

TERMS OF ENGAGEMENT

1. PRIVATE BUILDING SURVEYOR FUNCTIONS

1.1 The Private Building Surveyor Functions include, as relevant for the Project:

- 1.1.1 assessing the building permit application;
- 1.1.2 the issuing of a building permit;
- 1.1.3 the carrying out of building inspections under Part 4 of the Act;
- 1.1.4 the issuing of an occupancy permit and temporary approvals under Part 5 of the Act.
- 1.1.5 The issuing of certifications, notices and/or reports as required by the Act; and
- 1.1.6 Issuance of approval for building work.

1.2 The Private Building Surveyor Functions exclude:

- 1.2.1 preparation of the design of the Project;
- 1.2.2 matters pertaining to Building Quality;
- 1.2.3 any guarantee by the Building Surveyor that the Project will be granted a building permit or occupancy permit or that it will be considered compliant in any inspections undertaken;
- 1.2.4 any act or activity deemed by the Building Surveyor to be contrary to the requirements of the Act, the *Building Regulations 2018* or the National Construction Code, as relevant.
- 1.2.5 paying the applicable building levy to the Victorian Building Authority prior to the building permit being issued.

The Client acknowledges the following:

- 1.3 That the Building Surveyor is subject to the requirements of the Act. As a result, the Client understands that the Building Surveyor may be required to refuse the Client's application or otherwise not grant a permit sought by the Client.
- 1.4 That the Building Surveyor may engage in any other business, occupation or activity during the Term, provided that this engagement does not detrimentally affect the performance of the Private Building Surveyor Functions.
- 1.5 If the Client engages another person to provide services substantially the same as the Private Building Surveyor Functions in respect of the Project, then the Building Surveyor may terminate this Agreement in accordance with Law.
- 1.6 It is not the role of the Building Surveyor to supervise the project.
- 1.7 The Client agrees that they accept the terms and conditions contained in this Agreement.

2. DELIVERY OF THE PRIVATE BUILDING SURVEYOR FUNCTIONS

- 2.1 The delivery of the Private Building Surveyor Functions will occur when any Private Building Surveyor Functions are exercised for the Client.
- 2.2 The Building Surveyor may subcontract or licence all or part of its obligations under this Agreement.

3. FEE

- 3.1 The Fee payable for the Private Building Surveyor Functions is, at the Building Surveyor's discretion, either:
 - 3.1.1 as indicated on invoices provided by the Building Surveyor to the Client in respect of Private Building Surveyor Functions supplied; or
 - 3.1.2 the Building Surveyor's quoted Fee (subject to clause 3.2) which is binding upon the Building Surveyor provided that the Client shall accept the quote in writing within one hundred and eighty (180) days of receipt.
- 3.2 The Building Surveyor reserves the right to change the Fee in the event of a variation to the scope of work for the Private Building Surveyor Functions with prior notice to the Client. Any variation from the plan of scheduled works or specifications (including, but not limited to, any variation due to unforeseen circumstances, or as a result of increases to the Building Surveyor in the cost of materials and labour) will be charged for on the basis of the Building Surveyor's fee proposal in the Schedule as agreed upon by the parties and will be shown as variations on the invoice. Payment for all variations must be made in full at their time of completion. If a party disputes a variation, the matter must be dealt with under clause 13.
- 3.3 Payment of an invoice is required within fourteen (14) days of issue.
- 3.4 Payment will be made by cash, or by cheque, or by bank cheque, or by direct credit, or by any other method as agreed to between the Client and the Building Surveyor.
- 3.5 Receipt by the Building Surveyor of any form of payment other than cash does not constitute payment until that payment has been honoured, cleared or recognised by the building surveyor.
- 3.6 GST, other taxes, duties, disbursements and applicable government and council fees and charges will be added to the Fee other than where they are expressly included in the Fee.

4. INTELLECTUAL PROPERTY AND DATA

- 4.1 Nothing in this Agreement affects the Intellectual Property Rights of either party, except as set out in this clause.
- 4.2 The Client grants the Building Surveyor an unrestricted, royalty free licence to use or manipulate all Intellectual Property Rights in any Data which the Client provides to the Building Surveyor to the extent reasonably necessary for the Building Surveyor to perform the Private Building Surveyor Functions.
- 4.3 The Client warrants that any Data provided by it to the Building Surveyor will not infringe the Intellectual Property Rights of any person. The Client indemnifies the Building Surveyor against any direct loss, costs, expenses, demands or liability arising out of a claim by a third party against the Surveyor alleging that such Data infringes any such Intellectual Property Rights.
- 4.4 Each party must do all things and execute all documents necessary or desirable as agreed upon by the parties for the transactions contemplated by this clause.

5. INDEMNITY AND EXCLUSION OF LIABILITY

- 5.1 To the maximum extent permitted by law:
 - 5.1.1 the Building Surveyor is not liable to the Client, whether in contract, tort, equity, under statute or otherwise, for any:
 - 5.1.1.1 loss or damage incurred if the Services are not completed within the Project timeframes unless the delay is caused by the negligent act or omission of the Building Surveyor; or
 - 5.1.1.2 consequential loss;
 - 5.1.2 the Building Surveyor is not liable to the Client whether in contract, tort, equity, under statute or otherwise, for any loss or damage resulting from a breach by the Client of any terms of this agreement;
 - 5.1.3 the Building Surveyor's liability to the Client, whether in contract, tort, equity, under statute or otherwise, is limited to:
 - 5.1.3.1 an amount equal to the Fees received by the Building Surveyor under this Agreement; or
 - 5.1.3.2 the resupply of the services provided by the Building Surveyor under this Agreement

5.2 Notwithstanding any other provision in this Agreement, neither party is liable to the other party, nor is it required to indemnify the other party, for any loss or damage suffered by the other party or for any claim against the other party (howsoever arising) for economic, indirect or consequential losses of any kind whatsoever.

5.3 The Client indemnifies the Building Surveyor and its employees, officers and contractors against all claims, demands, expenses, loss or damage in respect of loss or damage to any property, or the death of or personal injury to any person, caused or contributed to by the Client, a breach by the Client of this Agreement, a wilful unlawful or negligent act or omission of the Client, and any claim action or proceeding by a third party against the Building Surveyor or its employees officers and contractors caused or contributed to by the Client.

5.4 This indemnity is reduced by the extent to which the Building Surveyor contributes to the event giving rise to the claim for the indemnity.

5.5 The Client releases and holds harmless the Building Surveyor against all claims, demands, expenses, loss or damage arising in connection with the Client's reliance on, or use of, any Private Building Surveyor Functions, including advice, given to the Client by the Building Surveyor in a manner which is not contemplated or authorised by the Act or otherwise not in accordance with any exclusions or assumptions given by the Building Surveyor.

6. MUTUAL WARRANTIES

Each party represents and warrants to the other that as at the date of this Agreement:

- 6.1 All actions, conditions and things required to be taken, fulfilled and done by it in order to enable it to enter into, exercise its rights and perform its obligations under this Agreement have been done; and
- 6.2 All Authorisations required for its entry into, exercise of its rights under, and performance of its obligations under this Agreement have been obtained.

7. CLIENT WARRANTIES AND OBLIGATIONS

7.1 The Client warrants:

- 7.1.1 that any Data provided to the Building Surveyor is accurate and complete in all respects;
- 7.1.2 that, in performing the Private Building Surveyor Functions, the Surveyor acts with the Client's authority;
- 7.1.3 that no other person has been appointed to perform the Private Building Surveyor Functions in relation to the Project.

7.2 The Client must:

- 7.2.1 provide all information required by the Building Surveyor within the time specified by the Building Surveyor to enable the Building Surveyor to perform the Private Building Surveyor Functions;
- 7.2.2 provide all information required by the Building Surveyor within the time specified by the Building Surveyor to enable the Building Surveyor to perform the Private Building Surveyor Functions;
- 7.2.3 give the Building Surveyor such access to the Project and any relevant site as is required by the Building Surveyor to perform the Private Building Surveyor Functions.

8. BUILDING SURVEYOR WARRANTIES

8.1 The Building Surveyor warrants:

- 8.1.1 that it holds the prescribed qualifications and prescribed experience under the Act;
- 8.1.2 that it holds the required insurance under the Act
- 8.1.3 that it holds the required certificate of registration for a particular category or class of building surveyor authorising it to carry out the Services in accordance with the Act;
- 8.1.4 if it is a building employee, that it is licensed and its licence authorises it to carry out the Services, and it is carrying out the Services in the course of its employment pursuant to the Act;
- 8.1.5 that it complies with the personal probity and financial probity requirements under the Act;
- 8.1.6 that in the provision of Services, it will comply with the provisions of the code of conduct that applies to building practitioners.

FORCE MAJEURE

- 9.1 If a Force Majeure Event causes delay or failure by a party to perform its obligations under this Agreement:

<p>9.1.1 neither party is liable for such delay or failure; and</p> <p>9.1.2 all obligations of a party under this Agreement are suspended until the Force Majeure Event ceases to apply.</p> <p>9.2 A party which is, by reason of a Force Majeure Event, unable to perform any obligation or condition required by this Agreement must:</p> <p>9.2.1 notify the other party as soon as possible giving:</p> <p>9.2.1.1 reasonably full particulars of the Force Majeure Event;</p> <p>9.2.1.2 the date of commencement of the Force Majeure Event and an estimate of the time required to enable it to resume full performance of its obligations; and</p> <p>9.2.1.3 where possible, the means proposed to be adopted to remedy or abate the Force Majeure Event;</p> <p>9.2.2 use all reasonable diligence and employ all reasonable means to remedy or abate the Force Majeure Event as soon as possible;</p> <p>9.2.3 resume performance as soon as possible after termination of the Force Majeure Event or after the Force Majeure Event abates to an extent which permits resumption of performance;</p> <p>9.2.4 notify the other party when the Force Majeure Event terminates or abates to an extent which permits resumption of performance; and</p> <p>9.2.5 notify the other party when resumption of performance occurs.</p> <p>9.3 If a delay or failure under this clause exceeds 60 days, either party may immediately terminate this Agreement by notice to the other party.</p> <p>10. TERMINATION</p> <p>10.1 Pursuant to section 81 of the Act, this Agreement cannot be terminated without the prior written consent of the Victorian Building Authority.</p> <p>10.2 Notwithstanding any other provision of this Agreement, the Client must pay the Building Surveyor the Fee within fourteen (14) days of the termination of this Agreement, or such part of the Fee which is, at that time, unpaid.</p> <p>10.3 Termination of this Agreement under this clause does not affect any accrued rights or remedies of either party.</p> <p>11. CONFIDENTIAL INFORMATION</p> <p>11.1 Subject to the Act, each party agrees that it will not use any Confidential Information of the other party or allow any Confidential Information of the other party to be used for any purpose, except for the purposes of and in the manner contemplated by this Agreement, and agrees that it will:</p> <p>11.1.1 keep confidential;</p> <p>11.1.2 take reasonable steps to ensure that the party's officers and employees do not disclose to a third party;</p> <p>11.1.3 maintain proper and secure custody of; and</p> <p>11.1.4 not use or reproduce in any form,</p> <p>any Confidential Information belonging to the other party.</p> <p>12. INSURANCE</p> <p>12.1 The Building Surveyor must maintain at all times during the Term all insurances required by Law or this Agreement.</p> <p>12.2 The Building Surveyor must produce evidence of those insurances to the Client upon reasonable request.</p> <p>12.3 The Building Surveyor must not allow any act or omission which would make any such policy of insurance void or unenforceable.</p> <p>13. DISPUTE RESOLUTION</p> <p>13.1 General</p> <p>13.1.1 A party must not commence arbitration or court proceedings (except for urgent equitable or injunctive relief) in respect of a dispute under this Agreement, unless it first attempts to resolve the dispute by negotiation and mediation under this clause.</p> <p>13.1.2 A party claiming that a dispute has arisen under this Agreement must give written notice to the other party specifying the nature and details of the dispute.</p>	<p>13.2 Negotiation</p> <p>13.2.1 On receipt of that notice by the other party, the parties must negotiate in good faith to resolve the dispute.</p> <p>13.2.2 If the parties are unable to resolve the dispute within 10 Business Days, they must promptly refer the dispute:</p> <p>13.2.2.1 in the case of the Client to the Client's Representative; and</p> <p>13.2.2.2 in the case of the Building Surveyor to the Building Surveyor's Representative.</p> <p>13.2.3 Those persons must meet to resolve the dispute and must be authorised to resolve the dispute.</p> <p>13.3 Mediation</p> <p>13.3.1 If those persons are unable to resolve the dispute within 10 Business days of referral, a party may refer the dispute for mediation under the mediation rules of the Resolution Institute to:</p> <p>13.3.1.1 a mediator agreed by the parties; or</p> <p>13.3.1.2 if the parties are unable to agree a mediator within five Business Days, a mediator nominated by the Resolution Institute.</p> <p>13.3.2 The role of a mediator is to assist in negotiating a resolution of the dispute. A mediator may not make a decision that is binding on a party unless that party has agreed in writing.</p> <p>13.3.3 Any information or documents disclosed by a party under this clause:</p> <p>13.3.3.1 must be kept confidential; and</p> <p>13.3.3.2 may not be used except to attempt to resolve the dispute.</p> <p>13.3.4 Each party must bear its own mediation costs. The parties must bear equally the costs of any mediator.</p> <p>13.4 Performance</p> <p>If possible, each party must perform its obligations under this Agreement during negotiations, mediation and arbitration proceedings.</p> <p>14. MISCELLANEOUS</p> <p>14.1 Entire Agreement</p> <p>This Agreement:</p> <p>14.1.1 constitutes the entire agreement between the parties about its subject matter;</p> <p>14.1.2 supersedes any prior understanding, agreement, condition, warranty, indemnity or representation about its subject matter.</p> <p>14.2 Waiver</p> <p>A waiver of a provision of or right under this Agreement must be in writing signed by the party giving the waiver and is effective only to the extent set out in the written waiver.</p> <p>14.3 Exercise of power</p> <p>14.3.1 The failure, delay, relaxation or indulgence by a party in exercising a power or right under this Agreement is not a waiver of that power or right.</p> <p>14.3.2 An exercise of a power or right under this Agreement does not preclude a further exercise of it or the exercise of another right or power.</p> <p>14.4 Survival</p> <p>Each indemnity, obligation of confidence and other term capable of taking effect after the expiration or termination of this Agreement, remains in force after the expiration or termination of this Agreement.</p> <p>14.5 Governing law</p> <p>This Agreement is governed by the law in Victoria and is subject to the jurisdiction of the Courts in Victoria.</p> <p>14.6 Consumer Law</p> <p>14.6.1 Nothing in this Agreement is intended to have the effect of contracting out of any applicable provisions of the <i>Competition and Consumer Act 2010</i> (Cth) or the <i>Australian Consumer Law and Fair Trading Act 2012</i> (Vic) (including any substitute to those Acts or re-enactment thereof), except to the extent permitted by those Acts where applicable.</p>
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<p>14.6.2 Where the Client buys Private Building Surveyor Functions as a consumer these terms and conditions shall be subject to any laws or legislation governing the rights of consumers and shall not affect the consumer's statutory rights.</p> <p>15. NOTICES</p> <p>15.1 A notice, demand, consent, approval or communication under this Agreement (Notice) must be:</p> <p>15.1.1 in writing, in English and signed by a person authorised by the sender; and</p> <p>15.1.2 hand delivered or sent by prepaid post or email to the recipient's address or email address specified in the Schedule, as varied by any Notice given by the recipient to the sender.</p> <p>15.2 A Notice is deemed to be received:</p> <p>15.2.1 if hand delivered, on delivery;</p> <p>15.2.2 if sent by prepaid post, ten Business Days after posting (or fourteen Business Days after posting if posting to or from a place outside Australia);</p> <p>15.2.3 if sent by email, at the time deemed to be the time of receipt under the Electronic Transactions (Victoria) Act 2000 (Vic) or the Electronic Transactions Act 1999 (Cth) if the notice was being given under a law of the Commonwealth of Australia.</p> <p>15.2.4 However, if the Notice is deemed to be received on a day that is not a Business Day or after 5:00pm, the Notice is deemed to be received at 9:00am on the next Business Day.</p> <p>16. DEFINITIONS AND INTERPRETATION</p> <p>16.1 Definitions</p> <p>In this Agreement:</p> <p>16.1.1 Act means the <i>Building Act 1993</i> (Vic)</p> <p>16.1.2 Authorisation means any authorisation, Agreement approval, licence, permit, consent, qualification, accreditation, filing, registration, certificate, resolution, direction, declaration or exemption and any renewal and variation of them by or with a Governmental Agency.</p> <p>16.1.2 Building Quality means any matter that could or might be a defective item with respect to any contract between the Client and another party which defines the standards of work to be achieved pursuant to that contract with respect to the Project but does not include matters which relate to conformance by the Project to technical standards including the National Construction Code.</p> <p>16.1.3 Building Surveyor means the person identified as such on the front page of this Agreement.</p> <p>16.1.4 Business Day means a day which is not a weekend or public holiday in Victoria.</p> <p>16.1.5 Confidential Information means any documentation or information of a confidential nature supplied by either party to the other in connection with this Agreement and includes all scientific, technical, manufacturing, performance, sales, financial, commercial, contractual or marketing information possessed by a party but excludes any documentation or information which has been previously published or otherwise disclosed to the general public or is required to be disclosed by law.</p> <p>16.1.6 Data means information directly or indirectly relating to this Agreement and/or the Private Building Surveyor Functions and includes software (including source code and object code versions) manuals, diagrams, graphs, charts, projections, specifications, estimates, records, concepts, documents, accounts, plans, formulae, designs, methods, techniques, processes, supplier lists, price lists, market research, information, correspondence, letters, warranties and manufacturer's information and data sheets, personal identification numbers (PINS) and access codes for security and alarm systems, and papers of every description including all copies of and extracts from them.</p> <p>16.1.7 Fee is defined in clause 3.</p> <p>16.1.8 Force Majeure Event means an event beyond the reasonable control of the parties which precludes a party from performing on time an obligation under this Agreement. Such circumstances include:</p>	<p>16.1.8.1 acts of God, lightning strikes, earthquakes, floods, storms, explosions, fires and any natural disaster; and</p> <p>16.1.8.2 acts of war, acts of public enemies, terrorism, riots, civil commotion, malicious damage, sabotage and revolution.</p> <p>16.1.9 Intellectual Property Rights includes property and rights in respect of or in connection with copyright (including future copyright and rights in the nature of or analogous to copyright), know-how, trade mark, service mark, design, inventions (including patents), semi-conductor or circuit layout rights, trade, business or company names, or other proprietary rights, or any rights to registration of such rights (including all renewals and extensions) whether created before or on or after this Agreement.</p> <p>16.1.10 Law means any statute, regulation, order, rule, subordinate legislation or other document enforceable under any statute, regulation, order, rule or subordinate legislation.</p> <p>16.1.11 Private Building Surveyor Functions is defined in Clause 1 to this Agreement.</p> <p>16.1.12 Term means the period starting on the date that the client accepts the terms and conditions of this Agreement as per clause 1 and concluding upon the completion of the Private Building Surveyor Functions or termination of this Agreement, whichever occurs first.</p> <p>16.2 Interpretation</p> <p>In this Agreement, unless the context otherwise requires:</p> <p>16.2.1 headings do not affect interpretation, singular includes plural and plural includes singular and words of one gender include any gender;</p> <p>16.2.2 a reference to a party includes its executors, administrators, successors and permitted assigns;</p> <p>16.2.3 a reference to a person includes a partnership, corporation, association, government body and any other entity;</p> <p>16.2.4 a reference to this Agreement includes any schedules and annexures to this Agreement;</p> <p>16.2.5 an Agreement, representation, warranty or indemnity by two or more parties (including where two or more persons are included in the same defined term) binds them jointly and severally;</p> <p>16.2.6 an Agreement, representation, warranty or indemnity in favour of two or more parties (including where two or more persons are included in the same defined term) is for the benefit of them jointly and severally;</p> <p>16.2.7 a reference to legislation includes any amendment to it, any legislation substituted for it, and any subordinate legislation made under it;</p> <p>16.2.8 a provision is not construed against a party only because that party drafted it;</p> <p>16.2.9 an unenforceable provision or part of a provision may be severed, and the remainder of this Agreement continues in force, unless this would materially change the intended effect of this Agreement;</p> <p>16.2.10 the meaning of general words is not limited by specific examples introduced by 'including', 'for example' or similar expressions;</p> <p>16.2.11 an expression defined in the Act has the meaning given by that Act at the date of this Agreement;</p> <p>15.2.12 an expression defined in the Corporations Act 2001 (Cth) has the meaning given by the Act at the date of this Agreement; and</p> <p>15.2.13 an expression defined in the A New Tax System (Goods and Service Tax) Act 1999 (Cth) has the meaning given by that Act at the date of this Agreement</p>
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