
KwikUP Hire Pty Ltd - Terms & Conditions of Hire

1. Definitions

- 1.1 **"Charges"** means the cost of the hire of the Equipment (plus any GST where applicable) as agreed between KwikUP and the Client subject to clause 5 of this Contract.
- 1.2 **"Client"** means the person/s, entities or any person acting on behalf of and with the authority of the Client requesting KwikUP to provide the services 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.
- 1.3 **"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.
- 1.4 **"Contract"** means the terms and conditions contained herein, together with any quotation, hire form, invoice or other document or amendments expressed to be supplemental to this Contract.
- 1.5 **"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 KwikUP'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.**
- 1.6 **"Equipment"** means all Equipment (including any scaffolding accessories and labour required to install or dismantle the scaffolding) supplied on hire by KwikUP to the Client (and where the context so permits shall include any incidental supply of services). The Equipment shall be as described on the invoices, quotation, authority to hire, or any other work authorisation forms as provided by KwikUP to the Client.
- 1.7 **"GST"** means Goods and Services Tax as defined within the "A New Tax System (Goods and Services Tax) Act 1999" (Cth).
- 1.8 **"KwikUP"** means KwikUP Hire Pty Ltd, its successors and assigns or any person acting on behalf of and with the authority of KwikUP Hire Pty Ltd.
- 1.9 **"Minimum Hire Period"** means the Minimum Hire Period as described on the invoices, quotation, authority to hire, or any other forms as provided by KwikUP to the Client.
- 1.10 **"Site"** means the location/s at which the Equipment is to be installed and dismantled.

2. Acceptance

- 2.1 The parties acknowledge and agree that:
- (a) they have read and understood the terms and conditions contained in this Contract; and
 - (b) the parties are taken to have exclusively accepted and are immediately bound, jointly and severally, by these terms and conditions if the Client places an order for or accepts delivery of the Equipment.
- 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 and accepts that:
- (a) the hire of Equipment on credit shall not take effect until the Client has completed a credit application with KwikUP and it has been approved with a credit limit established for the account. In the event that the hire of Equipment requested exceeds the Client's credit limit and/or the account exceeds the payment terms, KwikUP reserves the right to refuse delivery;
 - (b) that following the handover of the certified Equipment to the Client, it shall be the Client's responsibility to check the Equipment before each use. If the Equipment is deemed to be damaged, altered or appears unsafe it should **not** be used, and KwikUP is to be notified; and
 - (c) KwikUP reserves the right to remove the Equipment without prejudice should the Equipment be considered to be unsafe due to washout and/or erosion, upon such action this shall not be deemed to be a breach of Contract. KwikUP will not accept any claim for in respect of any consequential loss to the Client that may result from such an event.
- 2.5 Any advice, recommendation, information or assistance provided by KwikUP in relation to the Equipment supplied is given in good faith to the Client, or the Client's agent and is based on KwikUP's own knowledge and experience and shall be accepted without liability on the part of KwikUP.
- 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 Transactions 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 KwikUP 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 KwikUP 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 KwikUP in respect of the Equipment hire and/or services.
- 3.2 In circumstances where the Client is required to place an order for the Equipment, in writing, or otherwise as permitted by these terms and conditions, the Client is responsible for supplying correct order information such as, without limitation, measurements and quantity, when placing an order for the Equipment ("**Client Error**"). The Client must pay for all Equipment it orders from KwikUP notwithstanding that such Equipment suffer from a Client Error and notwithstanding that the Client has not taken or refuses to take Delivery of such Equipment. KwikUP is entitled to, at its absolute discretion to waive its right under this sub-clause in relation to Client Errors.

4. Change in Control

- 4.1 The Client shall give KwikUP 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 KwikUP as a result of the Client's failure to comply with this clause.

5. Charges and Payment

- 5.1 At KwikUP's sole discretion, the Charges shall be either:
- (a) as indicated on invoices provided by KwikUP to the Client upon placement of an order for the Equipment; or
 - (b) KwikUP's quoted Charges (subject to clause 5.2) which shall be binding upon KwikUP provided that the Client shall accept in writing KwikUP's quotation within thirty (30) days.
- 5.2 KwikUP reserves the right to change the Charges:
- (a) if a variation to the Equipment which is to be supplied is requested; or
 - (b) if a variation to the services originally scheduled (including any applicable plans, erection and dismantle charges, Site requirements or specifications) is requested; or
 - (c) if there are changes to the Hire Period; or
 - (d) where additional services are required due to the discovery of hidden or unidentifiable difficulties (including, but not limited to, poor weather conditions, limitations to accessing the Site, protruding or dismantled formwork, repositioning or adjusting the Equipment, additional Site visits required, safety considerations, obscured building defects, prerequisite work by any third party not being completed, etc.) which are only discovered on commencement of the services; or
 - (e) in the event of increases to KwikUP in the cost of labour or materials which are beyond KwikUP's control.
- 5.3 Variations will be charged for on the basis of KwikUP's quotation, and will be detailed in writing, and shown as variations on KwikUP's invoice. The Client shall be required to respond to any variation submitted by KwikUP within ten (10) working days. Failure to do so will entitle KwikUP to add the cost of the variation to the Charges. Payment for all variations must be made in full at the time of their completion.
- 5.4 At KwikUP's sole discretion, a reasonable deposit (in the form of a bond) shall be required at the commencement of this Contract in accordance with any quotation provided by KwikUP or as notified to the Client prior to the placement of an order for the Equipment, which shall be refunded to the Client by within thirty (30) days of the return of the Equipment, provided that the Client has complied with their obligations hereunder. The deposit may be used to offset any applicable Charges payable by the Client under clause 16.3, and any outstanding balance thereof shall be due as per clause 5.5.
- 5.5 Time for payment for the Equipment being of the essence, the Charges will be payable by the Client on the date/s determined by KwikUP, which may be:
- (a) on delivery of the Equipment; or
 - (b) on completion of the services; or
 - (c) by way of instalments/progress payments in accordance with KwikUP's payment schedule. Such progress payments may generally follow the following formula which may differ depending on the deposit required:
 - (i) seventy percent (70%) due when the scaffolding is installed; and
 - (ii) thirty percent (30%) when the scaffolding is dismantled.
 - (d) the date specified on any invoice or other form as being the date for payment; or
 - (e) failing any notice to the contrary, the date which is seven (7) days following the date of any invoice given to the Client by KwikUP.
- 5.6 Payment may be made by electronic/on-line banking or by any other method as agreed to between the Client and KwikUP.
- 5.7 KwikUP may in its discretion allocate any payment received from the Client towards any invoice that KwikUP determines and may do so at the time of receipt or at any time afterwards. On any default by the Client KwikUP may re-allocate any payments previously received and allocated. In the absence of any payment allocation by KwikUP, payment will be deemed to be allocated in such manner as preserves the maximum value of KwikUP's Purchase Money Security Interest (as defined in the PPSA) in the Equipment.
- 5.8 The Client shall not be entitled to set off against, or deduct from the Charges, any sums owed or claimed to be owed to the Client by KwikUP nor to withhold payment of any invoice because part of that invoice is in dispute. Once in receipt of an invoice for payment, if any part of the invoice is in dispute, then the Client must notify KwikUP in writing within three (3) business days, the invoice shall remain due and payable for the full amount, until such time as KwikUP investigates the disputed claim, no credit shall be passed for refund until the review is completed. Failure to make payment may result in KwikUP placing the Client's account into default and subject to default interest in accordance with clause 18.1.
- 5.9 Unless otherwise stated the Charges does not include GST. In addition to the Charges the Client must pay to KwikUP an amount equal to any GST KwikUP must pay for any supply by KwikUP under this or any other agreement for the hire of the Equipment. 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 Charges. In addition, the Client must pay any other taxes and duties that may be applicable in addition to the Charges except where they are expressly included in the Charges.
- 5.10 Receipt by KwikUP 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.

6. Hire Period

- 6.1 The hire Charges shall commence from the time the Equipment departs from KwikUP's premises and will continue until the return of the Equipment to KwikUP's premises, and/or until the expiry of the Minimum Hire Period, whichever last occurs.
- 6.2 Where the Client has agreed to a specific hire period or Minimum Hire Period with KwikUP and the hire period expires or is terminated, the Client acknowledges and agrees to promptly pay KwikUP for all lost hire Charges that KwikUP would otherwise have been entitled to under this Contract.
- 6.3 The date upon which the Client advises of termination shall in all cases be treated as a full day's hire.
- 6.4 No allowance whatsoever can be made for time during which the Equipment is not in use for any reason, unless KwikUP confirms special prior arrangements in writing. In the event of Equipment breakdown provided the Client notifies KwikUP immediately, hiring Charges will not be

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payable during the time the Equipment is not working, unless the condition is due to negligence or misuse on the part of or attributable to the Client.

- 6.5 Off-hire receipts will only be issued when the Equipment has been either collected by KwikUP or returned to KwikUP's premises.

7. Delivery

- 7.1 Delivery ("**Delivery**") of the Equipment is taken to occur at the time that:

(a) the Client or the Client's nominated carrier takes possession of the Equipment at KwikUP's premises; or
(b) KwikUP (or KwikUP's nominated carrier) delivers the Equipment to the Client's nominated address even if the Client is not present at the address.

- 7.2 The cost of Delivery will be payable by the Client in accordance with the quotation provided by KwikUP to the Client, or as otherwise notified to the Client prior to the placement of an order for the Equipment.

- 7.3 KwikUP may deliver the Equipment by separate instalments. Each separate instalment shall be invoiced and paid for in accordance with the provisions in these terms and conditions.

- 7.4 Any time specified by KwikUP for Delivery of the Equipment is an estimate only and KwikUP 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 Equipment to be supplied at the time and place as was arranged between both parties. In the event that KwikUP is unable to supply the Equipment as agreed solely due to any action or inaction of the Client, then KwikUP shall be entitled to charge a reasonable fee for re-supplying the Equipment at a later time and date, and/or for storage of the Equipment.

8. Risk

- 8.1 KwikUP retains ownership of the Equipment nonetheless all risk for the Equipment passes to the Client on Delivery.

- 8.2 The Client accepts full responsibility for the safekeeping of the Equipment and indemnifies KwikUP for all loss, theft, or damage to the Equipment howsoever caused and without limiting the generality of the foregoing whether or not such loss, theft, or damage is attributable to any negligence, failure, or omission of the Client.

- 8.3 The Client will insure, or self-insure, KwikUP's interest in the Equipment against physical loss or damage including, but not limited to, the perils of accident, fire, theft and burglary and all other usual risks and will effect adequate Public Liability Insurance covering any loss, damage or injury to property arising out of the Equipment. Further the Client will not use the Equipment nor permit it to be used in such a manner as would permit an insurer to decline any claim.

- 8.4 The Client accepts full responsibility for and shall keep KwikUP indemnified against all liability in respect of all actions, proceedings, claims, damages, costs and expenses in respect of any injury to persons, damage to property, or otherwise arising out of the use of the Equipment during the hire period and whether or not arising from any negligence, failure or omission of the Client or any other persons.

9. Access and Installation

- 9.1 Prior to KwikUP commencing any Services the Client must advise KwikUP of the precise location of all services on the Site and clearly mark the same. The 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 Site. Whilst KwikUP will take all care to avoid damage to any underground services the Client agrees to indemnify KwikUP 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 9.1.

- 9.2 The Client shall ensure that the:

(a) nominated Delivery address is cleared and ready for installation of the Equipment prior to Delivery of the Equipment, and that the foundations upon which KwikUP is to install the Equipment is sufficiently firm and otherwise suitable to safely carry the structure and the load to be put on it without subsidence. The Client will be liable to KwikUP for any loss, costs or damages which KwikUP may suffer or incur by reason of the Client's failure to carry out its obligations hereunder if KwikUP is unable or unwilling to install the Equipment due to the Site not being cleared and ready as aforesaid. Nevertheless, the Client shall be liable to pay the costs on the hire of the Equipment on the terms stated herein; and

(b) KwikUP has clear and free access to the nominated Delivery address to enable KwikUP to install and/or dismantle the Equipment, and KwikUP agrees at the time of completion thereof to carry out in a reasonable way the clean-up of the Site where the Equipment was installed. Furthermore, it is acknowledged that it is unreasonable to expect the clean-up to restore the property to its pre-existing condition, especially in the event where existing grass has died off due to the covering of base blocks to establish foundation support for the Equipment, such damage will remain the Client's responsibility.

- 9.3 The Client acknowledges and accepts that where the Equipment is required to be tied to the building structure, with ties at each scaffold lift, using either bolts, pins or screw eyes, the subsequent repairs of these holes and/or repainting shall be the responsibility of the Client.

- 9.4 The quotation is based upon wire ties and/or bolted scaffold ties to secure the Equipment to the building and the construction procedures must allow for these ties to remain in position whilst the Equipment is in use.

- 9.5 It shall be the Client's responsibility to ensure that:

(a) where Equipment is installed on concreted areas, patios, driveways or timber decks that suitable coverings are put in place to help prevent any marking/staining of the finished product. KwikUP shall not be liable for any loss or damage to the Site (including, without limitation, damage to pathways, driveways and concreted or paved or grassed areas) unless due to the negligence of KwikUP; and

(b) such that access is suitable to accept the weight of laden trucks. The Client agrees to indemnify KwikUP against all costs incurred by KwikUP in recovering such vehicles in the event they become bogged or otherwise immovable.

- 9.6 Any Equipment above four metres (4m) high may only be erected, altered or dismantled under the supervision of a scaffolder holding a certificate of competency or license that may be required by any legislation or local regulatory authority for the purpose of the erection or the dismantling of the Equipment or KwikUP. It shall be the Client's responsibility to notify the relevant regulatory body of their use of the Equipment four metres (4) or more in height.

- 9.7 If during the course of the Client's work, the Equipment is modified or removed by the Client to the extent the Equipment is no longer compliant with the applicable legislative requirements, any rectification work performed by KwikUP will be at the Client's expense.

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- 9.8 The Client acknowledges and agrees that:
- (a) KwikUP's erect and dismantle quotation, unless otherwise agreed, does not allow for subsequent visits to the Site to adjust or alter the Equipment, any additional rectification services will be charged as an extra; and
 - (b) in the event KwikUP require access, in order to erect, alter or dismantle the Equipment, to an adjoining or adjacent property or land to the nominated Site, that is not owned by the Client, then it is the Client's responsibility to gain permission from the landowner to use the above-mentioned property throughout the erection, alteration or dismantling of the Equipment. In the event the landowner denies access or use of the land or property, the Client shall be liable for all costs incurred by KwikUP in gaining permission to access and/or use the property through any legal process that may be deemed necessary.
- 9.9 The Client shall be responsible for providing KwikUP, while at the Site, with adequate access to parking and/or any other amenities as may be required unless otherwise agreed.
- 10. Affixation of Equipment to Land or Buildings**
- 10.1 If the Equipment or any part thereof is affixed to any land or buildings pursuant to this Contract, and the land or buildings are or become the subject of a mortgage or charge whether under the PPSA or otherwise at law, then the Client shall, without first receiving any request from KwikUP, obtain the written acknowledge of the mortgagee, administrator, or liquidator (as the case may be) that:
- (a) the Equipment or any part thereof is not a fixture for the purposes of the mortgage or charge;
 - (b) that the mortgagee, administrator or liquidator will not make any claim in relation to the Equipment or any part thereof; and
 - (c) that the mortgagee, administrator, or liquidator will permit KwikUP (whether or not there has been any default under the mortgage or charge) to enter upon the land or buildings and to remove the Equipment or part thereof.
- 11. Inspection of Equipment**
- 11.1 The Client hereby grants KwikUP (including its employees, duly authorised agents, or representatives) the right, at all times, upon KwikUP giving to the Client reasonable notice and without unduly interfering with the Client's business or operations, to:
- (a) enter onto the Site(s) where the Equipment or any part thereof may be located;
 - (b) inspect the state of repair or condition of the Equipment;
 - (c) carry out any such tests on the Equipment as may be reasonably necessary including but not limited to, health and safety tests or inspections;
 - (d) observe the use of the Equipment by the Client; and
 - (e) do any act, matter or thing which may be required at law or to otherwise protect KwikUP's rights or interests in the Equipment.
- 11.2 All scaffolds including special duty scaffolds will be maintained under the ACULOG scaffold register system and as such require inspections on KwikUP's part. KwikUP shall invoice such inspections as an extra at the rates noted in KwikUP's quotation for labour and transport costs.
- 12. Title**
- 12.1 The Equipment is and will at all times remain the absolute property of KwikUP, and the Client must return the Equipment to KwikUP upon request to do so.
- 12.2 If the Client fails to return the Equipment to KwikUP as is required under this Contract or when requested to do so, then KwikUP or KwikUP's agent may (as the invitee of the Client) enter upon and into any land and premises owned, occupied or used by the Client, or any premises where the Equipment is situated and take possession of the Equipment, without being responsible for any damage thereby caused. Any costs incurred by KwikUP as a result of KwikUP so repossessing the Equipment shall be charged to the Client.
- 12.3 The Client is not authorised to pledge KwikUP's credit for repairs to the Equipment or to create a lien over the Equipment in respect of any repairs.
- 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 Equipment that has previously been supplied and that will be supplied in the future by KwikUP 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 KwikUP 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, KwikUP 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 Equipment charged thereby;
 - (c) not register a financing change statement in respect of a security interest without the prior written consent of KwikUP; and
 - (d) not register, or permit to be registered, a financing statement or a financing change statement in relation to the Equipment in favour of a third party without the prior written consent of KwikUP.
- 13.4 KwikUP 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 waives their 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 their 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 KwikUP, the Client waives their right to receive a verification statement in accordance with section 157 of the PPSA.
- 13.8 The Client must unconditionally ratify any actions taken by KwikUP under clauses 13.3 to 13.5.

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- 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 the PPSA.
- 13.10 Only to the extent that the hire of the Equipment exceeds a two (2) year hire period with the right of renewal shall clause 13 apply as a security agreement in the form of a PPS Lease in respect of Section 20 of the PPSA, in all other matters this clause 13 will apply generally for the purposes of the PPSA.
- 14. Security and Charge**
- 14.1 In consideration of KwikUP agreeing to supply the Equipment on hire, the Client grants KwikUP a security interest by way of a floating charge (registerable by KwikUP pursuant to the PPSA) over all of its present and after acquired rights, title and interest (whether joint or several) in all other assets that is now owned by the Client or owned by the Client in the future, to the extent necessary to secure the repayment of monies owed under this Contract for provision of the Equipment on hire under this Contract and/or permit KwikUP to appoint a receiver to the Client in accordance with the *Corporations Act 2001* (Cth).
- 14.2 The Client indemnifies KwikUP from and against all KwikUP's costs and disbursements including legal costs on a solicitor and own client basis incurred in exercising KwikUP's rights under this clause.
- 14.3 In the event that the Client defaults or breaches any term of this Contract and as a result, the security provided in clauses 14.2 and 14.1 as applicable, is deemed insufficient by KwikUP to secure the repayment of monies owed by the Client to KwikUP, the Client hereby grants KwikUP a security interest as at the date of the default, by way of a charge, that enables the right and entitlement to lodge a caveat over any real property and or land owned by the Client now, or owned by the Client in the future, to secure the performance of the Client of its obligations under these terms and conditions (including, but not limited to, the payment of any money).
- 15. Defects, Warranties and Returns, Competition and Consumer Act 2010 ("CCA")**
- 15.1 The Client must inspect the Equipment on Delivery and must within forty-eight (48) hours of Delivery notify KwikUP 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 Equipment as soon as reasonably possible after any such defect becomes evident. Upon such notification the Client must allow KwikUP to inspect the Equipment.
- 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 KwikUP 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, KwikUP makes no warranties or other representations under these terms and conditions including but not limited to the quality or suitability of the Equipment. KwikUP'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, KwikUP's liability is limited to the extent permitted by section 64A of Schedule 2.
- 15.6 If KwikUP is required to rectify, re-supply, or pay the cost of re-supplying any services or Equipment under this clause or the CCA, but is unable to do so, then KwikUP may refund any money the Client has paid for the services or Equipment but only to the extent that such refund shall take into account the value of any services or Equipment and consumables which have been provided to the Client which were not defective.
- 15.7 If the Client is not a consumer within the meaning of the CCA, KwikUP's liability for any defect or damage in the services or Equipment is:
- (a) limited to the value of any express warranty or warranty card provided to the Client by KwikUP at KwikUP's sole discretion;
 - (b) limited to any warranty to which KwikUP is entitled, if KwikUP did not manufacture the Equipment; or
 - (c) otherwise negated absolutely.
- 15.8 Notwithstanding clauses 15.1 to 15.7 but subject to the CCA, KwikUP 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 Equipment;
 - (b) the Client interfering with the Equipment in any way without KwikUP's written approval to do so;
 - (c) the Client using the Equipment for any purpose other than that for which it was designed;
 - (d) the Client continuing the use of the Equipment after any defect became apparent or should have become apparent to a reasonably prudent operator or user;
 - (e) the Client failing to follow any instructions or guidelines provided by KwikUP; or
 - (f) fair wear and tear, any accident, or act of God.
- 16. Client's Responsibilities**
- 16.1 The Client shall:
- (a) satisfy itself at commencement that the Equipment is suitable for its purposes;
 - (b) notify KwikUP immediately by telephone of the full circumstances of any damages or accident. The Client is not absolved from the requirements to safeguard the Equipment by giving such notification;
 - (c) maintain the Equipment as is required by KwikUP;
 - (d) provide allowance for KwikUP to locate tying positions for the erection of the Equipment, and ensure that no such ties are removed by any person other KwikUP;
 - (e) operate the Equipment safely, strictly in accordance with the law, only for its intended use, and in accordance with any manufacturer's instruction whether supplied by KwikUP or posted on the Equipment;
 - (f) ensure that:
 - (i) all persons operating or erecting the Equipment are suitably instructed in its safe and proper use and where necessary hold a current Certificate of Competency and/or are fully licensed to operate the Equipment and shall provide evidence of the same to KwikUP upon request;
 - (ii) all water or overhead power likely to cause a hazard or adversely affect the installation of the Equipment is turned off prior to the installation of the Equipment; and
 - (iii) no digging or excavation work is performed near or under the Equipment during the installation or once the Equipment is installed.

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- (g) comply with all work health and safety laws relating to the Equipment and its operation;
 - (h) on termination of the hire, deliver the Equipment complete with all parts and accessories, clean and in good order as delivered, fair wear and tear accepted, to KwikUP;
 - (i) keep the Equipment in their own possession and control and shall not assign the benefit of the hire Contract nor be entitled to lien over the Equipment;
 - (j) employ the Equipment solely in its own work and shall not permit the Equipment or any part thereof to be used by any other party for any other work;
 - (k) indemnify and hold harmless KwikUP in respect of all claims arising out of the Client's use of the Equipment.
- 16.2 The Client shall not:
- (a) alter or make any additions to the Equipment including but without limitation altering, make any additions to, defacing or erasing any identifying mark, plate or number on or in the Equipment or in any other manner interfere with the Equipment;
 - (b) not exceed the recommended or legal load and capacity limits of the Equipment;
 - (c) not use or carry any illegal, prohibited or dangerous substance in or on the Equipment;
 - (d) not fix any of the Equipment in such a manner as to make it legally a fixture forming part of any freehold.
- 16.3 Immediately on request by KwikUP the Client will pay:
- (a) the new list price of any Equipment that is for whatever reason destroyed, written off or not returned to KwikUP;
 - (b) all costs incurred in cleaning the Equipment;
 - (c) all costs of repairing any damage caused by:
 - (i) the ordinary use of the Equipment;
 - (ii) the negligence of the Client or the Client's agent;
 - (iii) vandalism, or (in KwikUP's reasonable opinion) in any way whatsoever other than by the ordinary use of the Equipment by the Client.
 - (d) the cost of fuels and consumables provided by KwikUP and used by the Client;
 - (e) any:
 - (i) lost hire fees KwikUP would have otherwise been entitled to for the Equipment, under this, or any other hire Contract;
 - (ii) costs incurred by KwikUP in picking up and returning the Equipment to KwikUP's premises if the Client does not return the Equipment to KwikUP's premises or any pre-agreed pickup location when it was originally agreed that the Client would do so;
 - (iii) insurance excess payable in relation to a claim made by either the Client or KwikUP in relation to any damage caused by, or to, the hire Equipment whilst the same is hired by the Client and irrespective of whether charged by the Client's insurers or KwikUP's.
- 17. Cancellation**
- 17.1 Without prejudice to any other remedies the parties may have, if at any time either party is in breach of any obligation (including those relating to payment) under these terms and conditions ("**the Breaching Party**") the other party may suspend or terminate the supply of Equipment on hire to the other party, with immediate effect, by providing the Breaching Party with written notice. Neither party shall be liable for any costs associated with a party suspending/cancelling the Contract under this clause 17.1.
- 17.2 If KwikUP, due to reasons beyond KwikUP's reasonable control, is unable to deliver any Equipment to the Client, KwikUP may cancel any Contract to which these terms and conditions apply or cancel Delivery of the Equipment at any time before the Equipment are delivered by giving written notice to the Client. On giving such notice, KwikUP shall repay to the Client any money paid by the Client for the Equipment to be hired. KwikUP shall not be liable for any loss or damage whatsoever arising from such cancellation.
- 17.3 The Client may cancel Delivery of the Equipment by written notice served within forty-eight (48) hours of placement of the order. If the Client cancels Delivery in accordance with this clause 17.3, the Client will not be liable for the payment of any costs of KwikUP, except where a deposit is payable in accordance with clause 5.4.
- 18. Default and Consequences of Default**
- 18.1 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 KwikUP's sole discretion such interest shall compound monthly at such a rate) after as well as before any judgment.
- 18.2 If the Client owes KwikUP any money, the Client shall indemnify KwikUP from and against all costs and disbursements:
- (a) incurred; and/or
 - (b) which would be incurred and/or
 - (c) for which by the Client would be liable;
- in regard to legal costs on a solicitor and own client basis incurred in exercising KwikUP's rights under these terms and conditions, internal administration fees, KwikUP's contract fees owing for breach of these terms and conditions', including, but not limited to, contract default fees and/or recovery costs (if applicable), as well as bank dishonour fees.
- 18.3 Further to any other rights or remedies KwikUP may have under this Contract, if the Client has made payment to KwikUP, 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 KwikUP under this clause 18 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.
- 18.4 Without prejudice to KwikUP's other remedies at law KwikUP shall be entitled to cancel all or any part of any order of the Client which remains unperformed and all amounts owing to KwikUP shall, whether or not due for payment, become immediately payable in the event that:
- (a) any money payable to KwikUP becomes overdue, or in KwikUP's opinion the Client will be unable to meet its payments as they fall due; or
 - (b) the Client has exceeded any applicable credit limit provided by KwikUP;
 - (c) 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
 - (d) a receiver, manager, liquidator (provisional or otherwise) or similar person is appointed in respect of the Client or any asset of the Client.

19. Compliance with Laws

- 19.1 The Client and KwikUP shall comply with the provisions of all statutes, regulations and bylaws of government, local and other public authorities that may be applicable to the Equipment.

20. Privacy Policy

- 20.1 All emails, documents, images or other recorded information held or used by KwikUP is Personal Information, as defined and referred to in clause 20.3, and therefore considered Confidential Information. KwikUP 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"). KwikUP acknowledges that in the event it becomes aware of any data breaches and/or disclosure of the Client's Personal Information, held by KwikUP that may result in serious harm to the Client, KwikUP 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.

- 20.2 Notwithstanding clause 20.1, privacy limitations will extend to KwikUP in respect of Cookies where the Client utilises KwikUP's website to make enquiries. KwikUP 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 KwikUP when KwikUP sends an email to the Client, so KwikUP may collect and review that information ("collectively Personal Information").

If the Client consents to KwikUP's use of Cookies on KwikUP's website and later wishes to withdraw that consent, the Client may manage and control KwikUP's privacy controls via the Client's web browser, including removing Cookies by deleting them from the browser history when exiting the site.

- 20.3 The Client agrees for KwikUP 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 KwikUP.

- 20.4 The Client agrees that KwikUP 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.

- 20.5 The Client consents to KwikUP being given a consumer credit report to collect personal credit information relating to any overdue payment on commercial credit.

- 20.6 The Client agrees that personal credit information provided may be used and retained by KwikUP for the following purposes (and for other agreed purposes or required by):

- (a) the provision of Equipment; and/or
- (b) analysing, verifying and/or checking the Client's credit, payment and/or status in relation to the provision of Equipment; 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 Equipment.

- 20.7 KwikUP may give information about the Client to a CRB for the following purposes:

- (a) to obtain a consumer credit report; and/or
- (b) allow the CRB to create or maintain a credit information file about the Client including credit history.

- 20.8 The information given to the CRB may include:

- (a) Personal Information as outlined in 20.3 above;
- (b) name of the credit provider and that KwikUP 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 (provided KwikUP is a member of an approved OAIC External Disputes Resolution Scheme), 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 KwikUP has been paid or otherwise discharged and all details surrounding that discharge (e.g. dates of payments);
- (g) information that, in the opinion of KwikUP, the Client has committed a serious credit infringement; or
- (h) advice that the amount of the Client's overdue payment is equal to or more than one hundred and fifty dollars (\$150).

- 20.9 The Client shall have the right to request (by e-mail) from KwikUP:

- (a) a copy of the Personal Information about the Client retained by KwikUP and the right to request that KwikUP correct any incorrect Personal Information; and
- (b) that KwikUP does not disclose any Personal Information about the Client for the purpose of direct marketing.

- 20.10 KwikUP 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.

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- 20.11 The Client can make a privacy complaint by contacting KwikUP via e-mail. KwikUP 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.
- 21. Service of Notices**
- 21.1 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; or
 - (e) if sent by email to the other party's last known email address.
- 21.2 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.
- 22. Trusts**
- 22.1 If the Client at any time upon or subsequent to entering in to the Contract is acting in the capacity of trustee of any trust or as an agent for a trust ("Trust") then whether or not KwikUP may have notice of the Trust, the Client covenants with KwikUP as follows:
- (a) the Contract extends to all rights of indemnity which the Client now or subsequently may have against the Trust, the trustees and the trust fund;
 - (b) the Client has full and complete power and authority under the Trust or from the Trustees of the Trust as the case may be 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, the trustees and 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 during the term of the Contract without consent in writing of KwikUP (KwikUP 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 fund or trust property.
- 23. General**
- 23.1 Any dispute or difference arising as to the interpretation of these terms and conditions or as to any matter arising herein, shall be submitted to, and settled by, mediation before resorting to any external dispute resolution mechanisms (including arbitration or court proceedings) by notifying the other party in writing setting out the reason for the dispute. The parties shall share equally the mediator's fees. Should mediation fail to resolve the dispute, the parties shall be free to pursue other dispute resolution avenues.
- 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, that provision shall be severed from this Contract, and 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 New South Wales, the state in which KwikUP has its principal place of business and are subject to the jurisdiction of the Sydney Courts in that state.
- 23.4 KwikUP may licence and/or assign all or any part of its rights and/or obligations under this Contract without the Client's consent provided the assignment does not cause detriment to the Client.
- 23.5 The Client cannot assign or licence without the written approval of KwikUP.
- 23.6 KwikUP may elect to subcontract out any part of the provision services 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 KwikUP's sub-contractors without the authority of KwikUP.
- 23.7 The Client agrees that KwikUP 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 KwikUP to provide Equipment on hire to the Client.
- 23.8 Neither party shall be liable for any default due to any act of God, war, terrorism, strike, lock-out, industrial action, fire, flood, storm, national or global pandemics and/or the implementation of regulation, directions, rules or measures being enforced by Governments or embargo, including but not limited to, any Government imposed border lockdowns (including, worldwide destination ports), etc, ("Force Majeure") or other event beyond the reasonable control of either party. This clause does not apply to a failure by the Client to make a payment to KwikUP, once the parties agree that the Force Majeure event has ceased.
- 23.9 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.
- 23.10 The rights and obligations of the parties will not merge on completion of any transaction under this Contract, and they will survive the execution and delivery of any assignment or other document entered, for the purpose of, implementing any transaction under this Contract.
- 23.11 If part or all of any term of this Contract is or becomes invalid, illegal or unenforceable, it shall be severed from this Contract and shall not affect the validity and enforceability of the remaining terms of this Contract.