Nu-Eco Windows Pty Ltd – Commercial Terms & Conditions of Trade

1. Definitions

1.1 "Australian Consumer Law" means the laws set out in Schedule 2 of the *Competition and Consumer Act* 2010 (Cth) and other applicable consumer protection laws and regulations.

1.2 "Building Act" shall mean the *Building Act 1993* (Vic).

1.3 "Company" shall mean Nu-Eco Windows Pty Ltd ACN 135 929 118 (of 4 Nicholas Drive Dandenong South, Contact Phone Number: 03 9771 3103, Email: sales@nu-eco.com.au), its successors and assigns.

1.4 "Control" shall mean has the meaning set out in section 50AA of the *Corporations Act 2001* (Cth).

1.5 "Customer" shall mean the customer specified in the Quote provided by the Company.

1.6 "Materials" shall mean all materials required to complete the Works and all materials installed or otherwise included as part of the Works.

1.7 "PPSA" shall mean the *Personal Property Securities Act 2009* (Cth).

1.8 "Price" shall mean the price of the Works as agreed between the Company and the Customer in writing and as outlined in the agreed quotation.

1.9 "Quote" shall mean a quote for the Works provided by the Company to the Customer.

1.10 "Requested Variation" has the meaning given in clause 4.1.

1.11 "Required Variation" has the meaning given in clause 4.3.

1.12 "Security Interest" shall mean an interest or power:

(a) reserved in or over an interest in any asset including any retention of title; or

(b) created or otherwise arising in or over any interest in any asset under a security agreement, bill of sale, mortgage, charge, lien, pledge, trust or power or otherwise,

by way of security for the payment of a debt, any other monetary obligation or the performance of any other obligation and includes any agreement to grant or create any of the above and includes a security interest within the meaning of section 12(1) of the PPSA.

1.13 "Security of Payments Act" shall mean the *Building and Construction Industry Security of Payments Act 2002* (Vic).

1.14 "Terms" shall mean the terms and conditions contained in these Commercial Terms & Conditions of Trade.

1.15 "Works" shall mean all works (including the supply of Materials) undertaken by the Company and described in the Quote or otherwise provided by the Company in accordance with these Terms and includes any advice or recommendations.

2. Acceptance

2.1 The Customer will be deemed to have accepted these Terms (and will be bound by them in respect of all Works carried out by the Company) if they instruct the Company to carry out any Works after receipt of the Terms.

2.2 Where more than one Customer has entered into this agreement, the Customers shall be jointly and severally liable for all payments of the Price.

2.3 None of the Company's agents or representatives are authorised to make any representations, statements, conditions or agreements not expressed by the manager of the Company in writing or set out in the Quote nor is the Company bound by any such unauthorised statements unless they are ratified by the manager of the Company in writing.

2.4 The Customer shall give the Company not less than fourteen (14) days prior written notice of any proposed or actual:

(a) changes to directors or other officeholder of the Customer;

(b) changes to the shareholders of the Customer; or

(c) change in the Customer's name and/or any other change in the Customer's details (including but not limited to, changes in the Customer's address, email address or business premises).

The Customer shall be liable for any loss reasonably incurred by the Company as a result of the Customer's failure to comply with this clause.

3. Personal Property Securities Act 2009

3.1 The Customer consents to the Company effecting a registration on the PPSA register (in any manner the Company deems appropriate) in relation to any security interest arising under or in connection with or contemplated by these Terms.

3.2 The Customer waives its right to receive notice of a verification statement in relation to any registration by the Company on the register.

3.3 The Customer agrees to promptly execute any documents, provide all relevant information, fully cooperate with the Company and do any other act or thing that the Company reasonably requires to ensure that the Company has a perfected security interest in, and has priority over any other security interests in, the Materials or otherwise.

3.4 The Customer agrees that, until all monies owing to the Company are paid in full, it shall not sell or grant any other Security Interest in the Materials.

3.5 The Customer will not register a financing change statement in respect of the security interest without the Company's prior written consent.

3.6 The Customer agrees that the Company may, at its absolute discretion, apply any amounts received form the Customer towards amounts owing to the Company in such orders as the Company may determine.

3.7 If Chapter 4 of the PPSA would otherwise apply to the enforcement of a security interest arising in connection with these Terms, the Customer agrees that the following provisions of the PPSA will not apply to the enforcement of these Terms: section 95 (notice of removal of accession), to the extent that it requires the Company to give notice to the Customer; section 96 (when a person with an interest in the whole may retain an accession); subsection 121(4) (enforcement of liquid assets – notice to grantor); section 125 (obligation to dispose of or retain collateral). Section 130 (notice of disposal), to the extent that it requires the Company to give a notice to the Customer; paragraph 132(3)(d) (contents of statement of account after disposal); subsection 132(4) (statement of account if no disposal); subsection 132(1) (retention of collateral); section 142 (redemption of collateral); and section 143 (reinstatement of security agreement).

3.8 Notices or documents required of permitted to be given to the Company for the purposes of the PPSA must be given in accordance with the PPSA.

3.9 The Company agrees with the Customer not to disclose information of the kind mention in subsection 275(1) of the PPSA except in circumstances required by paragraphs 275(7)(b)-(2).

3.10 In these Terms the following words have the respective meanings given to them in the PPSA: commingled, financing statement, financing change statement, perfected, proceedings, register, registration, security interest and verification statement.

4. Variations

4.1 The Customer may request a variation to the Works (**Requested Variation**).

4.2 The cost of any Requested Variation must be agreed between the Company and the Customer, otherwise the Company will not be required to comply with the Requested Variation.

4.3 The Company may require a variation to the Works (**Required Variation**) if:

(a) unforeseeable problems with the site are revealed when the Company is undertaking the Works which the Company reasonably considers should be immediately rectified for the safe completion of the Works; or

(b) to address any additional Works that the Company is instructed to undertake by any person authorised by the Building Act.

4.4 In the case of a Required Variation, the Company will, in writing;

(a) state the reason for the Required Variation;

(b) provide a full description of the Required Variation; and

(c) state any effect the Required Variation will have on the agreement between the parties in respect of the Works, including but not limited to, the price, completion date and whether further permits or authorisations are required.

4.5 If the Company, acting reasonably, determines that the Required Variation needs to be completed immediately, then the Company may carry out any Works needed to fix any such problem/s or carry out any such instructions without first obtaining the written approval of the Customer.

4.6 Required Variations will be charged to the Customer at the Company's actual cost plus a margin of twenty percent (20%), reflecting standard practice. The Company will, to the extent practicable, seek to minimise any costs and/or delays associated with any Required Variation.

5. Price And Payment

5.1 At the Company's sole discretion a deposit may be required, with the amount of that deposit being specified to the Customer prior to the Customer committing to engage the Company for the Works.

5.2 Payment terms will be those set out in the Quote.

5.3 The Company shall charge a $165.00 call out fee where an appointment has been booked for measuring or installation and are unable to commence work due to site readiness or lack of accessibility. This does not apply to appointments affected by weather.

5.4 The Company may submit a detailed payment claim at intervals set out in the Quote for work performed up until the expiry of an interval. The value of work so performed shall include the value of:

(a) Requested Variations which have been agreed to by the parties;

(b) Required Variations; and

(c) the value of Materials delivered to the site but not installed.

5.5 Time for payment for the Works shall be of the essence.

5.6 Payment may be made by cash, or by cheque, or by bank cheque, or by credit card (plus a surcharge of up to two percent (2.0%) of the Price) or by direct credit, or by any other method as agreed to between the Customer and the Company.

5.7 The Price shall be increased by the amount of any GST.

6. Delivery Of Works

6.1 Subject to clause 6.3 it is the Company's responsibility to ensure that the Works start as soon as it is reasonably possible.

6.2 The Customer must provide the Company with all information, documents, designs, drawings and other materials reasonably requested by the Company to perform the Works.

6.3 The Works commencement date will be put back and the building period extended by whatever time is reasonable for variations and delays by any event beyond the Company's control, including but not limited to any direction given to the Company by the Customer to delay any part of the Works, or the failure by the Customer to:

(a) pay the deposit required at clause 5.1; or
(b) pay progress payments required at clause 5.4; or
(c) pay any other outstanding invoices; or
(d) notify the Company that the site is ready; or
(e) have the site ready for initial trade measure; or
(f) have the site ready for installation; or
(g) ensure structural adequacy of the as per clause 10.1; or
(h) make a selection reasonably requested by the Company, which includes but is not limited to selection of colour and finishes; or
(i) ensure all safety provisions are provided, including but not limited to scaffold, temporary handrails, and/or harness points, unless the Company has confirmed that it will provide such provisions in its Quote.

6.4 The Works shall be deemed to be completed when:

(a) all items listed on the Quote have been supplied and installed to the specifications agreed by the parties; or
(b) in the event that the building permit is obtained by the Company, the Company obtains either:
  (i) a copy of the occupancy permit under the Building Act, if the building permit for the Works requires the issue of an occupancy permit; or
  (ii) a copy of the certificate of final inspection.

6.5 The Company reserves the right to withhold any certification required by the Customer at the completion of the Works until all payments required to be paid by the Customer in accordance with this document have been made.

6.6 Failure of the Customer to pay a deposit or progress payment when required in accordance with these Terms may result in a delay in the Works (or if payment is not received at all, the Company not undertaking the Works).

6.7 The Company shall not be liable for any failure by the Company to deliver the Works (or any of them) promptly or at all to the extent caused or contributed to by an act or omission of the Customer.

6.8 The Company may charge a storage fee of $135.00 exclusive of GST per full calendar week or part thereof, past the anticipated delivery date, where the delivery of the Works has been delayed by the Customer, Customers agent or alike.

7. Customer's Responsibility

7.1 It is the intention of the Company and agreed by the Customer that:

(a) any building/construction sites will comply with all Victorian occupational health and safety laws relating to building/construction sites and any other relevant safety standards or legislation.
(b) Unless stated in the Quote, removal and re-instatement of any internal or external blinds, window furnishings, live electrical components such as power points, fans or light switches, that may hinder the installation process, is the responsibility of the customer or customer's Agent.
(c) any remedial painting, filling or sanding of the works after installation is the responsibility of the Customer unless specified in the Quote.

7.2 The Customer shall be responsible for obtaining and paying for any permits to facilitate the installation of the Materials.

8. Risk

8.1 All risk for the Materials passes to the Customer on completion of the Works (as at this point, the Customer will be in control of such Materials), even if ownership of any Materials remains vested in the Company under Clause 11 below.

8.2 Whilst the Company commits to exercising all reasonable care, the Company shall not assume liability in cases where damage arises during the Works due to the actions, omissions, incorrect use of materials, or incorrect sequencing of the construction method by either the Customer or an unrelated third party. Such damage encompasses, but is not limited to, issues like broken tiles, damaged render, or any other item that is attached or adjacent to Works.

8.3 Any advice, recommendation, information or assistance provided by the Company in relation to the Works supplied is given in good faith. The Company is not liable for any loss or damage suffered or incurred by the Customer in respect of such advice, recommendation, information or assistance where it was formulated on the basis of inaccurate information provided by the Customer.

9. Surplus Materials

9.1 Unless otherwise stated elsewhere in these Terms;
(a) only suitable new Materials will be used; and
(b) Materials which the Company brings to the site which are surplus remain the property of the Company (and will be removed from the site by the Company no later than on completion of the Works).

10. Structural Requirement

10.1 All effort is made by the Company to detect any existing structural deficiencies at the Customer's work site at the time of quoting. However, at the installation stage further structural supports may be needed to enable the Company to deliver the Works. It is the responsibility of the Customer at the Customer's cost to ensure that there are adequate structural fixing points where required. The Company reserves the right to determine the final installation method, as may be structurally necessary.

11. Retention of Title

11.1 Title in all Materials remain in the Company until all monies owing to the Company by the Customer, including in the instance of non-payment all reasonable collection, repossession and / or legal costs incurred, have been paid in full.

11.2 In the event of a breach of Clause 5 hereof, the Company shall be entitled to enter upon the Premise of the Customer for the purpose of removing all Materials of the Company pursuant to the Company's security interest and Purchase Money Security Interest in the Materials.

11.3 The Customer acknowledges that it is in possession of all Materials as bailee for the Company until payment for all Materials has been made by the Customer to the Company.

11.4 The Customer acknowledges that where Materials have been installed in a premises, the Company has a 'Purchase Money Security Interest' in the goods and the proceeds of such goods, within the meaning of the PPSA.

12. Warranties

12.1 Nothing in these Terms is intended to exclude any rights you have at law, including any rights you have under the Australian Consumer Law.

12.2 Subject to clause 12.5 and 12.6 the Company warrants that:
(a) the Works shall be carried out in a proper and workmanlike manner and in accordance with the agreed plans and specifications;
(b) all Materials supplied be suitable for the purpose for which they are used and that, unless otherwise stated by the Company, those Materials will be new;
(c) the Works will be carried out in accordance with all relevant laws and legal requirements (including, but not limited to, the Building Act);
(d) the Works will be carried out in an appropriate and skilful way, with reasonable skill and care;
(e) if the Works consists of the construction of a detached dwelling or are intended to renovate, alter, extend, improve or repair a home to a stage suitable for occupation, that the detached dwelling or home will be suitable for occupation when the Works are finished; and
(f) if the Quote states the particular purpose for which the Works are required, or the result which the Customer wishes the Works to achieve (so as to show that the Customer relies on the Company's skill and judgment) then the Works and any Materials will be reasonably fit for that purpose or will be of such a nature and quality that they might reasonably be expected to achieve that result.

12.3 The Company will not be liable in respect of any damage or defects in the Works or Materials to the extent they are caused by:
(a) the subsidence or movement of land and structures in which the Works have been installed;
(b) glass breakage; other than that stated in clause 12.6;
(c) tarnishing of stainless steel;
(d) items listed at clause 8;
(e) faulty or improper modification by a third party;
(f) failure on the part of the Customer to properly maintain Works; or
(g) failure on the part of the Customer to follow any instructions or guidelines provided by the Company; or
(h) any use of the Works otherwise than for any application specified on a quote or order form; or
(i) the continued use of the Works after any defect becomes apparent or would have become apparent to a reasonably prudent operator or user; or
(j) fair wear and tear, any accident or act of God.

12.4 In addition to anything otherwise set out in these Terms, the Company also warrants the Works on the basis set out in the warranty contained on the Company's website at https://www.nu-eco.com.au/terms-and-conditions/ .

12.5 Further, the Company's extended or builder warranty does not cover any hardware items not typically provided as standard inclusions, including specialised hinges, locks, or other items that were not specifically

manufactured for the Works. These items will instead be subject to the warranty provided by the original equipment manufacturer.

12.6 Spontaneous fracture in toughened glass is caused by nickel sulphide (NiS) inclusions formed during manufacture of glass. As it is difficult to ascertain whether a breakage is due to this rare natural phenomena the glass is only covered for a maximum of 6 months after installation.

13. Intellectual Property

13.1 Where the Company has designed, drawn or written plans or a schedule of Works for the Customer, then the copyright in those plans, schedules, designs and drawings shall remain vested in the Company, and shall only be used by the Customer to enjoy the benefit of the Works (and for no other purpose).

13.2 Where the Customer provides the Company with designs and/or instructions, the Customer warrants that such designs and/or instructions will not cause the Company to infringe any patent, registered design or trademark.

14. Default & Consequences of Default

14.1 Interest on overdue invoices shall accrue from the date when payment becomes due daily until the date of payment at the rate for the time being fixed by section 2 of the *Penalty Interest Rates Act 1983* (Vic), and such interest shall compound monthly at such a rate after as well as before any judgment.

14.2 If the Customer defaults in payment of any invoice when due, the Customer shall indemnify the Company from and against all reasonable and substantiated costs and disbursements incurred by the Company in pursuing the debt including legal costs on a solicitor and own client basis and the Company's collection agency costs.

14.3 Without prejudice to any other remedies the Company may have, if at any time the Customer is in breach of any obligation (including those relating to payment), and the breach is not or is unable to be remedied within 14 days of the breach arising, then the Company acting reasonably may suspend or terminate the supply of Works to the Customer under the Security of Payments Act and demand immediate payment of overdue and outstanding invoices (including interest) in relation to the Works in accordance with and as allowed by the Security of Payments Act. The Company will not be liable to the Customer for any loss or damage the Customer suffers because the Company exercised its rights under this clause.

14.4 Without prejudice to the Company's other remedies at law the Company shall be entitled to cancel all or any part of any order of the Customer which remains unperformed and all amounts owing to the Company shall, whether or not due for payment, become immediately payable in the event that:

(a) the Customer in the case of an individual becomes bankrupt, or in the case of a company 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

(b) a receiver, manager, liquidator (provisional or otherwise) or similar person is appointed in respect of the Customer or any asset of the Customer.

15. Cancellation

15.1 The Company may notify the Customer in writing prior to commencement of the Works that the Works cannot be performed where the Company determines, acting reasonably, that:

(a) the Works are not suitable or safe to be performed at the site or their performance could result in the contravention or non-compliance with any laws or regulations; or

(b) the timeframe required for completion of the Works is inadequate; or

(c) issues relating to the Customers credit worthiness have been identified as a result of clause 16.1.

15.2 Where the circumstances in clause 15.1 arise, the Company will provide written notice to the Customer. On giving such notice the Company shall repay to the Customer any sums paid in respect of the Price. The Company shall not be liable for any loss or damage whatever arising from such cancellation, provided that the Company was not grossly negligent with respect to its conduct which gave rise to the cancellation.

15.3 The Customer may not cancel the Works once they have been agreed to be performed by the Company and the Company has taken steps to commence performance of the Works (including but not limited to ordering any Materials) except with the express written consent of the Company, which consent may be subject to a requirement that the Customer pay the Company its reasonable costs and expenses incurred in respect of such cancellation.

16. Privacy Act 1988

16.1 The Customer agrees for the Company to obtain from a credit reporting agency a credit report containing personal credit information about the Customer in relation to credit provided by the Company.

16.2 The Customer agrees that the Company may exchange information about the Customer with those credit providers either named as trade referees by the Customer or named in a consumer credit report issued by a credit reporting agency for the following purposes:

(a) to assess an application by Customer; and/or

(b) to notify other credit providers of a default by the Customer; and/or

(c) to exchange information with other credit providers as to the status of this credit account, where the Customer is in default with other credit providers; and/or
(d) to assess the credit worthiness of Customer.

16.3 The Customer consents to the Company being given a consumer credit report to collect overdue payment on commercial credit (Section 18K(1)(h) Privacy Act 1988).

16.4 The Customer agrees that personal credit information provided may be used and retained by the Company for the following purposes and for other purposes as shall be agreed between the Customer and Company or required by law from time to time:
(a) provision of Works; and/or
(b) marketing of Works by the Company, its agents or distributors in relation to the Works; and/or
(c) analysing, verifying and/or checking the Customer's credit, payment and/or status in relation to provision of Works; and/or
(d) processing of any payment instructions, direct debit facilities and/or credit facilities requested by Customer; and/or
(e) enabling the daily operation of Customer's account and/or the collection of amounts outstanding in the Customer's account in relation to the Works.

16.5 The Company may give information about the Customer to a credit reporting agency for the following purposes:
(a) to obtain a consumer credit report about the Customer; and/or
(b) allow the credit reporting agency to create or maintain a credit information file containing information about the Customer.

17. Security of Payments Act and the Building Act

17.1 Subject to the relevant applicability of the Security of Payments Act and the Building Act, if there are any disputes or claims for unpaid Work then the provisions of the Security of Payments Act may apply.

17.2 Nothing in this agreement is intended to have the affect of contracting out of any applicable provisions of the Security of Payments Act, except to the extent permitted by the Building Act where applicable.

18. General

18.1 If any provision of these Terms shall be invalid, void, illegal or unenforceable the validity, existence, legality and enforceability of the remaining provisions shall not be affected, prejudiced or impaired.

18.2 These Terms and any contract to which they apply shall be governed by the laws of Victoria and are subject to the jurisdiction of the courts of Victoria.

18.3 Neither party shall be entitled to set off any amounts they owe against amounts they say the other party owes them.

18.4 The failure by the Company or the Customer to enforce any provision of these Terms shall not be treated as a waiver of that provision, nor shall it affect the Company or Customer's right to subsequently enforce that provision.

19. Force Majeure

19.1 Delivery of the Works may be totally or partially suspended by the Company in the event of:
(a) any act of God, war, riot, fire, explosion, accident, flood or sabotage;
(b) a change in or the imposition of new laws, regulations, orders, or government requirements, including any national defence requirements;
(c) the breakage or failure of machinery or apparatus;
(d) the failure of a supplier to the Company,
(e) an inability to obtain fuel, power, raw materials, labour, containers or transportation facilities and/or services;
(f) any labour trouble, strike, lockout or injunction (whether or not such labour events within the reasonable control of the Company); or
(g) any other event beyond the reasonable control of the Company,

which event prevents the manufacture, supply, delivery, acceptance or consumption of a delivery of the Materials or completion of the Works, or equipment upon which the manufacture of the Materials or completion of the Works is dependent (**Force Majeure Event**). For the avoidance of doubt, nothing in this clause requires the Company to change its regular business practices including its suppliers, or incur additional and/or unreasonable costs or expenses to overcome the Force Majeure Event (such as sourcing raw materials at a higher price from another supplier).

19.2 The Company will provide the Customer with written notice of a Force Majeure Event as soon as reasonably practicable on its occurrence.

19.3 If, because of a Force Majeure Event, the Company's capacity to manufacture and/or complete the Works is limited or constrained, the Company is under no obligation to prioritise completion of the Works to the Customer over other customers.

19.4 During the period of total or partial suspension, the Customer shall be free to purchase elsewhere at its sole risk and cost, such quantities of alternative Materials necessary to cover the shortfall of Materials not delivered by the Company.

19.5 Either party may terminate this agreement by providing written notice to the other party if the Force Majeure Event continues for a period of 3 months or more following the provision of notice under clause 19.2.