

COST PLUS CONSTRUCTION CONTRACT

Suitable for any type of 'larger scale' residential building work, where there is no lump sum contract price, as covered under the *Home Building Act 1989 (NSW)*

Owner Name: _____

Site Address: _____

Date: _____

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Checklist for Owners entering into building contracts

CHECKLIST

- | | | | |
|----|--|------------------------------|-----------------------------|
| 1 | Does the contractor hold a current contractor licence? | YES <input type="checkbox"/> | NO <input type="checkbox"/> |
| 2 | Does the licence cover the type of work included in the contract? | YES <input type="checkbox"/> | NO <input type="checkbox"/> |
| 3 | Is the name and number on the contractor's licence the same as on the contract? | YES <input type="checkbox"/> | NO <input type="checkbox"/> |
| 4 | Is the work to be undertaken covered in the contract, drawings or specification? | YES <input type="checkbox"/> | NO <input type="checkbox"/> |
| 5 | Does the contract clearly state a contract price or contain a warning that the contract price is not known? | YES <input type="checkbox"/> | NO <input type="checkbox"/> |
| 6 | If the contract price may be varied, is there a warning and an explanation about how it may be varied? | YES <input type="checkbox"/> | NO <input type="checkbox"/> |
| 7 | Are you aware of the cooling off provisions relating to the contract? | YES <input type="checkbox"/> | NO <input type="checkbox"/> |
| 8 | Is the deposit within the legal limit? The limit is 10% for work costing \$20,000 or less or 5% for work costing more than \$20,000. | YES <input type="checkbox"/> | NO <input type="checkbox"/> |
| 9 | Is the procedure for variations understood? | YES <input type="checkbox"/> | NO <input type="checkbox"/> |
| 10 | Are you aware of who is to obtain any council or other approval for work? | YES <input type="checkbox"/> | NO <input type="checkbox"/> |
| 11 | Do you understand that the contractor must have a policy of home warranty insurance under the <i>Home Building Act 1989</i> and provide you with a certificate of insurance before receiving any money under the contract (including a deposit) or before doing any work for more than \$20,000? | YES <input type="checkbox"/> | NO <input type="checkbox"/> |
| 12 | Has the contractor given you a document that explains the operation of the <i>Home Building Act 1989</i> and the procedures for the resolution of contract and Insurance disputes? | YES <input type="checkbox"/> | NO <input type="checkbox"/> |

SIGNATURES

Do not sign this contract unless you have read and understand the clauses as well as the notes and explanations contained in this document.

If you have answered "no" to any question in the checklist, you may not be ready to sign the contract.

Both the contractor and the owner should retain an identical signed copy of this contract including drawings, specifications and other attached documents. Make sure that you initial all attached documents and any attachments or deletions to the contract.

SIGNED COPY OF THE CONTRACT

Under the *Home Building Act* a signed copy of the contract must be given to the owner within 5 working days after the contract is entered into.

HOME WARRANTY INSURANCE

The contractor must provide the owner with a certificate of home warranty insurance (for work over \$20,000) before commencement of work and before demanding or receiving payment.

OWNER'S ACKNOWLEDGEMENT

I/We have been given a copy of the Consumer Information Brochure and I/We have read and understand it.

I/We have completed the check list and answered "Yes" to all items on it.

Note: Where the owner is a company or partnership or the contract is to be signed by an authorised agent of the owner, the capacity of the person signing the contract, eg director, must be inserted

Signature _____

Signature _____

Name [print] _____

Name [print] _____

Capacity [print] _____

Capacity [print] _____

Schedule 1 – Contract Details

ITEM

1. This contract is dated the _____ day of _____, 20__

2. Owner(s) Name: _____ Address: _____ Phone (H): _____ (W): _____ Fax: _____ Mobile: _____ Email: _____ A.B.N: _____

3. Builder(s) Name: _____ Address: _____ Phone (H): _____ (W): _____ Fax: _____ Mobile: _____ Email: _____ A.B.N: _____ Builder's Licence No: _____
--

4. Builder's Margin

The *builder's margin* is _____% (if nothing stated, then 20%).

WARNING – THE CONTRACT PRICE ████████████████████

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5. The Land

The *land* is: Lot _____ DP No. _____

Certificate of Title: _____

Street Address: _____

Mortgages 1. Lending Body: _____ Amount \$ _____

Branch: _____

Contact Name: _____

2. Lending Body: _____ Amount \$ _____

Branch: _____

Contact Name: _____

6. Encumbrances, covenants and easements

The land relating to the site as identified in item 6 above is affected by the following encumbrances, covenants, easements and caveats (give the substances of each affectation, and details of any registrations where registered at the Titles Office).

7. Sources of funds

The *price of the building works* to be paid by the *owner* under this *contract* will be funded by:

the *owner* \$ _____

the *lending authority* \$ _____

other \$ _____

TOTAL FUNDS \$ _____

8. Interest

Interest on late payments is _____% (if nothing stated, then 10% per annum calculated daily)

9. Planning and Building Approvals

The party to obtain and pay for all planning and building approvals is _____
(if no party is stated, then the *builder*).

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10. Contract Period

The *building works* must reach the stage of *practical completion* no more than _____ weeks after the *contract period* commenced under Clause 8, as extended under Clause 9. If there is no *contract period*, then the *builder* must complete the *building works* within a reasonable time.

11. Other Contract Documents

In addition to these general terms, any special conditions, the plans and specifications, the following documents form part of this *contract*:

- 1. _____
- 2. _____
- 3. _____
- 4. _____

12. Guarantors

SAMPLE - COPYRIGHT

Schedule 2 – Cost of the Building Works

The *cost of the building works* includes, but is not limited to:

- (a) the cost of all subcontracts (including labour and / or materials) that are solely related to the *building works*;
- (b) the costs of labour and services supplied by the *builder* that are solely related to _____;
- (c) all fees payable in relation to a _____;
- (d) all fees payable for any surveyor, structural engineer, architect or other consultant engaged by the *builder*;
- (e) all premiums and other costs relating to the insurances referred to in Schedule 6 and Clause 22;
- (f) the cost of all building materials, including _____, used for the *building works*, including the cost of _____;
- (g) the cost to rectify any defects during the contract maintenance period, unless such defects are due to faulty materials or workmanship;
- (h) the cost of _____ used for the *building works*;
- (i) the costs to repair, replace or rebuild any _____ as a result of any cause that is not at the *builder's* risk;
- (j) any excess for insurance claims by the *builder*;
- (k) any GST payable on any of the amounts listed in this Schedule 2, or on the supply of the *building works* to the *owner*;
- (l) _____
- (m) _____
- (n) _____

The costs referred to in paragraph (b) above are to be calculated as follows:

Builder: as a supervisor / co-ordinator \$ _____
 as a tradesman \$ _____

Trades:
 _____ \$ _____
 _____ \$ _____
 _____ \$ _____
 _____ \$ _____

Note: The above amounts are in addition to the *builder's fee* as set out in Schedule 3.

Schedule 3 – Builder’s Fee

The *builder’s fee* includes GST, and shall be calculated as follows:

- (a) A set amount of \$ _____
- (b) A percentage fee being _____% of the *cost of the building works*.

Schedule 4 – Progress Payments

The stages for when progress payment claims can be made by the *builder* are specified below:

	Stage	Percentage	Amount
1			
2			
3			
4			

If nothing is stated above, then the *builder* may submit a progress payment claim every fortnight.

Schedule 5 – Excluded Items

The *owner* acknowledges that the *builder* is not responsible for

_____ that are listed below:

Schedule 6 – Warranty Insurance

Note: The *builder* must not carry out any of the *building works*, or demand or receive any part of the *price of the building works* (including a deposit) until warranty insurance is in force, and the *owner* is provided with the certificate of insurance.

Insurer Name: _____

Insurer Address: _____

Phone: _____ Fax: _____

Name of insured (*owner*): _____

Premium payable: _____

ATTACH CERTIFICATE HERE

Schedule 7 – Special Conditions

SAMPLE - COPYRIGHT

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Schedule 8 – Signatures

1. This *contract* is made between the *owner* and the *builder*.
2. The Schedules form part of this *contract*.
3. The Table of Contents and the Checklist do not form part of this *contract*.
4. The parties have signed this *contract* on the date stated in Item 1 of Schedule 1.
5. The *owner* acknowledges that it has received the Checklist and the Consumer Building Guide before signing this *contract*.
6. The *owner* has read and understood this *contract*.

OWNER 1	OWNER 2
Name:	Name:
Owner's Signature:	Owner's Signature:
Witness' name and signature:	Witness' name and signature:
Witness' address:	Witness' address:

BUILDER	
Name:	<p align="center">PLEASE NOTE THESE EXAMPLES</p> <p>When signing on behalf of a <u>Partnership</u>: <i>A Smith (signed) Partner</i>, signed for and on behalf of ABC Building</p> <p>When signing on behalf of a <u>Corporation</u>: <i>A Smith (signed) Director</i>, signed for and on behalf of ABC Building Pty Ltd</p>
Builder's Signature:	
Witness' name and Signature:	
Witness' Address:	

STATEMENT SETTING OUT THE OWNER'S RIGHT TO TERMINATE THIS CONTRACT UNDER SECTION 7BA OF THE HOME BUILDING ACT

This *contract* may be subject to a cooling-off period that entitles the *owner* to rescind this *contract* by giving a notice in writing as required by Section 7BA of the *Home Building Act 1989*:

- (o) If the *owner* has been given a copy of the signed *contract* – at any time before the expiration of 5 clear business days after the *owner* is given a copy of the signed *contract*; or
- (p) If the *owner* has not been given a copy of the signed *contract* within 5 days after the *contract* has been signed – at any time before the expiration of 5 clear business days after the *owner* becomes aware that the *owner* is entitled to be given a copy of the signed *contract*.

If the *owner* terminates this *contract* under Section 7BA of the *Home Building Act 1989*, the *builder* is entitled to a reasonable price for the work carried out under the *contract* up to the date this *contract* is rescinded.

Clause 1 – Definitions

1.1 In this *contract*:

“*all weather access*” means

_____ by the *builder* for carrying out the *building works*;

“*builder*” means the party named in Item 3 of Schedule 1 and, where appropriate, includes the *builder’s* appointed agent / representative;

“*builder’s fee*” means the set amount and / or the percentage of the *cost of the building works* as stated in Schedule 3;

“*builder’s margin*” means the percentage stated in Item 4 of Schedule 1;

“*building works*” means the *building works* to be carried out, completed and handed over to the *owner* in accordance with this *contract* as shown in the *contract documents*, and shall include all *variations*;

“*contract*” means the agreement between the *builder* and the *owner* as set out in the *contract documents*;

“*contract documents*” means these general terms, any special conditions, the plans, the specifications, and any other documents specified in Item 11 of Schedule 1;

“*contract period*” means the amount of time specified in Item 10 of Schedule 1, which can be extended under clause 9;

“*cost of the building works*” means the total of all the amounts described in Schedule 2 that are attributable or in relation to the *building works*;

“*date of practical completion*” means the date that is deemed to be the *date of practical completion* under Clause 23, except where the date is determined by dispute resolution (including litigation), then it is that date;

“*existing building*” means any building or structure on the *land* which:
(a) is likely to be affected by the *building works*; or
(b) the *building works* are to be carried out on,
and includes the services to an *existing building*;

“*inclement weather*” means any weather that,
_____ work from being carried out in the usual manner;

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“*land*” means the land described in Item 5 of Schedule 1;

“*lending authority*” means any institution that lends the *owner* funds for the purpose of paying to the *builder* any money under this *contract*;

“*notice of practical completion*” means the written notice given by the *builder* to the *owner* under sub-clause 23.1;

“*owner*” means the party named in Item 2 of Schedule 1, and includes the *owner’s* agents, employees and invitees;

“*practical completion*” means when the *building works* are complete, except for

[REDACTED];

“*preliminary period*” means a period of 15 *working days* from the date of this *contract*;

“*price of the building works*” means the total of the *cost of the building works* and the *builder’s fee*;

“*rock*” means any material, other than clay or soil, that cannot, in the *builder’s* opinion, be readily removed by hand;

“*security account*” means an account described in Clause 4;

“*site*” means that part of the *land* where the *building works* are carried out;

“*statutory authority*” means a Local, State or Federal Government, or any government agency that has the power to affect the *building works*;

“*variation*” means:

- (a) any [REDACTED] to the *building works*; or
- (b) a change in the [REDACTED] out the *building works*;

“*working days*” means any day other than a Saturday, Sunday or a public holiday;

and like words have corresponding meanings.

- 1.2 In this *contract*, the table of contents, general notes and clause headings do not form part of this *contract* and cannot be used in its interpretation.

Clause 2 – Primary Obligations of the Parties

- 2.1 The *builder* must carry out and complete the *building works* in accordance with this *contract*.
- 2.2 The *owner* must pay the *price of the building works* and other money that becomes payable under this *contract* in the manner and at the times stated in this *contract*.
- 2.3 If there is more than one *owner*:
 - (a) the obligations in this *contract* apply to [REDACTED], and to [REDACTED];
 - (b) a quote, notice, claim or any other communication to the *owners* is only [REDACTED];
 - (c) only [REDACTED] is required to sign a document (including a quote, notice, instruction, direction or other communication) or to give an instruction, direction or other communication, to legally bind [REDACTED].

Clause 3 – Preliminary Matters

- 3.1 The *owner* must, within the *preliminary period*, give the *builder*:
 - (a) written proof that the *owner* holds the legal title to, or is otherwise entitled to build on, the *site*, and written details of any encumbrances, covenants, easements and caveats affecting the *site*;
 - (b) if required by the *builder*, written evidence that the *security account* has been set up and the amount required to be deposited into the *security account* is held in clear funds;
 - (c) if the *owner* is obtaining any finance from a *lending authority*, written advice from the *lending authority* advising:
 - (i) the amount of finance that will be provided to the *owner* for the purpose of paying to the *builder* any money under this *contract*; and
 - (ii) that the *building works* are authorised to commence.
- 3.2 If the *owner* fails to satisfy any of the above within the *preliminary period*, the *builder* may [REDACTED].
- 3.3 If the *builder* [REDACTED], the *owner* must pay to the [REDACTED] must pay to the *builder* any related costs incurred by the *builder* up to the date this *contract* is terminated, plus the *builder's margin* applied to these costs. These related costs include, but are not limited to, the cost of materials on the *site* or already having being ordered from suppliers that are not returnable.

Clause 4 – Security Account

- 4.1 When requested by the *builder* at any time, the *owner* must deposit any of the *owner's* own funds that are to be used to pay the *price of the building works* into an account (the “*security account*”) at a bank, building society, or a similarly recognised financial institution.
- 4.2 The *security account* must be in the joint names of the *owner* and the *builder*, with:
 - (a) the *owner* receiving interest, if any is payable, on the money deposited in the account; and
 - (b) the *builder* as a joint signatory for any withdrawal from the account.

Clause 5 – Ability to Pay

- 5.1 The *owner* must, within [REDACTED] of being requested by the *builder* at any time, give the *builder* written evidence, to the *builder's* satisfaction, of the *owner's* ability to pay all money that is or may become payable to the *builder* under this *contract*.

Clause 6 – Accuracy of Contract Documents

- 6.1 Where the *owner* supplies any *contract document*, the *owner* warrants that *contract document* is accurate and the suitability of the design, materials and methods of working each specified therein.
- 6.2 If either party becomes aware of an error, ambiguity or inconsistency in or between the *contract documents*, that party must, within 2 *working days* of becoming aware, give the other party a written notice detailing such an error, ambiguity or inconsistency.
- 6.3 The *owner* must, within 2 *working days* of receiving a notice or becoming aware of an error, ambiguity or inconsistency in or between the *contract documents*, give the *builder* written instructions detailing how the *builder* is to proceed with the *building works*.
- 6.4 If the *owner* fails to give the *builder* such written instructions within 2 *working days*, the *builder* may proceed with the *building works*, applying the *contract documents* in the following order of precedence:
 - (a) [REDACTED];
 - (b) [REDACTED];
 - (c) [REDACTED];
 - (d) [REDACTED]; and
 - (e) any other documents specified in Item 11 of Schedule 1.

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- 6.5 In relation to a document that is:
- (a) supplied by;
 - (b) prepared under instruction of; or
 - (c) prepared from sketches provided by,
- a party, that party indemnifies the other party for all costs, expenses, losses or damages that are incurred by the other party relating to or as a consequence of any claim for breach of copyright or moral right arising from the *builder* carrying out the *building works* in accordance with that document.
- 6.6 The *builder* owns the copyright in any document prepared by or on behalf of the *builder*.

Clause 7 - Planning and Building Approvals

- 7.1 The party named in Item 9 of Schedule 1 must obtain and pay for all building and planning approvals.
- 7.2 If the *builder* is named in Item 9 of Schedule 1, the *owner* authorises the *builder* to sign any document necessary to obtain the approvals.
- 7.3 If the *owner* is named in Item 9 of Schedule 1, the *owner* must both obtain and give the approvals to the *builder* promptly.
- 7.4 If the requirements of a *statutory authority* necessitate a change to the *building works*, the *builder* must inform the *owner* of the change required and ask for a *variation* for the *building works* to comply with the requirements.
- 7.5 If the *owner* agrees to a *variation* when asked for by the *builder* under sub-clause 7.4, the *owner* must promptly sign the relevant written *variation* when produced by the *builder*.

Clause 8 - Commencing the Building Works

- 8.1 The *builder* must commence the *building works* within ■ working days after the day that:
- (a) the *builder* receives all the necessary building permits and planning approvals required for the *building works* to commence; or
 - (b) the *owner* satisfies all of the requirements of sub-clause 3.1, whichever is later.
- 8.2 The *contract period* commences on the ■ working day after both ■ are satisfied.
- 8.3 The *contract period* will commence in accordance with sub-clause 8.2 even if the *builder* ■.

Clause 9 – Delays and Extensions of Time

- 9.1 The *builder* shall be entitled to a reasonable extension of the *contract period* if the *building works* are delayed by the *builder* suspending the *building works* under Clause 30, or from a cause, thing or matter beyond the sole control of the *builder*, including (but not limited to):
- (a) a *variation*, or a request for a *variation* by the *owner*;
 - (b) an act of God, fire, explosion, earthquake, civil commotion or an act of terrorism;
 - (c) *inclement weather*, or conditions resulting from *inclement weather*;
 - (d) an industrial dispute;
 - (e) a dispute with adjoining or neighbouring residents or owners;
 - (f) any act or omission by the *owner*;
 - (g) delays in obtaining any approvals;
 - (h) [REDACTED] by the *owner*;
 - (i) the need for a survey of or other report in relation to the *site*, including the existence of latent site conditions; or
 - (j) the industry shutdown, being a 5 week period commencing on or about 22 December in each year.
- 9.2 The *builder* is to give the *owner* written notice of an entitlement to an extension of time detailing both:
- (a) the extension of time; and
 - (b) the cause of the delay, within [REDACTED] after becoming aware of both [REDACTED] and the [REDACTED] of the delay.
- 9.3 A failure on the *builder's* part to comply with sub-clause 9.2 will not in itself [REDACTED] to a reasonable extension of the *contract period*.
- 9.4 If the *owner* wishes to dispute the *builder's* entitlement to an extension of time the *owner* must, within [REDACTED] *working days* of receiving the *builder's* notice, give the *builder* a written notice:
- (a) disputing the extension of time; and
 - (b) detailed reasons why the extension of time is disputed.
- 9.5 If the *owner* fails to give the *builder* a written notice in accordance with sub-clause 9.4, the *owner* will be [REDACTED].

Clause 10 – Survey of the Site

- 10.1 If, in the *builder's* opinion, the boundaries of the *site* are [REDACTED], the *builder* may give the *owner* a written notice requesting that the *owner* provide a survey of the *site*.
- 10.2 If the *owner* does not provide a survey of the *site* within [REDACTED] *working days* of the *builder* giving the written notice, the *builder* will [REDACTED].

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survey. The *owner* must pay to the *builder* on demand the total of [REDACTED], plus [REDACTED].

Clause 11 – Site Possession and Access

- 11.1 The *owner* gives the *builder* exclusive and uninterrupted possession of the *site* to carry out the *building works*.
- 11.2 The *owner* must provide *all weather access*. If the *owner* does not provide *all weather access*, and the *builder* is required to carry out additional work to achieve such access, the *owner* is deemed to have asked the *builder* for a *variation* to carry out that additional work, and the *owner* must promptly sign a written *variation* when produced by the *builder*.
- 11.3 The *owner* must not, or must not allow agents or officers of the *lending authority* to:
- (a) [REDACTED] *builder's* access or possession of the *site*; or
 - (b) [REDACTED] progress of the *building works*.
- 11.4 The *owner* must not, or must not allow agents or officers of the *lending authority* to:
- (c) make inquiry of; or
 - (d) issue directions to; or
 - (e) give instructions to,
the *builder's* employees, subcontractors or agents. All communication must only be with the *builder*, or the *builder's* nominated person.
- 11.5 The *owner* must not, or must not allow an officer of the *lending body*, to have access to the *site* or the *building works* for any purpose, including for the purpose of inspecting the progress of the *building works*, unless:
- (a) the *owner* has given the *builder* or the *builder's* nominated person at least [REDACTED] notice; and
 - (b) access to the *site* or the *building works* is at reasonable times.
- 11.6 All recovered and demolished materials from the *site* shall at all times remain the property of the *builder*. Furthermore, the *builder's* unused materials on the *site* are the property of the *builder*.
- 11.7 If it is agreed that the *owner* is to remain in occupation of the *land* while the *building works* are being carried out, the *owner* must:
- (a) provide the *builder* with free, uninterrupted and unobstructed access to the *site*, including the removal of all furniture, fittings, carpets or any other property of the *owner* as required by the *builder* in order to carry out the *building works*; and
 - (b) take necessary steps for the safekeeping, control and supervision of all domestic animals that may interfere with the *builder's* access to the *site*, and the carrying out of the *building works*.
- 11.8 Where there is an *existing building*, the *owner* must give the *builder* and the *builder's* workers and subcontractors adequate access to any available water, electricity, toilet and washing facilities.

Clause 12 – Latent Site Conditions

- 12.1 If:
- (a) either party believes that the surface or sub-surface conditions of the *site* may not support or are likely to affect the *building works*, or
 - (b) rock is found at the *site*,
- the *builder* may, or must at the *owner's* written request, as the *owner's* agent, engage a [REDACTED] to report on the *site's* conditions and their effect on the *building works*, and the cost of every consultant engaged is to be paid by the *owner* as a *contract price adjustment*.
- 12.2 The *builder* must promptly give the *owner* a notice specifying the details of any [REDACTED], and the [REDACTED]. The *builder* must attach a copy of any written report obtained from [REDACTED] under sub-clause 12.1, to that notice.
- 12.3 The *owner* must, within 5 *working days* of receiving such notice, give the *builder*:
- (a) a signed written notice instructing the *builder* to proceed with the additional work required for the *building works* as detailed by the *builder* under sub-clause 12.2; or
 - (b) a signed written notice terminating this *contract*, whereby sub-clause 12.5 will apply.
- 12.4 If the *owner* does not give the *builder* any written notice under sub-clause 12.3, the *builder* may do either or both of the following:
- (a) suspend the carrying out of the *building works* under Clause 30;
 - (b) terminate this *contract*, whereby Clause 33 will apply.
- 12.5 If the *owner* terminates this *contract* under sub-clause 12.3(b), the *owner* must pay to the *builder* the *cost of the building works* plus an amount equal to the *builder's margin* applied to that cost, except to the extent that the *owner* has already paid such amount to the *builder* under clause 13.

Clause 13 – Progress Payments

- 13.1 The *owner* must pay the *price of the building works* progressively as claimed by the *builder*, which shall include any deposit requested by the *builder*.
- 13.2 In order to be entitled to a progress payment, the *builder* must give the *owner* a written progress payment claim at the times specified in Schedule 4.
- 13.3 A progress payment claim is to include:
- (a) details of the *cost of the building works* for the *building works* carried out which relate to that claim;
 - (b) the proportion of the *builder's fee* claimed;
 - (c) details of any other moneys then due to the *builder* which are payable under this *contract*.

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- 13.4 A progress payment claim is to be accompanied by such invoices, receipts or other written records or documents that may reasonably be expected to support the claim, and evidence the *cost of the building works* being claimed.
- 13.5 The *owner* must pay the amount stated in the progress payment claim within 5 *working days* of the *builder* giving the claim.
- 13.6 Unless the *owner* disputes:
- (a) the amount of a progress payment claim; or
 - (b) that sufficient written evidence has accompanied the progress payment claim,
- by giving the *builder* a written notice detailing the dispute within 5 *working days* of receiving a progress payment claim, the *owner* will be deemed to have accepted the progress payment claim as the cost of materials, labour and other items provided by the *builder* which are the subject of the claim.

Clause 14 – Interest on Late Payments

- 14.1 The *builder* shall be entitled to interest at the rate stated in Item 8 of Schedule 1 from the day on which an amount falls due to be paid to the *builder* by the *owner*, up to and including the day that the amount is paid.

Clause 15 – Variations

- 15.1 A *variation* must be:
- (a) in writing; and
 - (b) signed by the *builder* and the *owner*.
- Either the *owner* or the *builder* may ask for a *variation*.
- 15.2 However, a failure to comply with sub-clause 15.1 will not [REDACTED] that was the subject of a *variation* verbally requested by the *owner*.
- 15.3 If the *owner* asks for a *variation*, the *builder* must reply in writing as soon as is reasonable.
- 15.4 The reply is to be either:
- (a) a signed written offer to carry out the *variation* detailing:
 - (i) the work required to carry out the *variation*;
 - (ii) the price of the *variation*, or the method for calculating the price of the *variation*; and
 - (iii) any extension of time to the *contract period* as a result of carrying out the *variation*; or
 - (b) a refusal to carry out the *variation*. The *builder* is not required to give [REDACTED].

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- 15.5 If the *owner* does not give to the *builder* signed written acceptance of the *builder's* offer within ■ *working days* of the *builder* giving the reply, the *builder's* offer is deemed to be withdrawn.
- 15.6 The *owner* must pay to the *builder* an amount equal to the sum of the cost for the additional work for a *variation*, plus the *builder's margin* applied to that amount. The cost of any omitted amount is deducted from the price of the *variation*.
- 15.7 The price of a *variation* is due and payable the next time the *builder* gives the *owner* a progress payment claim after the relevant work has been carried out, unless a different time is agreed between the parties.
- 15.8 The *owner* must not unreasonably withhold consent to any *variation* which is required for the *building works* to comply with the law or a requirement of a *statutory authority*.
- 15.9 The *owner* acknowledges that the colour and grain of timber, granite and other natural materials can vary. The *builder* is to use reasonable endeavours to match the colour or grain of any sample selected by the *owner*, but is not liable if there is a difference, and such difference is not a *variation*.

Clause 16 – Excluded Items

- 16.1 The *owner* and the *builder* agree that the items described in Schedule 5 are excluded from this *contract*, and the *builder* is not liable for these items in any way whatsoever.

Clause 17 – Materials Supplied by Owner

- 17.1 In this Clause 17, any reference to materials, goods, labour and/or work performed, provided or supplied by the *owner*, includes materials, goods, labour and/or work performed, provided or supplied on behalf of the *owner* (but not by or on behalf of the *builder*), whether or not those materials, goods, labour and/or work are listed in Schedule 5.
- 17.2 Materials, goods, labour and/or work to be provided by the *owner* shall be:
- (a) suitable for inclusion into the *building works*;
 - (b) supplied or completed in the time required by the *builder*;
 - (c) new, unless otherwise specified; and
 - (d) completed to the *builder's* satisfaction.
- 17.3 The *builder* shall not be responsible for the performance and suitability of materials, services, labour and goods provided by the *owner*.
- 17.4 The *builder* may reject any item, good, material or work supplied by the *owner*, if the *builder* believes that item, good, material or work to be defective, and require the replacement or correction of that item, good, material or work.

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- 17.5 Notwithstanding Clause 20, all works carried out by the *owner* on the *site* are at the risk of the *owner*, and the *owner* shall insure that work against damage, loss or theft until such a time that the *owner* takes exclusive possession of the *site*.
- 17.6 The *owner* indemnifies the *builder* against all loss, cost, damage or expense that the *builder* may suffer or incur in connection with the work or labour done by the *owner* or materials or goods supplied by the *owner*.
- 17.7 If the *owner* carries out other work on the *site* while the *building works* are being carried out, then the *owner* shall, and shall ensure that each of the *owner's* contractors:
- (a) do not interfere with the progress of the *building works*;
 - (b) if required by law, hold and maintain the same insurance coverage as the *builder* is required to hold and maintain under this *contract* in relation to their works;
 - (c) hold an appropriate licence to carry out the work as issued by the NSW Office of Fair Trading;
 - (d) observe all relevant occupational health and safety laws, and the requirements of the *builder* in regard to occupational health and safety;
 - (e) obey all directions issued by the *builder* regarding the coordination and timing of their works on the *site*;
 - (f) co-operate with all of the other workers and contractors on the *site*.
- 17.8 The *owner* shall, on request, give the *builder* evidence of all licences and insurances referred to under sub-clauses 17.7(b) and 17.7(c).
- 17.9 If the *owner*, or the *owner's* contractor, does not observe any of the requirements in sub-clauses 17.7 and 17.8, the *builder* may exclude or direct the *owner* or the *owner's* contractor to leave the site.
- 17.10 When the *owner* commences any works on the site, the *owner* is deemed to have accepted the base work as satisfactory, unless a competent builder who had examined and inspected the base work would not have detected or anticipated the unsatisfactory base work. The base work is the site conditions, including work carried out by the *builder* in, on or over which the work is to be carried out.
- 17.11 If the *owner* breaches any provision in this Clause 17 in any way, it shall constitute a serious breach of this *contract*, and the *builder* may:
- (a) carry out the *building works* without incorporating such materials, services or goods; or
 - (b) do either or both of the following:
 - (i) suspend the carrying out of the *building works* by giving the *owner* a written notice under Clause 30;
 - (ii) give the *owner* a notice of serious breach under Clause 31.

Clause 18 – Specified Materials

- 18.1 If any material specified to be used in the *building works* is unavailable when required by the *builder*, the *builder* may ask the *owner* for a *variation* to substitute the use of similar material, and the *owner* must promptly sign the relevant written *variation* when produced by the *builder*.

Clause 19 – Assignment and Subcontracting

- 19.1 Neither party may assign this *contract* or any of their rights, benefits or obligations under this *contract*, without the prior written consent of the other party.
- 19.2 The *builder* may subcontract any part of the *building works*, but will at all times remain responsible for all of the *building works*.

Clause 20 – Risk

- 20.1 Subject to sub-clause 20.2, while carrying out the *building works* to and including *the date of practical completion*, the *builder* is responsible for loss or damage to the *building works*, except to the extent that it is caused or contributed to by an act or omission of the *owner*.
- 20.2 If the *owner* takes possession of the *site*, either prior or subsequent to *the date of practical completion*, and whether it be in accordance with this *contract* or otherwise, the *builder* shall not be responsible for any loss or damage to the *building works*.
- 20.3 The *builder* is not responsible for any loss or damage to the *owner's* property or property for which the *owner* is responsible that is left on the *site*.
- 20.4 The *builder* is not responsible for personal injury, death, property loss or damage caused by war, civil commotion, or terrorism.
- 20.5 Unless stated elsewhere in this *contract*, the *builder* is not responsible for:
- (a) loss or damage to the *owner's* property or for property for which the *owner* is responsible that is left on the *site*;
 - (b) subject to sub-clause 20.5(c), any defect, structural deficiency, settlement or deterioration in the *existing building* except to the extent that it is caused by the *builder* failing to take reasonable care in carrying out the *building works*;
 - (c) damage to ceilings in the *existing building* except to the extent that it is caused by the *builder* failing to take reasonable care in carrying out the *building works*, but then only to the extent of repairing and excluding any repainting;

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- (d) damage to paths, gardens, driveways, trees, lawns and other landscaping; and
 - (e) the restoration of areas affected by the *building works* to their original condition.
- 20.6 The *builder* must take all reasonable steps to mitigate any loss or damage to the *building works* caused or contributed to by an act or omission of the *owner*.

Clause 21 – Indemnity

- 21.1 Except to the extent limited by another provision of this *contract*, each party agrees to indemnify the other, and keep the other party indemnified, against:
- (a) loss of or damage to property (other than the *building works*); and
 - (b) claims in respect of personal injury or death, arising out of or as a consequence of a cause or event at that party's risk.

Clause 22 – Insurances

- 22.1 The *builder* must insure against:
- (a) loss or damage to the *building works* and any goods and materials on the *site* relating to the *building works* against theft, fire, explosion, lightning, hail, storm and tempest, vandalism, civil commotion and earthquake; and
 - (b) public liability for an amount of \$5,000,000 for any one claim.
- 22.2 The above insurance policies must be in place before the *builder* commences the *building works*, and must be maintained:
- (a) in the case of sub-clause 22.1(a), to and including *the date of practical completion*; and
 - (b) in the case of sub-clause 22.1(b), for the duration of the *contract*.
- 22.3 If the *owner* requests so, the insurances specified in sub-clause 22.1 must note the names of the *owner* and the *lending authority* (if applicable) as being the class of the insureds under these insurance policies.
- 22.4 If the *owner* requests evidence of any of the insurance policies specified in sub-clause 22.1 being in place, the *builder* must give the *owner* a copy of the certificate of currency relating to the relevant insurance policy.
- 22.5 On the settlement of any claim under the insurance policy specified in sub-clause 22.1(a), the *builder* is to:
- (a) immediately be paid any part of the settlement moneys relating to loss suffered by the *builder* relating to any work that is the subject of the claim, but for which the *owner* has not paid the *builder*; and

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- (b) carry out the reinstatement and/or rectification of the *building works*, and be paid the balance of the settlement moneys for the reinstatement and/or rectification works.
- 22.6 The *owner* must:
- (a) keep and maintain, until the *date of practical completion*, a home and contents insurance policy over the *existing building*, the *site* and all of the *owner's* property on the *land* including cover against fire, theft, storm and tempest; and
 - (b) before the *building works* commence, notify the insurer of such an insurance policy that the *building works* are to be carried out.

Clause 23 – Practical Completion

- 23.1 The *builder* must give the *owner* a *notice of practical completion* at least 5 *working days* prior to *practical completion* being reached.
- 23.2 The *notice of practical completion* is to:
- (a) state the *builder's* assessment of the *date of practical completion*;
 - (b) state the date and time for the *owner* to meet the *builder* on the *site* to carry out an inspection of the *building works*, and the *builder's* final progress payment claim is to be attached to the *notice of practical completion*.
- 23.3 The *owner* must meet the *builder* on the *site* for the inspection at the date and time stated by the *builder* in the *notice of practical completion*, or at a date and time otherwise agreed with the *builder*, and either:
- (a) pay the amount of the final progress payment claim; or
 - (b) if the *owner* reasonably believes that the *building works* have not reached *practical completion*, promptly give the *builder* a written notice detailing anything to be done to reach *practical completion*.
- 23.4 If the *owner* pays the amount of the final progress payment claim under sub-clause 23.3(a), the *date of practical completion* stated in the *notice of practical completion* is deemed to be the *date of practical completion*.
- 23.5 If the *owner* gives the *builder* a notice under sub-clause 23.3(b) of work to be completed:
- (a) the *builder* must carry out any work required for *practical completion* to be reached, and give the *owner* a further *notice of practical completion*;
 - or
 - (b) if the *builder* does not agree that there is any further work to be carried out to reach *practical completion*, the *builder* must give the *owner* written notice:
 - (i) rejecting the *owner's* notice; and
 - (ii) referring the matter to dispute resolution.
- 23.6 If the *owner* does not pay the amount of the final progress payment claim under sub-clause 23.3(a), or does not, within ■ *working days* after meeting the *builder* on *site*, give the *builder* a notice under sub-clause 23.3(b):

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- (a) the amount of the final progress payment claim is deemed to be a debt due and owing from the *owner* to the *builder*;
 - (b) the *date of practical completion* stated in the *notice of practical completion* is deemed to be the *date of practical completion*; and
 - (c) the *owner* acknowledges the *building works* have reached *practical completion*.
- 23.7 On the *owner* paying the final progress payment claim, the *builder* must give the keys to the *building works* to the *owner*.

Clause 24 – Final Certificate

- 24.1 Unless provided for elsewhere in this *contract*, the *builder*
- [REDACTED]

Clause 25 – Early Possession

- 25.1 If the *owner*:
- (a) enters into occupation of the *site*, or any part of the *site*;
 - (b) takes control of the *building works* or the *site*; or
 - (c) prevents or inhibits the *builder* from carrying out the *building works*, without the *builder's* written consent, the *owner* shall be deemed to have committed a serious breach of this *contract*, and the *builder* shall be entitled to either:
 - (i) treat the *owner's* actions as a repudiation of its obligations under this *contract* [REDACTED]; or
 - (ii) do either or both of the following:
 - A. [REDACTED];
 - B. [REDACTED].
- 25.2 If the *owner* breaches (including repudiates) this *contract*, nothing in this Clause prejudices the right of the *builder* to recover damages or exercise any other right or remedy.

Clause 26 – Contract Maintenance Period

- 26.1 The contract maintenance period is a period of [REDACTED] weeks commencing on and including the *date of practical completion*.
- 26.2 The *owner* may, prior to the expiration of the contract maintenance period, give the *builder* [REDACTED] defects in the *building works* that appear after the *date of practical completion*.
- 26.3 The *builder* must rectify defects that are the *builder's* responsibility and which are notified to the *builder* during the contract maintenance period.

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- 26.4 If the *owner* gives the *builder* a list of defects under sub-clause 26.2, the *owner* must provide the *builder* access to the *site* for the *builder* to carry out the maintenance work.

Clause 27 – Defects and First Right of Rectification

- 27.1 If the *owner* believes that any defect exists in the *building works*, whether it is during or after the contract maintenance period, the *owner* must [REDACTED].
- 27.2 If the *builder* [REDACTED].
- 27.3 The *owner* must allow the *builder* [REDACTED].
- 27.4 Nothing in this Clause 27 shall be construed as purporting to restrict or remove the rights of the *owner* in respect of any statutory warranty under the *Home Building Act 1989 (NSW)*.

Clause 28 – Termite Treatment and Maintenance

- 28.1 Where a termite treatment system is installed or forms part of the *building works*, the *owner* is responsible for and agrees to maintain such a system in the manner specified or required by the manufacturer and installer of the system.
- 28.2 The *owner* is solely responsible for having the *building works* inspected in relation to termite activity at least every 12 months, with such an inspection to be carried out by a licensed pest control person or firm.
- 28.3 No act, conduct or omission of the *builder* shall constitute an extension of the *builder's* warranty applicable to the termite treatment system used beyond the warranty period provided by the manufacturer of such treatment system.

Clause 29 – Charge on the Site

- 29.1 The *owner* charges the *site* with due payment to the *builder* of all moneys that are or may become payable under this *contract* to the extent that a court of tribunal has made an order that the *owner* pays that amount to the *builder*.

Clause 30 – Suspension

- 30.1 If the *owner* is in breach of this *contract* in any way whatsoever, the *builder* may suspend the carrying out of the *building works*.

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- 30.2 The *builder* must give to the *owner* written notice of the suspension and details of the breach.
- 30.3 The *builder* must recommence the carrying out of the *building works* within 10 *working days* after the *owner* remedies the breach and gives the *builder* written notice of that fact.
- 30.4 The *builder's* exercise of the right of suspension does not prevent the *builder* from also exercising any right to terminate this *contract* under Clause 31 in relation to the same breach.

Clause 31 – Termination (Serious Breach)

- 31.1 A serious breach of this *contract* by the *builder* includes if the *builder*:
- (a) has its licence cancelled;
 - (b) suspends the carrying out of the *building works* other than under Clause 30 (a mere absence of the *builder* or its representatives from the *site* will not in itself be sufficient).
- 31.2 A serious breach of this *contract* by the *owner* includes, but is not limited to, if the *owner*:
- (a) fails to pay any amount by the due date;
 - (b) fails to give evidence of ability to pay when requested;
 - (c) fails to establish and maintain a *security account* if requested;
 - (d) interferes with, or obstructs the progress of the *building works*;
 - (e) fails to give, or interferes with the *builder's* possession of the *site*;
 - (f) fails to give an instruction or direction required within the time specified.
- 31.3 If a party is in serious breach of this *contract*, the other party may give the party in breach a written notice stating:
- (a) the details of the breach; and
 - (b) that, if the breach is not remedied within 10 *working days*, that party is entitled to terminate this *contract*.
- 31.4 If 10 *working days* have passed since the notice of serious breach is given, and the breach is not remedied, then the party giving the notice of serious breach may terminate this *contract* by giving a further written notice to that effect.
- 31.5 All notices given under this Clause must be given by certified mail or personally.

Clause 32 – Termination (Insolvency)

- 32.1 The *builder* may terminate this *contract* by giving the *owner* written notice by certified mail or personal service if the *owner*:
- (a) being a person, is or becomes bankrupt; or

(b) being a corporation, is or goes into liquidation.

Clause 33 – Effect of the Builder terminating the contract

33.1 If the *builder* terminates this *contract* under Clause 12.4(b), Clause 31 or Clause 32 then, at the election of the *builder*, the *owner* must pay, as a debt due and payable:

- (a) the greater of the cost of or the market value of the *building works* to date, including the cost of any materials on the *site* or already ordered from suppliers, and costs related to the *building works* not proceeding, less the amount already paid by the *owner* to the *builder*, or
- (b) common law damages (including loss of bargain damages).

Clause 34 – Debt Collection Costs

34.1 The *owner* must pay to the *builder* any debt collection costs, including any legal fees and costs associated with recovering or attempted recovery of any amount under this *contract*.

Clause 35 – Statutory Warranties

35.1 To the extent required by the *Home Building Act 1989*, the *builder* warrants that:

- (a) the *building works* will be performed in a proper and workmanlike manner and in accordance with the plans and specifications attached to this *contract*;
- (b) all materials supplied by the *builder* will be good and suitable for the purpose for which they are used and that, unless otherwise stated in this *contract*, those materials will be new;
- (c) the *building works* will be done in accordance with, and will comply with, the *Home Building Act 1989* or any other law;
- (d) the *building works* will be done with due diligence and within the time stipulated in this *contract*, or if no time is stipulated, within a reasonable time;
- (e) if the *building works* consists of the construction of a dwelling, the making of alterations or additions to a dwelling or the repairing, renovation, decoration or protective treatment of a dwelling, the *building works* will result, to the extent of the *building works* conducted, in a dwelling that is reasonably fit for occupation as a dwelling; and

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- (f) the *building works* and any materials used in doing the *building works* will be reasonably fit for the specified purpose or result, if the *owner* expressly makes it known to the *builder*, or other person with express or apparent authority to enter into or vary contractual arrangements on behalf of the *builder*, the particular purpose for which the *building works* are required or the result that the *owner* desires to be achieved, so as to show that the *owner* relies on the *builder's* skill and judgment.

Clause 36 – Dispute Resolution

- 36.1 If a dispute arises, then a party must give notice to the other party setting out the matter in dispute.
- 36.2 The *builder* and the *owner* must meet within 10 *working days* of the giving of the notice to attempt to resolve the dispute or to agree on methods of doing so.
- 36.3 If the dispute is resolved, the resolution must be documented and signed by both parties.
- 36.4 The parties agree that anything done or said in the negotiation cannot be revealed in any other proceedings.

Clause 37 – Notices

- 37.1 Unless otherwise stated in this *contract*, a notice is deemed to be given if the notice is:
- (a) delivered by hand to the other party;
 - (b) posted by ordinary pre-paid mail to the other party's last known address on the day following the day that it was posted; and
 - (c) sent by facsimile transmission to the party's last known facsimile number on receiving confirmation of transmission.

Clause 38 – No Waiver

- 38.1 Except as provided at law, in equity, or elsewhere in this *contract*, none of the provisions of this *contract* may be varied, waived, discharged or released, except with the prior written consent of the parties.

Clause 39 – Severance

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- 39.1 Any provision in this *contract* which is illegal, void or unenforceable will be ineffective only to the extent of such illegality, voidness or unenforceability, and will not invalidate any other provision of this *contract*.

Clause 40 – Mandatory Conditions

- 40.1 To the extent required by the *Home Building Act 1989* and subject to sub-clause 40.2, the *building works* will comply with:
- (a) the Building Code of Australia (to the extent required under the Environmental Planning and Assessment Act 1979, including any regulation or other instrument made under that Act);
 - (b) all other relevant codes, standards and specifications that the *building works* are required to comply with under any law; and
 - (c) the conditions of any relevant development consent or complying development certificate.
- 40.2 The *builder* is not liable if the *building works* do not comply with the requirements of sub-clause 40.1 if the failure relates solely to:
- (a) a design or specification prepared by or on behalf of the *owner* (but not by or on behalf of the *builder*); or
 - (b) a design or specification required by the *owner*, if the *builder* has advised the *owner* in writing that the design or specification contravenes sub-clause 40.1.
- 40.3 To the extent required by the *Home Building Act 1989*:
- (a) all plans and specifications for the *building works* including any variations to those plans and specifications form part of this *contract*;
 - (b) any agreement to vary this *contract*, or to vary the plans and specifications for the *building works*, must be in writing and signed by the parties.

DEED OF GUARENTEE AND INDEMNITY

builder is _____

COST PLUS CONSTRUCTION CONTRACT

owner is _____

contract is the written agreement between the owner and the builder dated _____

BACKGROUND

The owner entered into the contract at the guarantor's request, and the guarantor is familiar with the owner's obligations under the contract.

OPERATIVE

1. Guarantee

The guarantor guarantees to the builder to fulfil all of the owner's obligations under the contract, including but not limited to, the payment of all monies in accordance with the contract.

2. Indemnity

The guarantor indemnifies the builder, and shall keep the builder indemnified, against any claim, loss, damage or expense arising out of the content of the contract caused by or resulting from any non-fulfilment of the owner's obligation referred to in Clause 1.

3. Principal Debtor

The guarantor shall be deemed to be a principal debtor, jointly and severally liable with the owner, to discharge the obligations referred to in Clause 1.

4. No Merger

Nothing in this Deed merges, extinguishes, postpones, lessens or otherwise prejudicially affects any right, power or remedy that a party may have against another party or any other person at any time. If the contract is terminated in anyway, this Deed shall nevertheless continue to operate, notwithstanding that the owner:

- (a) if a corporation, is placed in liquidation; or
- (b) if a person, is declared bankrupt.

5. No Release

The guarantor is not discharged by:

- (a) any variation to the contract, including a variation to the building works;
- (b) any delay or claim by the builder to enforce a right against the owner; and
- (c) any forbearance given to the owner to perform the owner's obligations under the contract.

6. Severability

If any part of this Deed is invalid, void or unenforceable, that part of the Deed will not invalidate the remainder of this Deed, which shall continue in full force.

7. Where More Than One Guarantor

If the guarantor is more than one person, this guarantee and indemnity is not affected by the failure of all of the persons consisting of the guarantor to sign this Deed being enforced against any one of them.

8. Waiver of Rights

The guarantor waives all rights as surety inconsistent with this Deed, or to the detriment or disadvantage of the builder.

GUARANTOR'S STATEMENT

I/We understand the nature, terms and extent of the guarantee and indemnity provided by me/us, and further acknowledge that I/We have obtained legal advice prior to signing this Deed.

Guarantor's Name (the guarantor)

Witness' Name

Guarantor's Signature

Witness' Signature

Date:

Date: