goods, or replacement of the Goods.
- 8.2 Goods will not be accepted for return other than in accordance with 8.1 above.

9. Warranty

- 9.1 Subject to the conditions of warranty set out in clause 9.2 TSCW warrants that if any defect in any workmanship of TSCW becomes apparent and is reported to TSCW within twelve (12) months of the date of delivery (time being of the essence) then TSCW will either (at TSCW's sole discretion) replace or remedy the workmanship.
- 9.2 The conditions applicable to the warranty given by clause 9.1 are:
 - (a) the warranty shall not cover any defect or damage which may be caused or partly caused by or arise through:
 - (i) failure on the part of the Client to properly maintain any Goods; or
 - (ii) failure on the part of the Client to follow any instructions or guidelines provided by TSCW; or
 - (iii) any use of any Goods otherwise than for any application specified on a quote or order form; or
 - (iv) the continued use of any Goods after any defect becomes apparent or would have become apparent to a reasonably prudent operator or user; or
 - (v) fair wear and tear, any accident or act of God.
 - (b) the warranty shall cease and TSCW shall thereafter in no circumstances be liable under the terms of the warranty if the workmanship is repaired, altered or overhauled without TSCW's consent.
 - (c) in respect of all claims TSCW shall not be liable to compensate the Client for any delay in either replacing or remedying the workmanship or in properly assessing the Client's claim.
- 9.3 For Goods not manufactured by TSCW, the warranty shall be the current warranty provided by the manufacturer of the Goods. TSCW shall not be bound by nor be responsible for any term, condition, representation or warranty other than that which is given by the manufacturer of the Goods.
- 9.4 To the extent permitted by statute, no warranty is given by TSCW as to the quality or suitability of the Goods for any purpose and any implied warranty, is expressly excluded. TSCW shall not be responsible for any loss or damage to the Goods, or caused by the Goods, or any part thereof however arising.
- 9.5 The conditions applicable to the warranty given on Goods supplied by TSCW are contained on the "Warranty Card" that will be supplied with the Goods.
- 9.6 In the case of second hand Goods, the Client acknowledges that he has had full opportunity to inspect the same and that he accepts the same with all faults and that no warranty is given by TSCW as to the quality or suitability for any purpose and any implied warranty, statutory or otherwise, is expressly excluded. TSCW shall not be responsible for any loss or damage to the Goods, or caused by the Goods, or any part thereof however arising.

10. Intellectual Property

- 10.1 Where TSCW has designed, drawn or written Goods for the Client, then the copyright in those designs and drawings and documents shall remain vested in TSCW, and shall only be used by the Client at TSCW's discretion.
- 10.2 The Client warrants that all designs or instructions to TSCW will not cause TSCW to infringe any patent, registered design or trademark in the execution of the Client's order and the Client agrees to indemnify TSCW against any action taken by a third party against TSCW in respect of any such infringement.

11. Default & Consequences of Default

- 11.1 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 one half percent (2.5%) per calendar month (and at TSCW's sole discretion such interest shall compound monthly at such a rate) after as well as before any judgment.
- 11.2 In the event that the Client's payment is dishonoured for any reason the Client shall be liable for any dishonour fees incurred by TSCW.

- 11.3 If the Client defaults in payment of any invoice when due, the Client shall indemnify TSCW from and against all costs and disbursements incurred by TSCW in pursuing the debt including legal costs on a solicitor and own client basis and TSCW's collection agency costs.
- 11.4 Without prejudice to any other remedies TSCW may have, if at any time the Client is in breach of any obligation (including those relating to payment), TSCW may suspend or terminate the supply of Goods to the Client and any of its other obligations under the terms and conditions. TSCW will not be liable to the Client for any loss or damage the Client suffers because TSCW has exercised its rights under this clause.
- 11.5 If any account remains overdue after thirty (30) days then an amount of the greater of twenty dollars (\$20.00) or ten percent (10.00%) of the amount overdue (up to a maximum of two hundred dollars (\$200.00)) shall be levied for administration fees which sum shall become immediately due and payable.
- 11.6 Without prejudice to TSCW's other remedies at law TSCW shall be entitled to cancel all or any part of any order of the Client which remains unfulfilled and all amounts owing to TSCW shall, whether or not due for payment, become immediately payable in the event that:
- (a) any money payable to TSCW becomes overdue, or in TSCW's opinion the Client will be unable to meet its payments as they fall due; or
 - (b) the Client becomes insolvent, 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
 - (c) a receiver, manager, liquidator (provisional or otherwise) or similar person is appointed in respect of the Client or any asset of the Client.

12. Security And Charge

- 12.1 Despite anything to the contrary contained herein or any other rights which TSCW may have howsoever:
- (a) where the Client and/or the Guarantor (if any) is the owner of land, realty or any other asset capable of being charged, both the Client and/or the Guarantor agree to mortgage and/or charge all of their joint and/or several interest in the said land, realty or any other asset to TSCW or TSCW's nominee to secure all amounts and other monetary obligations payable under these terms and conditions. The Client and/or the Guarantor acknowledge and agree that TSCW (or TSCW's nominee) shall be entitled to lodge where appropriate a caveat, which caveat shall be withdrawn once all payments and other monetary obligations payable hereunder have been met.
 - (b) should TSCW elect to proceed in any manner in accordance with this clause and/or its sub-clauses, the Client and/or Guarantor shall indemnify TSCW from and against all TSCW's costs and disbursements including legal costs on a solicitor and own client basis.
 - (c) the Client and/or the Guarantor (if any) agree to irrevocably nominate constitute and appoint TSCW or TSCW's nominee as the Client's and/or Guarantor's true and lawful attorney to perform all necessary acts to give effect to the provisions of this clause 12.1.

13. Cancellation

- 13.1 TSCW may cancel any contract to which these terms and conditions apply or cancel delivery of Goods at any time before the Goods are delivered by giving written notice to the Client. On giving such notice TSCW shall repay to the Client any sums paid in respect of the Price. TSCW shall not be liable for any loss or damage whatever arising from such cancellation.
- 13.2 In the event that the Client cancels delivery of Goods the Client shall be liable for any loss incurred by TSCW (including, but not limited to, any loss of profits) up to the time of cancellation.

14. Privacy Act 1988

- 14.1 The Client and/or the Guarantor/s agree for TSCW to obtain from a credit reporting agency a credit report containing personal credit information about the Client and Guarantor/s in relation to credit provided by TSCW.
- 14.2 The Client and/or the Guarantor/s agree that TSCW may exchange information about the Client and the Guarantor/s with those credit providers either named as trade referees by the Client or named in a consumer credit report issued by a credit reporting agency for the following purposes:
- (a) to assess an application by 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 credit worthiness of Client and/or Guarantor/s.
- 14.3 The Client consents to TSCW being given a consumer credit report to collect overdue payment on commercial credit (Section 18K(1)(h) Privacy Act 1988).
- 14.4 The Client agrees that personal credit information provided may be used and retained by TSCW for the following purposes and for other purposes as shall be agreed between the Client and TSCW or required by law from time to time:
- (a) provision of Goods; and/or
 - (b) marketing of Goods by TSCW, its agents or distributors in relation to the Goods; and/or

- (c) analysing, verifying and/or checking the Client's credit, payment and/or status in relation to provision of Goods; and/or
 - (d) processing of any payment instructions, direct debit facilities and/or credit facilities requested by Client; and/or
 - (e) enabling the daily operation of Client's account and/or the collection of amounts outstanding in the Client's account in relation to the Goods.
- 14.5 TSCW may give information about the Client to a credit reporting agency for the following purposes:
- (a) to obtain a consumer credit report about the Client; and/or
 - (b) allow the credit reporting agency to create or maintain a credit information file containing information about the Client.

15. Construction Contracts Act 2004

- 15.1 At TSCW's sole discretion, if there are any disputes or claims for unpaid Goods and/or Services then the provisions of the Construction Contracts Act 2004 may apply.
- 15.2 Nothing in this agreement is intended to have the affect of contracting out of any provisions of the Construction Contracts Act 2004 of Western Australia, except to the extent permitted by the Acts where applicable.

16. General

- 16.1 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.
- 16.2 These terms and conditions and any contract to which they apply shall be governed by the laws of Western Australia and are subject to the jurisdiction of the courts of Western Australia.
- 16.3 TSCW shall be under no liability whatever to the Client for any indirect loss and/or expense (including loss of profit) suffered by the Client arising out of a breach by TSCW of these terms and conditions.
- 16.4 In the event of any breach of this contract by TSCW the remedies of the Client shall be limited to damages which under no circumstances shall exceed the Price of the Goods.
- 16.5 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 TSCW.
- 16.6 TSCW may license or sub-contract all or any part of its rights and obligations without the Client's consent.
- 16.7 The Client agrees that TSCW may review these terms and conditions at any time. If, following any such review, there is to be any change to these terms and conditions, then that change will take effect from the date on which TSCW notifies the Client of such change.
- 16.8 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.
- 16.9 The failure by TSCW to enforce any provision of these terms and conditions shall not be treated as a waiver of that provision, nor shall it affect TSCW's right to subsequently enforce that provision.