

Aardcure Concrete Coatings Pty Ltd T/A Arrunga Surface Solutions & Aardcure Concrete – Terms & Conditions of Trade

1. **Definitions**
- 1.1 "Contractor" shall mean Aardcure Concrete Coatings Pty Ltd ATF Aardcure Unit Trust T/A Arrunga Surface Solutions & Aardcure Concrete, its successors and assigns or any person acting on behalf of and with the authority of Aardcure Concrete Coatings Pty Ltd ATF Aardcure Unit Trust T/A Arrunga Surface Solutions & Aardcure Concrete.
- 1.2 "Client" shall mean the Client (or any person acting on behalf of and with the authority of the Client) as described in any quotation, work authorisation or other form as provided by the Contractor to the Client.
- 1.3 "Guarantor" means that person (or persons) who agrees to be liable for the debts of the Client on a principal debtor basis.
- 1.4 "Equipment" shall mean all Equipment including any accessories supplied on hire by the Contractor to the Client (and where the context so permits shall include any supply of services). The Equipment shall be as described on the invoices, quotation, authority to hire, or any other work authorisation form provided by the Contractor to the Client.
- 1.5 "Goods" shall mean all Goods supplied by the Contractor to the Client (and where the context so permits shall include any supply of Services as hereinafter defined) and are as described on the invoices, quotation, work authorisation or any other forms as provided by the Contractor to the Client.
- 1.6 "Services" shall mean all Services supplied by the Contractor to the Client and includes any advice or recommendations (and where the context so permits shall include any supply of Goods as defined above).
- 1.7 "Price" shall mean the Price payable for the Goods as agreed between the Contractor and the Client in accordance with clause 4 of this contract.
2. **The Competition and Consumer Act 2010 ("CCA") and Fair Trading Acts ("FTA")**
- 2.1 Nothing in this agreement is intended to have the effect of contracting out of any applicable provisions of the CCA or the FTA in each of the States and Territories of Australia (including any substitute to those Acts or re-enactment thereof), except to the extent permitted by those Acts where applicable.
- 2.2 Where the Client buys Goods 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.
3. **Acceptance**
- 3.1 Any instructions received by the Contractor from the Client for the supply of Goods and/or the Client's acceptance of Goods supplied by the Contractor shall constitute acceptance of the terms and conditions contained herein.
- 3.2 Where more than one Client has entered into this agreement, the Clients shall be jointly and severally liable for all payments of the Price.
- 3.3 Upon acceptance of these terms and conditions by the Client the terms and conditions are binding and can only be amended with the written consent of the Contractor.
- 3.4 The Client shall give the Contractor not less than fourteen (14) days prior written notice of any proposed change of ownership of the Client or any change in the Client's name and/or any other change in the Client's details (including but not limited to, changes in the Client's address, facsimile number, or business practice). The Client shall be liable for any loss incurred by the Contractor as a result of the Client's failure to comply with this clause.
- 3.5 Goods are supplied by the Contractor only on the terms and conditions of trade herein to the exclusion of anything to the contrary in the terms of the Client's order notwithstanding that any such order is placed on terms that purport to override these terms and conditions of trade.
4. **Price and Payment**
- 4.1 At the Contractor's sole discretion the Price shall be either:
 - (a) as indicated on invoices provided by the Contractor to the Client in respect of Goods supplied; or
 - (b) the Contractor's quoted Price (subject to clause 4.2) which shall be binding upon the Contractor provided that the Client shall accept the Contractor's quotation in writing within thirty (30) days.
- 4.2 The Contractor reserves the right to change the Price in the event of a variation to the Contractor's quotation. 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 Contractor in the cost of materials and labour) will be charged for on the basis of the Contractor's quotation and will be shown as variations on the invoice. Payment for all variations shall be made in full at their time of completion.
- 4.3 The Contractor may submit detailed progress payment claims in accordance with the Contractor's specified payment schedule. Such payment claims may include the reasonable value of authorised variations and the value of any materials delivered to the site but not yet installed.
- 4.4 At the Contractor's sole discretion:
 - (a) payment shall be due on delivery of the Goods; or
 - (b) payment for approved Clients shall be made by instalments in accordance with the Contractor's payment schedule; or
 - (c) payment for approved Clients shall be due seven (7) days following the end of the month in which a statement is posted to the Client's address or address for notices.
- 4.5 Time for payment for the Goods shall be of the essence and will be stated on the invoice or any other forms. If no time is stated then payment shall be due thirty (30) days following the date of the invoice.
- 4.6 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 Contractor.
- 4.7 GST and other taxes and duties that may be applicable shall be added to the Price except where they are expressly included in the Price.
5. **Delivery of Goods**
- 5.1 At the Contractor's sole discretion delivery of the Goods shall take place when:
 - (a) the Client takes possession of the Goods at the Contractor's address; or
 - (b) the Client takes possession of the Goods at the Client's nominated address (in the event that the Goods are delivered by the Contractor or the Contractor's nominated carrier); or
 - (c) the Client's nominated carrier takes possession of the Goods in which event the carrier shall be deemed to be the Client's agent.
- 5.2 At the Contractor's sole discretion the costs of delivery are:
 - (a) included in the Price; or
 - (b) in addition to the Price; or
 - (c) for the Client's account.
- 5.3 The Client shall make all arrangements necessary to take delivery of the Goods whenever they are tendered for delivery. In the event that the Client is unable to take delivery of the Goods, as arranged then the Contractor shall be entitled to charge a reasonable fee for delivery.
- 5.4 Delivery of the Goods to a third party nominated by the Client is deemed to be delivery to the Client for the purposes of this agreement.
- 5.5 The Client shall take delivery of the Goods tendered notwithstanding that the quantity so delivered shall be either greater or less than the quantity purchased provided that:
 - (a) such discrepancy in quantity shall not exceed five percent (5%); and
 - (b) the Price shall be adjusted pro rata to the discrepancy.
- 5.6 Where the Client expressly requests the Contractor to deliver the Goods to a third party, the Contractor shall not be liable for any loss or damage to the Goods.
- 5.7 The Contractor shall not be liable for any loss or damage whatsoever due to failure by the Contractor to deliver the Goods (or any of them) promptly or at all, where due to circumstances beyond the control of the Contractor.
6. **Risk**
- 6.1 If the Contractor retains ownership of the Goods nonetheless, all risk for the Goods passes to the Client on delivery.
- 6.2 If any of the Goods are damaged or destroyed following delivery but prior to ownership passing to the Client, the Contractor is entitled to receive all insurance proceeds payable for the Goods. The production of these terms and conditions by the Contractor is sufficient evidence of the Contractor's rights to receive the insurance proceeds without the need for any person dealing with the Contractor to make further enquiries.
- 6.3 Where the Client expressly requests the Contractor to leave Goods outside the Contractor's premises for collection or to deliver the Goods to an unattended location then such Goods shall be left at the Client's sole risk and it shall be the Client's responsibility to ensure the Goods are insured adequately or at all.
7. **Access**
- 7.1 The Client shall ensure that the Contractor has clear and free access to the work site at all times to undertake the works. The Contractor shall not be liable for any loss or damage to the site (including, without limitation, damage to pathways, driveways and concrete or paved or grassed areas) unless due to the negligence of the Contractor.
8. **Title**
- 8.1 The Contractor and the Client agree that ownership of the Goods shall not pass until:
 - (a) the Client has paid the Contractor all amounts owing for the particular Goods; and
 - (b) the Client has met all obligations due by the Client to the Contractor in respect of all contracts between the Contractor and the Client.
- 8.2 Receipt by the Contractor of any form of payment other than cash shall not be deemed to be payment until that form of payment has been honoured, cleared or recognised and until then the Contractor's ownership or rights in respect of the Goods shall continue.
- 8.3 It is further agreed that:
 - (a) where practicable the Goods shall be kept separate and identifiable until the Contractor shall have received payment and all other obligations of the Client are met; and
 - (b) until such time as ownership of the Goods shall pass from the Contractor to the Client the Contractor may give notice in writing to the Client to return the Goods or any of them to the Contractor. Upon such notice the rights of the Client to obtain ownership or any other interest in the Goods shall cease; and
 - (c) the Contractor shall have the right of stopping the Goods in transit whether or not delivery has been made; and
- (d) if the Client fails to return the Goods to the Contractor then the Contractor or the Contractor's agent may (as the invitee of the Client) enter upon and into land and premises owned, occupied or used by the Client, or any premises where the Goods are situated and take possession of the Goods; and
- (e) the Client is only a bailee of the Goods and until such time as the Contractor has received payment in full for the Goods then the Client shall hold any proceeds from the sale or disposal of the Goods in trust for the Contractor and the Client owes to the Contractor for the Goods, on trust for the Contractor; and
- (f) the Client shall not deal with the money of the Contractor in any way which may be adverse to the Contractor; and
- (g) the Client shall not charge the Goods in any way nor grant nor otherwise give any interest in the Goods while they remain the property of the Contractor; and
- (h) the Contractor can issue proceedings to recover the Price of the Goods sold or disposed of by the Client and the Client agrees to indemnify the Contractor and until such time that ownership in the Goods passes to the Client, if the Goods are converted into other products, the parties agree that the Contractor will be the owner of the end products.
9. **Personal Property Securities Act 2009 ("PPSA")**
- 9.1 In this clause:
 - (a) financing statement has the meaning given to it by the PPSA;
 - (b) financing charge statement has the meaning given to it by the PPSA;
 - (c) security agreement means the security agreement under the PPSA created between the Client and the Contractor by these terms and conditions; and
 - (d) security interest has the meaning given to it by the PPSA.
- 9.2 Upon assenting to these terms and conditions in writing the Client acknowledges and agrees that these terms and conditions:
 - (a) constitute a security agreement for the purposes of the PPSA; and
 - (b) create a security interest in:
 - (i) all Goods previously supplied by the Contractor to the Client (if any);
 - (ii) all Goods that will be supplied in the future by the Contractor to the Client.
- 9.3 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 the Contractor may reasonably require to:
 - (i) register a financing statement or financing charge 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 9.3(a)(i) or 9.3(a)(ii);
 - (b) indemnify, and upon demand reimburse, the Contractor for all expenses incurred in registering a financing statement or financing charge statement on the Personal Property Securities Register established by the PPSA or releasing any Goods charged to the Client;
 - (c) not register a financing charge statement in respect of a security interest without the prior written consent of the Contractor;
 - (d) not register, or permit to be registered, a financing statement or a financing charge statement in relation to the Goods in favour of a third party without the prior written consent of the Contractor; and
 - (e) immediately advise the Contractor of any material change in its business practices of selling the Goods which would result in a change in the nature of proceeds derived from such sales.
- 9.4 The Contractor 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.
- 9.5 The Client hereby waives its rights to receive notices under sections 95, 118, 121(4), 130, 132(3)(d) and 132(4) of the PPSA.
- 9.6 The Client waives its rights as a grantor and/or a debtor under sections 142 and 143 of the PPSA.
- 9.7 Unless otherwise agreed to in writing by the Contractor, the Client waives its right to receive a verification statement in accordance with section 157 of the PPSA.
- 9.8 The Client shall unconditionally ratify any actions taken by the Contractor under clauses 9.3 to 9.5.
10. **Security and Charge**
- 10.1 Despite anything to the contrary contained herein or any other rights which the Contractor may have hereover:
 - (a) where the Client and/or the Guarantor (if any) is the owner of land, realty or any other asset capable of being charged, both the Client and/or the Guarantor agree to mortgage and/or charge all of their joint and/or several interest in the said land, realty or any other asset to the Contractor or the Contractor's nominee to secure all amounts and other monetary obligations payable under these terms and conditions. The Client and/or the Guarantor acknowledge and agree that the Contractor (or the Contractor's nominee) shall be entitled to lodge where appropriate a caveat, which caveat shall be withdrawn once all payments and other monetary obligations payable hereunder have been met.
 - (b) should the Contractor elect to proceed in any manner in accordance with this clause and/or its sub-clauses, the Client and/or Guarantor shall indemnify the Contractor from and against all the Contractor's costs and disbursements including legal costs on a solicitor and own client basis.
 - (c) the Client and/or the Guarantor (if any) agree to irrevocably nominate constitute and appoint the Contractor or the Contractor's nominee as the Client's and/or Guarantor's true and lawful attorney to perform all necessary acts to give effect to the provisions of this clause 10.1.
11. **Defects**
- 11.1 The Client shall inspect the Goods on delivery and shall within seven (7) days of delivery (time being of the essence) notify the Contractor of any alleged defect, shortage in quantity, damage or failure to comply with the description or quote. The Client shall afford the Contractor an opportunity to inspect the Goods within a reasonable time following delivery if the Client believes the Goods are defective in any way. If the Client shall fail to comply with these provisions the Goods shall be presumed to be free from any defect or damage. For defective Goods, which the Contractor has agreed in writing that the Client is entitled to reject, the Contractor's liability is limited to either (at the Contractor's discretion) replacing the Goods or repairing the Goods except where the Client has acquired Goods as a consumer within the meaning of the Competition and Consumer Act 2010 (C/with) or the Fair Trading Acts of the relevant state or territories of Australia, and is therefore also entitled to, at the consumer's discretion either a refund of the purchase price of the Goods, or repair of the Goods, or replacement of the Goods.
- 11.2 Goods will not be accepted for return other than in accordance with 11.1 above.
12. **Warranty**
- 12.1 Subject to the conditions of warranty set out in clause 12.2 the Contractor warrants that if any defect in any workmanship of the Contractor becomes apparent and is reported to the Contractor within twelve (12) months of the date of delivery (time being of the essence) then the Contractor will either (at the Contractor's sole discretion) replace or remedy the workmanship.
- 12.2 In respect of all claims the Contractor shall not be liable to compensate the Client for:
 - (a) the warranty shall not cover any defect or damage which may be caused or partly caused by or arise through:
 - (i) failure on the part of the Client to properly maintain any Goods; or
 - (ii) failure on the part of the Client to follow any instructions or guidelines provided by the Contractor; or
 - (iii) any use of any Goods otherwise than for any application specified on a quote or order form; or
 - (iv) the continued use of any Goods after any defect becomes apparent or would have become apparent to a reasonably prudent operator or user; or
 - (v) fair wear and tear, any accident or act of God.
 - (b) the warranty shall cease and the Contractor shall thereafter in no circumstances be liable under the terms of the warranty if the workmanship is repaired, altered or overhauled without the Contractor's consent.
 - (c) in respect of all claims the Contractor shall not be liable to compensate the Client for any delay in either replacing or remedying the workmanship or in properly assessing the Client's claim.
- 12.3 For Goods not manufactured by the Contractor, the warranty shall be the current warranty provided by the manufacturer of the Goods. The Contractor shall not be bound by nor be responsible for any term, condition, representation or warranty other than that which is given by the manufacturer of the Goods.
13. **Intellectual Property**
- 13.1 Where the Contractor has designed, drawn or written Goods for the Client, then the copyright in those designs and drawings and documents shall remain vested in the Contractor, and shall only be used by the Client at the Contractor's discretion.
- 13.2 The Client warrants that all designs or instructions to the Contractor will not cause the Contractor to infringe any patent, registered design or trademark in the execution of the Client's order and the Client agrees to indemnify the Contractor against any action taken by a third party against the Contractor in respect of any such infringement.
- 13.3 The Client agrees that the Contractor may use any documents, designs, drawings or Goods created by the Contractor for the purposes of advertising, marketing, or entry into any competition.
14. **Default and Consequences of Default**
- 14.1 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 a half percent (2.5%) per calendar month (and at the Contractor's sole discretion such interest shall compound monthly at such a rate) after as well as before any judgment.
- 14.2 In the event that the Client's payment is dishonoured for any reason the Client shall be liable for any dishonour fees incurred by the Contractor.
- 14.3 If the Client defaults in payment of any invoice when due, the Client shall indemnify the Contractor from and against all costs and disbursements incurred by the Contractor in pursuing the debt including legal costs on a solicitor and own client basis and the Contractor's collection agency costs.
- 14.4 Without prejudice to any other remedies the Contractor may have, if at any time the Client is in breach of any obligation (including those relating to payment) the Contractor may suspend or terminate the supply of Goods to the Client and any of its other obligations under the terms and conditions. The Contractor will not be liable to the Client for any loss or damage the Client suffers because the Contractor has exercised its rights under this clause.
- 14.5 If any amount remains overdue after thirty (30) days then an amount of the greater of twenty dollars (\$20.00) or ten percent (10%) of the amount overdue (up to a maximum of two hundred dollars (\$200.00)) shall be levied for administration fees which sum shall become immediately due and payable.
- 14.6 Without prejudice to the Contractor's other remedies at law the Contractor shall be entitled to sue the Client in respect of any order of the Client which remains unfulfilled and all amounts owing to the Contractor shall, whether or not due for payment, become immediately payable in the event that:
 - (a) any money payable to the Contractor becomes overdue, or in the Contractor's opinion the Client will be unable to meet its payments as they fall due; or
 - (b) the Client becomes insolvent, convenes a meeting with its creditors or proposes or enters into an arrangement with creditors, or makes an assignment for the benefit of its creditors; or
 - (c) a receiver, manager, liquidator (provisional or otherwise) or similar person is appointed in respect of the Client or any asset of the Client.
15. **Cancellation**
- 15.1 The Contractor may cancel any contract to which these terms and conditions apply or cancel delivery of Goods at any time before the Goods are delivered by giving written notice to the Client. In the event of such cancellation the Contractor shall repay to the Client any sums paid in respect of the Price. The Contractor shall not be liable for any loss or damage whatsoever arising from such cancellation.
- 15.2 In the event that the Client cancels delivery of Goods the Client shall be liable for any loss incurred by the Contractor (including, but not limited to, any loss of profits) up to the time of cancellation.
- 15.3 Cancellation of orders for Goods made to the Client's specifications or non-stockist items will definitely not be accepted, once production has commenced.
16. **Privacy Act 1988**
- 16.1 The Client and/or the Guarantor (herein referred to as the Client) agree for the Contractor to obtain from a credit reporting agency a credit report containing personal credit information about the Client in relation to credit provided by the Contractor.
- 16.2 The Client agrees that the Contractor may exchange information about the Client with those credit providers either named as trade referees by the Client or named in a consumer credit report issued by a credit reporting agency for the following purposes:
 - (a) to assess an application by 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.
- 16.3 The Client understands that the information exchanged can include anything about the Client's creditworthiness or standing, one of the purposes of which is to enable credit providers are allowed to exchange under the Privacy Act 1988.
- 16.4 The Client consents to the Contractor being given a consumer credit report to collect overdue payment on commercial credit (Section 18K(1)(h) Privacy Act 1988).
- 16.5 The Client agrees that personal credit information provided may be used and retained by the Contractor for the following purposes (and for other purposes as shall be agreed between the Client and the Contractor or required by law from time to time):
 - (a) the provision of Goods; and
 - (b) the marketing of Goods by the Contractor, its agents or distributors; and/or
 - (c) analysing, verifying and/or checking the Client's credit, payment and/or status in relation to the provision of Goods; and/or
 - (d) processing of any payment instructions, direct debit facilities and/or credit facilities requested by the Client; and/or
 - (e) enabling the daily operation of the Client's account and/or the collection of amounts outstanding in respect of the Client's account in relation to the Goods.
- 16.6 The Contractor may give information about the Client to a credit reporting agency for the following purposes:
 - (a) to obtain a consumer credit report about the Client;
 - (b) allow the credit reporting agency to create or maintain a credit information file containing information about the Client.
- 16.7 The information given to the credit reporting agency may include:
 - (a) personal details such as name, address, previous addresses, date of birth, name of employer and driver's licence number;
 - (b) details concerning the Client's application for credit or commercial credit and the amount requested;
 - (c) advice that the Contractor is a current credit provider to the Client;
 - (d) advice of any overdue accounts, loan repayments, and/or any outstanding monies owing which are overdue by more than sixty (60) days, and for which debt collection action has been taken;
 - (e) that the Client's overdue accounts, loan repayments and/or any outstanding monies are no longer overdue in respect of any default that has been listed;
 - (f) information that, in the opinion of the Contractor, the Client has committed a serious credit infringement (that is, fraudulently or shown an intention not to comply with the Client's credit obligations);
 - (g) advice that cheques drawn by the Client for one hundred dollars (\$100) or more, have been dishonoured more than once;
 - (h) that credit provided to the Client by the Contractor has been paid or otherwise discharged.
17. **Equipment Hire**
- 17.1 The Equipment shall at all times remain the property of the Contractor and is returnable on demand to the Contractor. In the event that the Equipment is not returned to the Contractor in the condition in which it was delivered the Contractor retains the right to charge the Client the full cost of repairing the Equipment. In the event Equipment is not returned at all the Contractor shall have right to charge the Client the full cost of replacing the Equipment.
- 17.2 The Client shall:
 - (a) keep the Equipment in their own possession and control and shall not assign the benefit of the Equipment to any other person; and
 - (b) not 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.
- 17.3 The Client, complete with all parts and accessories, clean and in good order as delivered, and shall comply with any maintenance schedule as advised by the Contractor to the Client.
- 17.4 The Client accepts full responsibility for the safekeeping of the Equipment and the Client agrees to insure the Equipment, the Contractor's interest in the Equipment and agrees to indemnify the Contractor 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 or persons arising out of the use 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.
18. **Building and Construction Industry Security of Payments Act 2009**
- 18.1 At the Contractor's sole discretion, if there are any disputes or claims for unpaid Goods and/or Services then the provisions of the Building and Construction Industry Security of Payments Act 2009 may apply.
- 18.2 Nothing in this agreement is intended to have the effect of contracting out of any applicable provisions of the Building and Construction Industry Security of Payments Act 1999 of South Australia, except to the extent permitted by the Act where applicable.
19. **General**
- 19.1 If any provision of these terms and conditions shall be invalid, void, illegal or unenforceable the validity, existence, legality and enforceability of the remaining provisions shall not be affected, prejudiced or impaired.
- 19.2 If any provisions of these terms and conditions are inconsistent with the PPSA, the PPSA shall prevail to the extent of that inconsistency.
- 19.3 These terms and conditions shall be subject to the jurisdiction of the courts of South Australia.
- 19.4 The Contractor shall be under no liability whatsoever to the Client for any indirect and/or consequential loss and/or expense (including loss of profit) suffered by the Client arising out of a breach by the Contractor of these terms and conditions.
- 19.5 In the event of any breach of this contract by the Contractor the remedies of the Client shall be limited to damages which under no circumstances shall exceed the Price of the Goods.
- 19.6 The Client shall take effect to set off against, or deduct from the Price, any sums owed or claimed to be owed to the Client by the Contractor nor to withhold payment of any invoice because part of that invoice is in dispute.
- 19.7 The Contractor may license or sub-contract all or any part of its rights and obligations without the Client's consent.
- 19.8 The Client agrees that the Contractor may review these terms and conditions at any time. If, following any such review, there is to be any change to these terms and conditions, then the Client will take effect to set off against, or deduct from the Price, any sums owed or claimed to be owed to the Client by the Contractor nor to withhold payment of any invoice because part of that invoice is in dispute.
- 19.9 Neither party shall be liable for any default due to any act of God, war, terrorism, strike, lock-out, industrial action, fire, flood, storm or other event beyond the reasonable control of either party.
- 19.10 The failure by the Contractor to enforce any provision of these terms and conditions shall not be treated as a waiver of that provision, nor shall it affect the Contractor's right to subsequently enforce that provision.