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## FAIR TRADING

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FT301\*

HOME BUILDING CONTRACTS ACT 1991

**HOME BUILDING CONTRACTS AMENDMENT REGULATIONS 1998**

Made by the Governor in Executive Council.

**Citation**

1. These regulations may be cited as the *Home Building Contracts Amendment Regulations 1998*.

**Principal regulations**

2. In these regulations the *Home Building Contracts Regulations 1992*\* are referred to as the principal regulations.

[\* Reprinted as at 17 October 1997.]

**Regulation 4 amended**

3. Regulation 4 of the principal regulations is amended by inserting after subregulation (6) the following subregulation—

“

(7) The form of contract set out in Schedule 7, prepared by the Housing Industry Association Limited, is prescribed for use for contracts for home building work involving alterations and additions to existing dwellings, but this subregulation does not affect copyright in that form of contract.

”

**Schedule 6 amended**

4. (1) Schedule 6 to the principal regulations is amended by deleting “**Form 31**” and substituting the following—

“ **Form 31B** ”.

- (2) Schedule 6 to the principal regulations is amended by deleting

“

**IMPORTANT DISCLAIMER**

Whilst this Agreement has been designed to comply with the provisions of the *Home Building Contracts Act 1991*, no person should use or rely on the contents of this Agreement without first obtaining advice from their own solicitor. This Agreement is sold and distributed on the terms and understanding that the Housing Industry Association Limited and the National Kitchen and Bathroom Association and their officers, consultants and professional advisers

are not responsible for any error in or omission from the Agreement or its failure to comply with the provisions of the *Home Building Contracts Act 1991* or any other law, Housing Industry Association Limited and National Kitchen and Bathroom Association and their officers, consultants and professional advisers expressly disclaim all and any responsibility to any person whether a party to the Agreement or not in respect of anything, either included in or omitted from the provisions of this Agreement and anything, and the consequences of anything, done or omitted to be done by any such person in reliance, whether wholly or partially, upon the whole or any part of the provisions of this Agreement.

and substituting the following—

“

#### IMPORTANT NOTICE

Persons intending to use this form of contract should carefully read and examine the document before signing it to ensure that it contains all of the terms, conditions and provisions of their agreement. If any person is unsure as to the nature of the document or its terms, conditions or provisions, then they should seek legal advice from a Solicitor before signing it.

”

#### Schedule 7 added

5. After Schedule 6 to the principal regulations the following Schedule is added—

“

#### SCHEDULE 7

[reg. 4]



HOUSING INDUSTRY ASSOCIATION LIMITED  
ACN 004 631752



#### LUMP SUM BUILDING CONTRACT FOR ALTERATIONS & ADDITIONS

#### IMPORTANT NOTICE

Persons intending to use this form of contract should carefully read and examine the document before signing it to ensure that it contains all of the terms, conditions and provisions of their agreement. If any person is unsure as to the nature of the document or its terms, conditions or provisions then they should seek legal advice from a Solicitor before signing it.

The Builder named in Item 1 of the Schedule hereto (“the Builder”) HEREBY AGREES with the Owner named in Item 2 of the Schedule (“the Owner”) as follows:

#### 1. AGREEMENT TO BUILD

- (a) The Builder agrees to build and complete for the Owner the Alterations and Additions building work (“the Works”) upon the land and existing improvements described in Item 3 of the Schedule (“the Site”) in a proper and workmanlike manner and in accordance with this Contract and the attached Drawings and Specifications, inclusive of all attached Addenda to Specifications agreed between the parties and, for the purpose of identification, signed by each of them, (the “Contract Documents”) for the price, terms and conditions herein and ensure the Works are adequately supervised for this purpose. The Contract Documents signed by the parties shall constitute the entire Contract between the parties.
- (b)
  - (i) Where there is a difference or inconsistency between the Contract Documents, they will be construed in the following order of precedence: Lump Sum Building Contract, Addenda to Specifications, Drawings, Specifications.
  - (ii) Any difference between scaled dimensions and figures on the Drawings shall be resolved by using and applying the figures. Drawings to a larger scale shall take precedence over drawings to a smaller scale.

© Copyright Housing Industry Association Limited **Form 38**

- (c) Where the Owner requires a lender to provide finance for the Works, the Owner shall use his or her best efforts to obtain the finance as defined in Item 4 of the Schedule. If the Owner is unable to obtain such finance within the period stated in Item 4 of the Schedule, then this Contract shall, unless the parties otherwise agree, be terminated.

- (d) The Builder shall not perform any of the Works nor make any demand for any payment under this Contract including any deposit until the Builder has given the Owner a certificate in the approved form that evidences the taking out of a policy of insurance that complies with Part 3A of the *Home Building Contracts Act 1991* in respect of the Works (Home Indemnity Insurance). Except for the Builder's interest in this Contract and the legal requirement for it to be arranged in respect of the Works, the Builder receives no benefits in relation to arranging Home Indemnity Insurance. The Builder further confirms that Home Indemnity Insurance may be arranged with an insurer of the Owner's choice. Item 13 of the Schedule sets out the premium anticipated to be paid by the Builder for Home Indemnity Insurance. If the Builder is unable to obtain Home Indemnity Insurance, from an insurer nominated by the Owner on terms and conditions acceptable to the Builder, the Builder may terminate this Contract by notice in writing to the Owner and the Owner shall pay to the Builder all direct costs paid or payable by the Builder for the purpose of obtaining the building licence up to the time of termination. If the Builder is unable to obtain Home Indemnity Insurance, where no insurer has been nominated by the Owner, on terms and conditions acceptable to the Builder, then the Builder may terminate this Contract by notice in writing to the Owner and the Builder shall be liable for all direct costs paid or payable by the Builder for the purpose of obtaining the building licence up to the time of termination.

## 2. NECESSARY APPROVALS

- (a) Subject to Clause 2 (b), this Contract is conditional upon:
- (i) a building licence under Part XV of the *Local Government (Miscellaneous Provisions) Act 1960* being issued in respect of the Works within FORTY FIVE (45) working days from the date of this Contract;
  - (ii) the Owner and the Builder acknowledging in writing within that period that each of them accepts any condition attached to the licence;
  - (iii) it becoming lawful under "the Water Act" (as defined in section 9 (6) of the *Home Building Contracts Act 1991*) within FORTY FIVE (45) working days from the date of this Contract for the Works to be commenced; and
  - (iv) the Owner and the Builder acknowledging in writing within that period that each of them accepts any direction that may be given by the Water Corporation under "the Water Act" in connection with the carrying out of the Works.
- (b) A condition referred to in Clause 2 (a) does not apply to this Contract:
- (i) to the extent that the subject matter of the condition was completed before this Contract was entered into; or
  - (ii) where the only work to be performed under this Contract is the construction or carrying out of "associated work" (as defined in section 3 (1) of the *Home Building Contracts Act 1991*) or any other work prescribed for the purpose of section 9 (5) (c) of that Act.
- (c) The Builder shall:
- (i) do all things that are reasonably necessary to be done to ensure that any condition referred to in Clause 2 (a) (i) and (iii) applicable to this Contract is fulfilled; and
  - (ii) not unreasonably decline to accept a condition or direction referred to in Clause 2 (a) (ii) or (iv) that applies to this Contract.
- (d) The Owner shall:
- (i) do all such things as may be required to be done by the Owner to ensure that any condition referred to in Clause 2 (a) (i) and (iii) applicable to this Contract is fulfilled; and
  - (ii) not unreasonably decline to accept a condition or direction referred to in Clause 2 (a) (ii) or (iv) that applies to this Contract.

- (e) If a condition referred to in Clause 2 (a) (i) and (iii) applicable to this Contract is not fulfilled, the consequences to, and the rights and remedies of, the parties are as set out in Clause 22.

### 3. OWNER'S WARRANTIES

- (a) The Owner warrants that:
  - (i) The Owner has title to the land on which the work is to be undertaken and the Owner is lawfully entitled to build on the Site.
  - (ii) The Site is subject only to those encumbrances, restrictive covenants and easements detailed in Item 5 of the Schedule.
  - (iii) The Builder has access to the Site for the purposes of this Contract or will be given access not later than the date by which the Builder is required to commence the Works in accordance with Clause 9 (a).
  - (iv) The existing fences on the Site adequately delineate the Site boundaries.
  - (v) The Site will support the Works.
  - (vi) Unless otherwise agreed, the Builder will have access free of charge to existing toilets and handwashing facilities, drinkable water (at normal mains pressure), power and gas.
  - (vii) The Owner authorizes the Builder to apply for and take out Home Indemnity Insurance in respect of the Works.
- (b) The Owner warrants he or she is able to pay the Contract Price, and within TEN (10) days of receipt of a notice in writing by the Builder requiring it, shall evidence this capacity in writing. Failure to do so entitles the Builder to terminate this Contract immediately by notice in writing given to the Owner within a further TEN (10) days, unless satisfaction is dependent on any of the Conditions stated in Clause 1 (c) or 27.
- (c) Unless the Builder has prepared or caused to be prepared the Contract Documents, the Owner warrants the same are accurate, free of error and consistent in every respect and do not infringe copyright, letters patent or registered design and the Owner shall indemnify the Builder against any action, claim, costs or expenses arising from any breach of this warranty.
- (d) Subject to sub-Clause (c) hereof and where the Contract Documents have not been prepared or caused to be prepared by the Builder, any discrepancy or error in the Contract Documents shall be dealt with in accordance with Clause 12 (b) or (d).

### 4. BUILDER'S DUTIES

- (a) In addition to the requirements of Clause 2 the Builder shall obtain any permits or licences that are required to build the Works pursuant to all statutes, codes, ordinances, rules, regulations, proclamations or orders of any officer and/or body lawfully empowered to make or issue the same.
- (b) The Builder shall comply with all relevant statutes, regulations and local laws and any lawful orders or directions made thereunder which relate to the Works and shall indemnify the Owner from and against all monies payable thereunder and for monies payable for any breach thereof provided that the Builder shall not be liable to indemnify the Owner for any breach caused by third parties other than the Builder or the Builder's agents.
- (c) If a variation of the Contract Documents or Works is necessary to enable the Builder to comply with Clause 4 (a) & (b) it shall be dealt with in accordance with Clause 12 (b) or (d).

## 5. CONSTRUCTION CONDITIONS

### (a) Record of Damage:

Before the date of possession, the Owner shall inspect the Site together with the Builder, who shall prepare a record of visible defects to the site which shall be signed by both parties.

### (b) Site Boundaries:

If the Builder has any reasonable doubt as to the accuracy or true position of the boundaries of the Site and considers that it is necessary to engage a licensed surveyor to survey and adequately peg, re-peg or delineate the Site and the position of the Works thereon, then this shall be dealt with as a variation in accordance with Clause 12 (b) or (d).

### (c) Structural Support:

If, at any time, the Builder becomes aware, based upon reasonable grounds, that the Site may not support the Works and considers it necessary to engage a practising structural engineer to inspect and certify the Site is capable of supporting the Works as proposed, then this additional cost shall be dealt with as a variation in accordance with Clause 12 (b) or (d).

### (d) Existing Hidden Structural Defects:

The Builder has not allowed for the making good of any hidden structural defects that may only become evident as a consequence of the Works. When exposed, any such defects shall be dealt with as a variation in accordance with Clause 12 (b) or (d).

### (e) Excessive Structural Costs:

If the practising structural engineer's inspection and certification shows that additional structural support costs will be incurred then these additional costs shall be dealt with in accordance with Clause 12 (b) or (d) except that where the additional costs to be incurred exceed 5% of the Contract Price, the Owner may by notice in writing terminate this Contract.

### (f) Materials or Workmanship Methods Dissimilar to Existing:

Unless otherwise specified, as materials and workmanship methods readily available and/or applicable today may be dissimilar to those in the period the existing building was built, it is agreed the intention is not to replicate existing details exactly, but to build the Works in harmony with the existing building while complying with current building regulations and practice.

### (g) Hard Digging or Other Unforeseen Requirements:

Unless otherwise specified in the Contract Documents, digging requiring the use of pick, axe, crowbar, blasting or machinery and the removal of rocks, soil, dewatering, pile and keel to sewer lines and consequent restoration and drainage of the Site or other such unforeseen requirements have not been allowed for in this Contract and shall be dealt with as a variation in accordance with Clause 12 (b) or (d).

### (h) Power and Water Not Available

In the event power and water are not available the Builder's reasonable costs and expenses incurred due to power and water not being so available, shall be dealt with in accordance with Clause 12 (b) or (d).

## 6. THE CONTRACT PRICE

- (a) The price for the Works shall be the amount set out in Item 6 of the Schedule which shall be subject to the adjustments and variations provided for in this Contract. The price so adjusted shall hereinafter be called the "Contract Price".

- (b) If there is a delay in the commencement of the Works beyond the period of FORTY FIVE (45) working days after the date of this Contract being a delay:

- (i) that is caused solely by the failure of the Owner to comply with a condition imposed on the Owner by this Contract, including the provisions of Clause 3 (b); or
- (ii) that occurs without any failure on the part of either the Owner or the Builder to comply with their obligations under this Contract

then the consequences to, and the rights and remedies of, the parties are as set out in Clause 22 (d) and (e).

- (c) If further costs are actually imposed on or incurred by the Builder as a direct consequence of a written law of the State of Western Australia or the Commonwealth of Australia or on account of an increase in any tax, duty or other charge imposed under any such law after the date of this Contract then the Builder shall be entitled to increase the Contract Price to reflect such further costs. The Builder shall notify the Owner of such further costs and specify to the Owner when such further costs are payable.

## 7. DEPOSIT AND PROGRESS PAYMENT

The Owner shall pay to the Builder the Contract Price in the following manner:

- (a) Provided that the requirements of Part 3A of the *Home Building Contracts Act 1991* have been complied with, upon the signing of this Contract the Owner shall pay to the Builder the deposit set out in Item 7 of the Schedule.
- (b) The Owner shall pay to the Builder the balance of the Contract Price by way of progress payments upon the following conditions:
  - (i) Within FIVE (5) working days of the service upon the Owner of a notice by the Builder that any of the Works described in Column 'A' of Item 7 of the Schedule have been completed the Owner shall pay to the Builder that portion of the Contract Price mentioned opposite those Works in Column 'B' of Item 7 having taken into account any adjustments in accordance with Clauses 11 and 12.
  - (ii) Where finance for the Works is being provided by a lender, the Owner shall immediately on signing this Contract authorize and direct the lender to make progress payments in accordance with Clause 7 (b) (i).
  - (iii) Any dispute as to the value of the Works completed or the state of the Works at any particular time shall be determined in accordance with Clause 18.
  - (iv) If any progress payment or final payment is not made within the times specified the Builder shall be entitled to charge interest thereon at the percentage rate per annum set forth in Item 8 of the Schedule as and from the date upon which the payment fell due until the date upon which the payment is made and the Builder may in addition to any other remedy which he or she may have against the Owner suspend the Works pending payment.

## 8. SECURITY

The Owner hereby charges the land constituting the Site with the due payments to the Builder of all the monies that will and/or may become payable hereunder and irrevocably authorizes and consents to the Builder lodging an absolute caveat in respect of the Site to protect the Builder's interests herein.

## 9. TIME FOR PERFORMANCE

- (a) Subject to this Contract the Builder shall commence the Works within the number of working days specified in Item 9 (a) of the Schedule or as soon

thereafter as may be reasonably practicable calculated from the latest of the following dates:

- (i) on which the Owner shall have complied with the conditions referred to in Clause 2;
  - (ii) on which the Owner shall have complied with any notice given by the Builder pursuant to Clause 3 (b);
  - (iii) on which the Builder is satisfied that the boundaries of the Site have been adequately delineated;
  - (iv) on which provision has been made for adequate water supply to the Site, and
  - (v) on which the Builder has received approval from all relevant authorities.
- (b) Subject to this Contract the Builder shall complete the Works (bring the Works to Practical Completion C Clause 19 (a)) by the time specified in Item 9 (b) of the Schedule. The time for completion of the Works may be extended in accordance with Clause 9 (c) in the event of delay caused by or resulting directly or indirectly from any of the following causes:
- (i) any of the following events which affect directly or indirectly access to or the condition of the Site or the Works or any person engaged on or material employed in or to be employed in or in relation to the Works, namely: acts of God, fire, explosion, earthquake, civil commotion, theft or acts of vandalism, flooding, inclement weather, strikes, industrial action, lock-outs or holidays granted in accordance with industrial awards, fires, vehicle accidents, unavailability of labour, vehicles or equipment or permits required.
  - (ii) any alterations to the Works.
  - (iii) any instruction or delay of instruction by or any omission of the Owner.
  - (iv) any deliberate and substantial prevention of or interference with the Works or the progress thereof caused by the Owner.
  - (v) any delay in the supply of materials or transport.
  - (vi) any proceedings being taken or threatened by any disputes with adjoining or neighbouring owners concerning the continuation or variation of delivery to or completion of the Works upon the Site.
  - (vii) any cessation of work pursuant to Clause 7 (b) (iv).
  - (viii) any delay in the commencement of or continuance with the Works, caused by or resulting from an order or directive of a relevant authority or proceedings before the Builders' Registration Board or the Disputes Committee, the Registrar, a mediator, an arbitrator or a Court.
  - (ix) any delay caused by proper investigation of any of the above by the Builder or the Owner.
- (c) Upon the happening of any of the events aforesaid the Builder shall be entitled to seek or make a variation by way of extension of the time for completion of the Works in accordance with the provisions of Clause 12 (b) or (d).

#### 10. POSSESSION OF THE SITE AND ACCESS TO THE WORKS

- (a) The Builder shall be given exclusive possession of the Site and shall be entitled to remain in possession until the Contract Price has been paid in full by the Owner.

- (b) Where it is agreed that the Owner shall remain in possession of part of the Site during the construction of the Works by the Builder, unless otherwise specified, the Owner shall:
  - (i) Ensure free and clear access to the Works is maintained for the Builder for all the Builder's normal working hours.
  - (ii) Before the date of possession, remove all the carpets, furniture and moveable items from the building area, and any shed, tree, plant or garden in the way of the Works.
  - (iii) Ensure the Builder always has all-weather access to the Site including being able to move all vehicles, machinery, equipment and materials necessary for the Works freely over the Site.
  - (iv) Take whatever steps necessary for the safekeeping, control and supervision of all pets that are liable to prevent easy access to the Works by the Builder.
- (c) The Owner or an "authorized person" as defined in section 26 (3) of the *Home Building Contracts Act 1991* shall be given access to the Site to carry out the relevant inspections, provided that such inspections are made during the Builder's normal working hours and such inspections do not unreasonably impede or interfere with the Works.
- (d) Neither the Owner nor any person acting on the Owner's behalf shall give or be entitled to give at any time, directions to the Builder's tradespersons or subcontractors on the Site or elsewhere relating to the Works.
- (e) After Practical Completion the Builder shall be entitled to reasonable access to the Site to complete the Builder's obligations under Clause 14.
- (f) If non-compliance with the requirements of this Clause by the Owner involves the Builder in loss or expense beyond that reasonably provided for by this Contract, the amount of such loss or expense shall be paid by the Owner to the Builder.

## 11. PROVISIONAL SUMS AND PRIME COST ITEMS

- (a) Where Provisional Sums or Prime Cost Items are included in the Contract Price, the Owner shall, within FIVE (5) working days of receiving a request from the Builder, supply to the Builder in writing, all necessary directions and selections regarding the work and/or goods comprised in any Provisional Sums and Prime Cost Items.
- (b) Provisional Sums stated in Item 11 (a) of the Schedule or detailed in the Contract Documents include:
  - (i) the total cost to the Builder for materials, subcontractor charges, delivery to the Site and installation; and
  - (ii) an additional amount calculated as the percentage set out in Item 11 of the Schedule of the cost in Clause 11 (b) (i) for the Builder's supervision, overhead and profit.
- (c) The Prime Cost Item amounts stated in Item 11 (b) of the Schedule or detailed in the Contract Documents, exclude the costs of delivery to the Site, the cost of installation, fixing, supervision, overhead and profit which are included in the Contract Price.
- (d) Upon completion of the work the subject of a Provisional Sum or on installation of an item the subject of a Prime Cost Item, or at the next progress payment notice, the Builder shall provide the Owner with an itemised statement stating the cost for the work or the items, calculated in accordance with the provisions of Clauses 11 (b) and (c) hereof, and the Contract Price shall be adjusted accordingly and paid in accordance with Clause 7.



## 12. VARIATIONS

- (a) If the Owner wishes to make any variation to the Works and/or the Contract Documents the Owner or the Owner's agent shall give the Builder a written request for such variation. The Builder may decline to agree to the variation requested but in the event that the Builder is prepared to agree to the variation:
- (i) the Builder shall prepare and give to the Owner or the Owner's agent a variation document setting out the terms of, and the cost to be incurred on account of, the variation;
  - (ii) the Owner or the Owner's agent shall sign and return the variation document to the Builder;
  - (iii) the Builder or the Builder's agent shall sign and insert in the variation document the date that the Builder signs it and forward a signed copy to the Owner or the Owner's agent as soon as is reasonably practicable thereafter and before the work to which the variation relates is commenced; and
  - (iv) the variation shall be carried out as if it were part of the Works under the Contract.
- (b) The Builder shall be entitled to vary all or any of the Works and/or the Contract Documents made necessary by:
- (i) any written direction lawfully given by a building surveyor or other person acting under a written law; or
  - (ii) circumstances that could not reasonably have been foreseen by the Builder at the time when this Contract was entered into if the Builder gives to the Owner, within the time specified in Clause 12 (c), a statement setting out the reason for, and the cost to be incurred on account of, the variation and a copy of any direction referred to in Clause 12 (b) (i)

PROVIDED THAT Clause 12 (b) (ii) shall not enable the Builder to make any variation by reason only of an increase in the costs of labour (including related overhead expenses) or materials or both, to be incurred by the Builder.

PROVIDED ALSO THAT where an Owner is given a statement by the Builder for the purposes of Clause 12 (b) (ii) and the Owner considers that the variation is not one to which Clause 12 (b) (ii) applies then the Owner may make an application to the Disputes Committee for relief under section 17 of the *Home Building Contracts Act 1991* within FOURTEEN (14) days of being given the statement.

- (c) The Builder shall give the statement referred to in Clause 12 (b) to the Owner within FOURTEEN (14) days after the Builder:
- (i) received notice of the direction under Clause 12 (b) (i); or
  - (ii) became aware or should reasonably have become aware, of the circumstances referred to in Clause 12 (b) (ii), as the case may be.
- (d) If any variation to the Works and/or the Contract Documents is required pursuant to Clause 3 (d), 4 (c), 5 (a)-(h) or 21 but not as a result of a direction under Clause 12 (b) (i) or the circumstances referred to in Clause 12 (b) (ii) then:
- (i) the Builder shall prepare and give to the Owner a variation document setting out the terms of and the cost to be incurred on account of the variation so required.
  - (ii) if the Owner signs and returns the variation document to the Builder then the provisions of Clause 12 (a) (iii) and (iv) shall also apply to the variation.

- (iii) if the Owner does not sign and return the variation document to the Builder within FIVE (5) working days of being given the variation document then the Builder shall be entitled to either carry out the work required but without any adjustment to the Contract Price or to terminate this Contract pursuant to Clause 16 (g).
- (e) The price of a "variation" shall, unless previously agreed in writing, be calculated as follows:
  - (i) If the amount is additional to the Contract Price it shall be equal to the cost of the labour and materials supplied together with other costs properly incurred as a consequence thereof plus that percentage of such additional costs as set forth in Item 11 (c) of the Schedule and shall be added to the Contract Price, and unless previously paid, shall be added to the next progress payment due after the work is done.
  - (ii) If it shall result in a decrease in cost the amount of such decrease shall be deducted from the Contract Price and shall be equal to the cost of labour and materials and other costs properly saved, and any such decrease shall be deducted from the final payment hereunder.
- (f) The Owner shall obtain the consent of the Owner's lender (if any) prior to requesting or authorising the Builder to carry out extra work or to vary the Works in any way.
- (g) The Builder may, at any time prior to the commencement of any building work that is to be performed by way of a variation pursuant to the provisions of this Contract, by notice in writing require the Owner to satisfy the Builder that the Owner is able to pay the cost to be incurred on account of the variation by production of evidence in writing and if the Owner shall fail to do so within TEN (10) working days of the receipt of such notice the Builder may terminate this Contract immediately by notice in writing given to the Owner within a further TEN (10) days.

### 13. INSURANCE

#### **NOTE: Warning to Owner**

- (i) Most building and/or contents insurance policies will not cover the Owner for damage occurring to the existing improvements and contents during construction of alterations and additions.
- (ii) Either the Owner or the Builder should take out specific insurance cover for this, as nominated in Item 10 of the Schedule.
- (iii) It is the Owner's responsibility to have any items supplied by the Owner adequately insured.

#### **INSURANCE OF EXISTING IMPROVEMENTS AND CONTENTS**

##### **(a) (i) RESPONSIBILITY OF THE OWNER**

Where indicated in the Schedule, the Owner shall insure in the joint names of the Owner and the Builder against any loss or damage to existing improvements and contents for their full replacement value, whilst the Works are being done. The Owner shall, upon request, deliver to the Builder evidence of such insurance.

Should the Owner fail to take out such insurance or, upon request, fail to deliver to the Builder evidence of such insurance, the Builder may take out the insurance and the cost shall be added to the Contract Price in accordance with Clause 12 (e).

##### **(ii) RESPONSIBILITY OF THE BUILDER**

Where indicated in the Schedule, the Builder shall insure in the joint names of the Owner and the Builder against any loss or damage to existing improvements and contents for their full replacement value, whilst the Works are being done.

Should the Builder fail to take out such insurance or, upon request, fail to deliver to the Owner evidence of such insurance, the Owner may take out the insurance and deduct the premium from the Contract Price.

- (iii) Should the parties fail to nominate the Owner or Builder in Item 10 of the Schedule, then Clause (a) (i) above shall apply.

(b) INSURANCE OF THE WORKS

In addition to any insurance cover which the Builder is obliged to obtain for the Works under Part 3A of the *Home Building Contracts Act 1991*:

- (i) The Builder shall in the joint names of the Builder and the Owner and the Owner's lender (if any) insure against damage, loss or theft to the full value under this Contract (plus the requisite amount to cover additional costs of demolition and removal of debris, architects, engineers, quantity surveyors and consultant's fees) all work done and materials and goods upon the Site whether fixed or unfixed except for goods belonging to the Owner or a third party and shall keep such work, materials and goods insured until the Works are delivered up to the Owner upon Practical Completion and upon request deliver to the Owner evidence of such insurance and such insurance shall be against all liability, loss, action, claim or proceedings in respect of fire, explosion, earthquake, flood, lightning, storm and tempest, rioting, civil commotion and the negligent or wilful act of any third party.
- (ii) Should the Builder fail to take out such insurance the Owner may insure the Works as aforesaid and the premiums paid by the Owner in relation thereto shall be deducted from the Contract Price. Upon settlement of any claim under a policy as aforesaid the Builder shall rebuild or repair the Works and replace or repair the materials or goods destroyed within a reasonable time of such settlement.

(c) INJURY TO PERSONS

The Builder shall insure against any legal liability, loss, damage, claim, demand, or proceedings due to personal injury or death of any person arising out of or in the course of the Works, other than due to the negligent act or omission by the Owner or of any person for whom the Owner may be responsible.

(d) INJURY TO PROPERTY

The Builder shall insure against any liability, loss, damage, claim, demand, or proceedings in respect of any injury or damage to any property which may arise out of building the Works, except injury or damage arising out of a negligent act or omission of the Owner or any person for whom the Owner may be responsible, except as already insured in Clause (a) above.

(e) WORKERS COMPENSATION AND SUBCONTRACTOR LIABILITY

The Builder shall insure against any liability, loss, damage, claim or proceedings whatsoever to or by any person employed by the Builder or the Builder's subcontractors in or about the Works arising at common law or by virtue of any statute relating to workers' compensation or employers' liability except where such liability, loss, damage, claim or proceeding is caused by the negligence act or omission of the Owner or any person for whom the Owner may be responsible.

(f) INSURANCE FOR OWNER SUPPLIED ITEMS

The Owner is responsible for and undertakes to have any items supplied by the Owner adequately insured against damage, loss or theft until the Owner takes possession of the Works.

#### 14. DEFECTS LIABILITY PERIOD

- (a) Except where the Owner has taken possession of the Works without the consent of the Builder and subject to Clause 14 (c) and (d), the Builder shall make good at the cost of the Builder as soon as reasonably practicable defects in the

Works notified in writing to the Builder within the period specified in Item 12 of the Schedule.

- (b) In Clause 14 (a): “defect” means a failure C
- (i) to perform the Works in a proper and workmanlike manner and in accordance with this Contract; or
  - (ii) to supply materials that are of merchantable quality and reasonably fit for the purpose for which the Owner required the Works to be performed, not being a failure for which the Builder is specifically declared by this Contract to be not liable.
- (c) The Builder’s liability under Clause 14 (a) shall be reduced to the extent of any exemptions prescribed from time to time for the purpose of section 11 (3) of the *Home Building Contracts Act 1991*.
- (d) The Builder shall not be liable to remedy any damage or rectify any defects to the Works arising from any work carried out on the Site by the Owner or the Owner’s servants and agents at any time.
- (e) In Item 12 of the Schedule of Particulars “practical completion” has the same meaning as in Clause 19 (a).

## 15. EARLY TERMINATION OF CONTRACT

- (a) In addition to their respective rights and remedies herein before contained or in equity the Builder may terminate this Contract in any of the events mentioned in Clause 16 hereof and the Owner may terminate this Contract in any of the events mentioned in Clause 17 hereof.
- (b) (i) Except as provided herein neither party shall be at liberty to terminate this Contract or exercise or enforce any other right or remedy in relation hereto whether pursuant to this Contract or at law or in equity without first giving to the other party a notice in writing specifying the matter complained of and requesting that other party to remedy it within TEN (10) working days of the service of such notice.
- (ii) If such notice is given and the other party fails within such period to remedy the matter complained of then the party giving such notice may terminate this Contract immediately.
- (c) (i) On termination, subject to any agreement to the contrary or to any determination made pursuant to Clause 18, if the Builder has begun the Works then the Builder shall be entitled to be paid for all work done and materials used or acquired by the Builder and properly chargeable to that date.
- (ii) The amount to be paid shall be the cost of the labour for all work done and materials used and acquired and all costs incurred by the Builder plus that percentage of all such costs as set forth in Item 11 (c) of the Schedule but proper allowances shall be made for all payments on account of the Contract Price already made by the Owner to the Builder.
- (iii) The Builder may claim interest at the rate specified in Item 8 of the Schedule hereto on the outstanding balance of monies found to be due and payable from and after the expiration of FIVE (5) working days from the date of termination of this contract until payment of balance of monies is received by the Builder.
- (d) The provisions of Clauses 15 (b) and (c) do not apply to a termination of this Contract pursuant to Clauses 16 (h) and 17 (d) or pursuant to the provisions of sections 4 (5), 10 (4) or 14 (3) of the *Home Building Contracts Act 1991*. In such cases this Contract may be terminated in accordance with the provisions of section 19 of that Act and the Owner or the Builder may apply to the Disputes Committee pursuant to the provisions of section 20 of that Act for repayment of any consideration given by the Owner under this Contract or for payment to the Builder in respect of any materials supplied or any home building work or other services performed by the Builder under or in relation to this Contract.

**16. EVENTS ALLOWING BUILDER TO TERMINATE**

The Builder may, in addition to any other rights under this Contract, terminate this Contract in any one of the following events:—

- (a) Substantial damage to or interference with the Works or delays to the Works or access thereto by any cause beyond the control of the Builder including (but without limiting in any way the generality thereof) water, flood, fire, storm, tempest, rioting, earthquake, civil commotion or industrial action.
- (b) Any substantial breach of the Contract by the Owner.
- (c) If the Owner shall make any assignment for the benefit of or enter into any arrangement or composition with the Owner's creditors or go into liquidation (whether voluntary or compulsory except for the purpose of reconstruction or amalgamation) or have a Receiver appointed or commit an act of bankruptcy or if a sequestration order is made against the Owner's estate.
- (d) Any deliberate and substantial prevention of or interference with the Works or progress thereof caused by the Owner.
- (e) Any failure by the Owner for TEN (10) working days after the due date thereof to pay any part of the Contract Price subject to Clause 18 of this Contract.
- (f) The entry into possession of the Works by the Owner prior to Practical Completion or without the Builder's written consent.
- (g) If the Owner fails to sign and return a variation document to the Builder given to the Owner by the Builder pursuant to Clause 12 (d) within the period referred to in Clause 12 (d).
- (h) If the circumstances specified in Clause 22 (b) or (c) occur.

**17. EVENTS ALLOWING OWNER TO TERMINATE**

The Owner may, in addition to any other rights under this Contract, terminate this Contract in any of the following events:—

- (a) Any substantial breach of this Contract by the Builder.
- (b) If the Builder shall make an assignment for the benefit of or enter into any composition with the Builder's creditors or go into liquidation (whether voluntary or compulsory except for the purpose of reconstruction or amalgamation) or commit an act of Bankruptcy or have a Receiver appointed or if a sequestration order is made against the Builder's estate.
- (c) If the Builder shall, without reasonable cause, wholly suspend the Works before Practical Completion.
- (d) If the circumstances specified in Clause 22 (b), (c) or (d) (ii) occur.

**18. DISPUTES**

- (a) In any dispute between the Owner and the Builder at any time relating to this Contract then subject to the rights of either party to apply to the Registrar or the Disputes Committee (or their successors) or any other relevant Statutory Authority, either party shall give to the other notice of such dispute, disagreement or difference and at the expiration of FIVE (5) working days thereafter and in the absence of any settlement the same shall be referred to:
  - (i) a single mediator appointed by mutual consent, or
  - (ii) a single arbitrator appointed by mutual consent, or

- (iii) in the event that neither (i) nor (ii) are satisfied within FIVE (5) working days or mediation is not successful, a single arbitrator shall be appointed by the President or the President's nominee of the Housing Industry Association Western Australian Region, provided that such arbitrator shall be a graded Arbitrator approved by the Institute of Arbitrators Western Australian Chapter.
- (b) The conduct of the Arbitrator shall be in accordance with and subject to the provisions of the *Commercial Arbitration Act 1985* and the decision of the single arbitrator appointed shall be final. The rights and obligations of the parties under this Contract shall be modified only to the extent made necessary by such arbitration.
- (c) This Contract and the parties' rights and obligations under this Contract shall in all respects be governed by the laws of the State of Western Australia and the parties hereto irrevocably submit themselves to the exclusive jurisdiction of the Courts of Western Australia.

## 19. PRACTICAL COMPLETION

- (a) Practical Completion of the Works means brought to the stage where the Works are completed except for any omissions or defects which do not prevent the Works from being reasonably capable of being used for its intended purpose.
- (b) The Builder shall notify the Owner when the Builder considers that Practical Completion has occurred and provide a detailed final account for payment which shall be paid within FIVE (5) working days of the date on which notice of Practical Completion was provided by the Builder.
- (c) Within FIVE (5) working days the Owner and the Builder or the Builder's representative shall meet at the Works to carry out a pre-handover inspection. During the pre-handover inspection the parties shall agree to a list of items which require completion or rectification. If agreement is not reached, or the said meeting does not occur, the dispute shall be dealt with pursuant to Clause 18 of this Contract.
- (d) The final payment shall be due within TEN (10) working days after Practical Completion and upon payment thereof the Builder shall hand the keys of the Works to the Owner or to such persons as the Owner may direct and on acceptance of the keys the Owner shall be deemed to have entered into possession of the Works and to have acknowledged that they have been completed by the Builder in accordance with this Contract and the Builder shall thereupon be relieved and discharged from all responsibilities under this Contract other than his obligations pursuant to Clause 14 and 19 (c).
- (e) If the Owner takes possession of the Works, permits work outside this Contract, or delivery of goods or chattels to the Works, without prior written consent of the Builder, when the Works are substantially complete but not necessarily at Practical Completion the Builder shall be discharged and relieved absolutely from all his or her obligations and responsibilities under this Contract and the unpaid balance of the Contract Price shall become due and payable immediately, together with interest thereon at the rate specified in Item 8 of the Schedule calculated from the date of taking such action until the date payment is made.
- (f) If the Owner denies access to the Builder or takes possession of the Works prior to the issue by the Builder of a Notice of Practical Completion and without prior written consent of the Builder, the Date of Practical Completion shall be the date such possession is taken.
- (g) The Works shall be at the risk of the Owner from the date the Owner takes or is entitled to take possession.

## 20. NOTICES

Any notice given to any party pursuant to the terms of this Contract shall be properly given if addressed to the party and served personally upon the party or forwarded to the party by prepaid letter or facsimile addressed to the address given herein or such other address as may be notified in writing by any party to the other. Any notice so posted shall be deemed to have been served unless contrary is shown at the time when by the ordinary course of post the notice would be delivered.

**21. SUPPLY OF MATERIALS AND UNFIXED MATERIALS ON SITE**

- (a) If the Builder is unable to obtain any materials or items selected by the Owner after the date of the Contract as and when the Builder shall require them, the Owner shall immediately, upon request from the Builder, select alternative available materials or insist on the original materials provided they are available with TEN (10) working days of being required on Site by the Builder. In either case, any delay and/or additional costs (including freight and transport insurance) in obtaining the same shall be dealt with in accordance with Clause 12 (b) or (d).
- (b) Unless otherwise specified in the Contract Documents, all materials resulting from demolition or surplus materials supplied by the Builder belong to the Builder who shall remove them from the Site before Practical Completion.
- (c) The Owner shall not supply any materials or do any work on the Site before Practical Completion, unless the Builder agrees in writing. If the Builder agrees in writing, and these materials or work need to be incorporated with the Builder's work, the owner shall supply the materials free of defects, or do the work, when required and, in any case, within FIVE (5) days of the Builder's request. If the owner does not, the Builder may supply the materials or do the work, and the cost shall be dealt with as a variation in accordance with Clause 12 (b) or (d).

Materials and goods supplied (or work done) by the Owner shall remain the responsibility of the Owner as to their suitability for their intended use.

- (d) If any item or material selected by the Owner is not available when the Builder requires, the Builder reserves the right to claim payment for the Works to date, and charge the Owner separately for such item or material when it is available.

**22. CONSEQUENCES OF NON-FULFILMENT OF CONDITIONS**

- (a) If any condition set out in Clause 2 (a) is not fulfilled solely because the Builder has failed to comply with the Builder's obligations under Clause 2 (c), this Contract is not affected but remains in force on the same terms and conditions except as otherwise agreed between the parties.
- (b) If any condition set out in Clause 2 (a) is not fulfilled solely because the Owner has failed to comply with the Owner's obligations under Clause 2 (d) this Contract remains in force on the same terms and conditions until the parties agree otherwise or either party terminates this Contract in accordance with Clause 16 or 17 as the case may be, but subject to the provisions of Clause 22 (d).
- (c) If any condition set out in Clause 2 (a) is not fulfilled and both the Owner and the Builder have, or neither the Owner nor the Builder has, failed to comply with their respective obligations under Clause 2 (c) and (d), this Contract remains in force on the same terms and conditions until the parties agree otherwise or either party terminates the contract in accordance with Clause 16 or 17 as the case may be, but subject to the provisions of Clause 22 (d).
- (d) Where Clause 22 (b) or (c) or Clause 6 (b) applies—
  - (i) the Builder may by notice in writing to the Owner—
    - (A) increase the Contract Price by an amount set out in the notice; and
    - (B) specify when any increased amount is payable, which must be either—
      - (1) not later than TEN (10) working days after the notice is given; or
      - (2) at the time of the next progress payment;
  - (ii) if the amount of an increase exceeds FIVE (5)% of the Contract Price, the Owner may terminate this Contract in accordance with Clause 17 within TEN (10) working days after receipt of notice under paragraph (i) of this sub-Clause; and

- (iii) if the Owner so terminates this Contract, the Owner is liable to compensate the Builder for the reasonable costs inclusive of supervision, overhead and margin incurred by the Builder up to the date of termination.
- (e) (i) If the Owner considers that the amount of a price increase notified under Clause 22 (d) (i) is excessive or unjustified the Owner may apply to the Disputes Committee, within TEN (10) working days after receipt of a notice under that Clause, for a review of that amount.
- (ii) On a review under this sub-Clause the Builder is required to show that the price has been increased to reflect actual increases in costs between the date of this Contract and the date of the notice under Clause 22 (d) (i).
- (iii) On a review under this sub-Clause the Disputes Committee may confirm, vary or disallow the amount of the price increase, and this Contract shall have effect in accordance with the Disputes Committee's decision.

## 23. ASSIGNMENT

- (a) Each of the parties to the Contract hereby specifically agree not to assign their interest in this Contract without the prior written consent of the other.
- (b) The Builder may at the option of the Builder sub-contract the whole or any portion of the Works but any such sub-contracting shall not relieve the Builder from any responsibility or obligation stated herein.

## 24. SEVERABILITY

- (a) If, in consequence of an item in the Schedule not being completed, any Clause contained herein is held by a Court to be uncertain and thus void, that Clause shall be deemed to have been severed from this Contract and shall not invalidate the Contract.
- (b) To the extent that any one or more of the provisions contained in this Contract is prohibited by or is void pursuant to any applicable law, that provision or each of them shall to that extent be ineffective without invalidating or modifying the remaining provisions of this Contract which shall continue in full force and effect as if each provision so prohibited had not been included in this Contract as from its commencement.

## 25. INTERPRETATION

In this Contract words denoting the singular shall include the plural and vice versa and words denoting the masculine gender shall include the feminine and neuter genders and vice versa and words denoting persons shall include corporate bodies. A reference to "Owner" or "Builder" includes each of their respective heirs, successors and assigns. "Working days" means Monday to Friday but excluding any day that is a public holiday in the area of the Site or throughout the State of Western Australia. "Registrar" means the registrar appointed under the *Builders' Registration Act 1939*. "Disputes Committee" means the Building Disputes Committee established by section 26 of the *Builders' Registration Act 1939*. Headings in this Contract are deemed not to be part hereof and are not to be used in the interpretation or construction hereof. A reference to statutes or regulations includes any statutory re-enactment or amendment.

## 26. APPOINTMENT AND AUTHORITY OF OWNER'S AGENT

The Owner (and where there are more than one then each of them) hereby appoints the person or persons named as the Owner's Agent in Item 2 of the Schedule as the authorized agent of the Owner to make and sign all variations to the Contract Documents and the Works and the Owner shall be bound by all such variations. If more than one person is named as the Owner's Agent then each of them shall be an individually authorized agent unless the contrary intention is indicated in Item 2 of the Schedule.



- (iii) if the Owner so terminates this Contract, the Owner is liable to compensate the Builder for the reasonable costs inclusive of supervision, overhead and margin incurred by the Builder up to the date of termination.
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M. C. WAUCHOPE, Clerk of the Executive Council.