

1. Definitions

- 1.1 “Contractor” means Sealed & Approved Ltd T/A Austin Asphalt, its successors and assigns or any person acting on behalf of and with the authority of Sealed & Approved Ltd T/A Austin Asphalt.
- 1.2 “Client” means the person/s ordering the Works as specified in any invoice, document or order, and if there is more than one Client is a reference to each Client jointly and severally.
- 1.3 “Works” means all Works or Materials provided by the Contractor to the Client at the Client’s request from time to time (where the context so permits the terms ‘Works’ or ‘Materials’ shall be interchangeable for the other).
- 1.4 “Price” means the Price payable for the Works as agreed between the Contractor and the Client in accordance with clause 4 below.

2. Acceptance

- 2.1 The Client is taken to have exclusively accepted and is immediately bound, jointly and severally, by these terms and conditions if the Client places an order for, or accepts provision of, any Works.
- 2.2 These terms and conditions may only be amended with the Contractor’s consent in writing and shall prevail to the extent of any inconsistency with any other document or agreement between the Client and the Contractor.
- 2.3 Electronic signatures shall be deemed to be accepted by either party providing that the parties have complied with Section 22 of the Electronic Transactions Act 2002 or any other applicable provisions of that Act or any Regulations referred to in that Act.

3. Change in Control

- 3.1 The Client shall give the Contractor not less than fourteen (14) days prior written notice of any proposed change of ownership of the Client and/or any other change in the Client’s details (including but not limited to, changes in the Client’s name, address, contact phone or fax number/s, 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.

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 Works provided; 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:
- (a) if a variation to the Materials which are to be supplied is requested; or
 - (b) if a variation to the Works originally scheduled (including any applicable plans or specifications) is requested; or
 - (c) where additional Works are required due to the discovery of hidden or unidentifiable difficulties (including, but not limited to, hard rock barriers below the surface, iron reinforcing rods in concrete, obscured defects and foreign material, filling required, poor weather conditions or limitations to accessing the site, etc.) which are only discovered on commencement of the Works; or
 - (d) in the event of increases to the Contractor in the cost of labour or Materials, or fluctuations in currency exchange rates, which are beyond the Contractor’s control.
- 4.3 At the Contractor’s sole discretion, a non-refundable deposit may be required.
- 4.4 Time for payment for the Works being of the essence, the Price will be payable by the Client on the date/s determined by the Contractor, which may be:
- (a) on completion of the Works;
 - (b) by way of progress payments in accordance with the Contractor’s specified progress payment schedule. Such progress payment claims may include the reasonable value of authorised variations and the value of any Materials delivered to the site but not yet installed;
 - (c) due twenty (20) days following the end of the month in which a statement is posted to the Client’s address or address for notices;
 - (d) the date specified on any invoice or other form as being the date for payment; or
 - (e) failing any notice to the contrary, the date which is fourteen (14) days following the date of any invoice given to the Client by the Contractor.
- 4.5 Payment may be made by cheque, bank cheque, electronic/on-line banking, credit card (plus a surcharge of to three and a half percent (3.5%) of the Price), or by any other method as agreed to between the Client and the Contractor.
- 4.6 No allowance has been made in the Price for the deduction of retentions. In the event that retentions are made, the Contractor reserves the right to treat all retentions as placing the Client’s account into default.
- 4.7 Unless otherwise stated the Price does not include GST. In addition to the Price the Client must pay to the Contractor an amount equal to any GST the Contractor must pay for any provision of Works by the Contractor under this or any other agreement. The Client must pay GST, without deduction or set off of any other amounts, at the same time and on the same basis as the Client pays the Price. In addition the Client must pay any other taxes and duties that may be applicable in addition to the Price except where they are expressly included in the Price.

5. Provision of the Works

- 5.1 Subject to clause 5.2, it is the Contractor’s responsibility to ensure that the Works start as soon as it is reasonably possible.
- 5.2 The Works commencement date will be put back and/or the completion date extended by whatever time is reasonable in the event that the Contractor claims an extension of time (by giving the Client written notice) where completion is delayed by an event beyond the Contractor’s control, including but not limited to:
- (a) adverse weather conditions; or
 - (b) any failure by the Client to:
 - (i) make a selection; or
 - (ii) have the site ready for the Works; or
 - (iii) notify the Contractor that the site is ready.
- 5.3 Any time or date given by the Contractor to the Client is an estimate only. The Contractor shall not be liable for any loss or damage whatsoever due to failure by the Contractor to provide the Works (or any part of them) promptly or at all, where due to circumstances beyond the reasonable control of the Contractor.

6. Risk

- 6.1 If the Contractor retains ownership of the Materials under clause 13 then:
- (a) where the Contractor is supplying Materials only, all risk for the Materials shall immediately pass to the Client on delivery and the Client must insure the Materials on or before delivery. Delivery of the Materials shall be deemed to have taken place immediately at the time that the Client or the Client’s nominated carrier takes possession of the Materials at the Contractor’s address. At the Contractor’s sole discretion, any costs associated with delivery of the Materials shall be in addition to the Price; or

- (b) where the Contractor is to both supply and install Materials then the Contractor shall maintain a contract works insurance policy until the Works are completed. Upon completion of the Works all risk for the Works shall immediately pass to the Client.
- 6.2 The Contractor shall have public liability insurance of at least \$5m. It is the Client's responsibility to ensure that they are similarly insured.
- 6.3 Notwithstanding the provisions of clause 6.1 if the Client specifically requests the Contractor to leave Materials outside the Contractor's premises for collection, then such materials shall always be left at sole risk of the Client and it shall be the Client's responsibility to ensure the Materials are insured adequately or at all. In the event that such Materials are lost, damaged or destroyed then replacement of the Materials shall be at the Client's expense.
- 6.4 The Client accepts and acknowledges that the Contractor accepts no responsibility for Works completed which have not been designed by a suitably qualified and registered engineer.
- 6.5 Any advice, recommendation, information, assistance or service provided by the Contractor in relation to Works provided is given in good faith is based on the Contractor's own knowledge and experience and shall be accepted without liability on the part of the Contractor and it shall be the responsibility of the Client to confirm the accuracy and reliability of the same in light of the use to which the Client makes or intends to make of the Works.
- 7. Concreting Risk**
- 7.1 Where the Client has supplied goods for the Contractor to complete the Works, the Client acknowledges that they accept responsibility for the suitability of purpose, quality and any faults inherent in those goods. The Contractor shall not be responsible for any defects in the Works, any loss or damage to the goods and/or Materials (or any part thereof), howsoever arising from the use of goods supplied by the Client.
- 7.2 The Client acknowledges that variations of colour and texture are inherent in concrete. The Contractor shall not be liable for any loss, damages or costs howsoever arising resulting from any variation of the colour or texture between different batches of product.
- 7.3 Detailed drawings of any services that will be embedded in the concrete are to be provided to the Contractor prior to commencement of the Works. Whilst all due care will be taken no liability will be accepted by the Contractor for damage to the services or any other element embedded in the concrete.
- 7.4 The Client acknowledges that the curing time for concrete can be affected by elements such as temperature or the weather as such the Contractor offers no guarantee as to the length of time the curing process will take.
- 7.5 The Contractor offers no guarantee against cracking of concrete.
- 8. Client's Responsibilities**
- 8.1 The Contractor shall be entitled to rely on the accuracy of any plans, specifications and other information provided by the Client. In the event that any of this information provided by the Client and/or marking out of the proposed area by the Client is inaccurate, the Contractor accepts no responsibility for any loss, damages, or costs however resulting from these inaccuracies where installation decisions need to be made by the Contractor in the Client's absence because the Client has failed to comply with this clause.
- 8.2 The Client acknowledges that in the event asbestos or any other toxic substances are discovered at the site that it is their responsibility to ensure the safe removal of the same. The Client further agrees to indemnify the Contractor against any costs incurred by the Contractor as a consequence of such discovery. Under no circumstances will the Contractor handle removal of asbestos product.
- 9. Fencing Clauses**
- 9.1 The Client must be on site to supervise the marking out of the fence line, placement of boundary pegs and during the installation of the fence. If the Client fails to comply with this clause then the Contractor accepts no responsibility for installation decisions that need to be made by the Contractor in the Client's absence.
- 9.2 The Client acknowledges that it is their responsibility to remove any existing fence (including existing footings), trees, vines and shrubs to allow the Contractor clear access along the proposed fence line prior to commencement of the Works by the Contractor, unless otherwise agreed in writing between the Contractor and the Client.
- 9.3 The Client shall provide the Contractor with a suitable free power source.
- 9.4 Whilst the Contractor will take all due care during installation, the Contractor will not accept any responsibility for tiles or pavers damaged during installation.
- 9.5 Where fencing is installed on a retaining wall the Contractor shall not be liable for any movement in the fence due to consolidation, or the movement of soil or any other component of the retaining wall.
- 9.6 The Contractor shall not be responsible for digging land out under fence lines nor removal of soil from the site.
- 9.7 The Contractor reserves the right to touch-up all Materials supplied and installed on the site to rectify minor blemishes or damage to paintwork.
- 10. Access**
- 10.1 The Client shall ensure that the Contractor has clear and free access to the site at all times to enable them 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 concreted or paved or grassed areas) unless due to the negligence of the Contractor.
- 11. Underground Locations**
- 11.1 Prior to the Contractor commencing the Works the Client must advise the Contractor of the precise location of all underground services on the site and clearly mark the same. The underground mains and services the Client must identify include, but are not limited to, electrical services, gas services, sewer services, pumping services, sewer connections, sewer sludge mains, water mains, irrigation pipes, telephone cables, fibre optic cables, oil pumping mains, and any other services that may be on site.
- 11.2 Whilst the Contractor will take all care to avoid damage to any underground services the Client agrees to indemnify the Contractor in respect of all and any liability claims, loss, damage, costs and fines as a result of damage to services not precisely located and notified as per clause 11.1.
- 12. Compliance with Laws**
- 12.1 The Client and the Contractor shall comply with the provisions of all statutes, regulations and bylaws of government, local and other public authorities that may be applicable to the Works, including any occupational health and safety laws relating to building/construction sites and any other relevant safety standards or legislation.
- 12.2 The Client shall obtain (at the expense of the Client) all licenses and approvals that may be required for the Works.

13. Title

- 13.1 The Contractor and the Client agree that the Client's obligations to the Contractor for the provision the Works shall not cease (and ownership of the Materials shall not pass) until:
- (a) the Client has paid the Contractor all amounts owing to the Contractor; and
 - (b) the Client has met all other obligations due by the Client to the Contractor in respect of all contracts between the Contractor and the Client.
- 13.2 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 rights and ownership in relation to the Works, and this agreement, shall continue.
- 13.3 It is further agreed that, until ownership of the Materials passes to the Client in accordance with clause 13.1:
- (a) the Client is only a bailee of the Materials and, unless the Materials have become fixtures, must return the Materials to the Contractor on request.
 - (b) the Client holds the benefit of the Client's insurance of the Materials on trust for the Contractor and must pay to the Contractor the proceeds of any insurance in the event of the Materials being lost, damaged or destroyed. The production of these terms and conditions by the Contractor shall be sufficient evidence of the Contractor's rights to receive the insurance proceeds direct from the insurer without the need for any person dealing with the Contractor to make further enquiries.
 - (c) the Client will not sell, dispose, or otherwise part with possession of the Materials other than in the ordinary course of business and for market value. If the Client sells, disposes or parts with possession of the Materials then the Client must hold the proceeds of any such act on trust for the Contractor and must pay or deliver the proceeds to the Contractor on demand.
 - (d) the Client should not convert or process the Materials or intermix them with other goods but if the Client does so then the Client holds the resulting product on trust for the benefit of the Contractor and must sell, dispose of or return the resulting product to the Contractor as it so directs.
 - (e) and unless the Materials have become fixtures, the Client irrevocably authorises the Contractor to enter any premises where the Contractor believes the Materials are kept and recover possession of the Materials.
 - (f) the Contractor may recover possession of any Materials in transit whether or not delivery has occurred.
 - (g) the Client shall not charge or grant an encumbrance over the Materials nor grant nor otherwise give away any interest in the Materials while they remain the property of the Contractor.
 - (h) the Contractor may commence proceedings to recover the Price notwithstanding that ownership of the Materials has not passed to the Client.

14. Personal Property Securities Act 1999 ("PPSA")

- 14.1 Upon assenting to these terms and conditions in writing the Client acknowledges and agrees that these terms and conditions constitute a security agreement for the purposes of the PPSA and creates a security interest in:
- (a) all Materials previously provided by the Contractor to the Client;
 - (b) all Materials will be provided in the future by the Contractor to the Client; and
 - (c) all the Client's present and after acquired property being a charge, including anything in respect of which the Client has at any time a sufficient right, interest or power to grant a security interest in for the purposes of securing repayment of all monetary obligations of the Client to the Contractor for Works – that have previously been provided and that will be provided in the future by the Contractor to the Client.
- 14.2 The Client undertakes to:
- (a) 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 register a financing statement or financing change statement on the Personal Property Securities Register;
 - (b) indemnify, and upon demand reimburse, the Contractor for all expenses incurred in registering a financing statement or financing change statement on the Personal Property Securities Register or releasing any registration made thereby;
 - (c) not register, or permit to be registered, a financing statement or a financing change statement in relation to the registration in favour of a third party without the prior written consent of the Contractor.
- 14.3 The Contractor and the Client agree that nothing in sections 114(1)(a), 133 and 134 of the PPSA shall apply to these terms and conditions.
- 14.4 The Client waives its rights as a debtor under sections 116, 120(2), 121, 125, 126, 127, 129, 131 and 132 of the PPSA.
- 14.5 Unless otherwise agreed to in writing by the Contractor, the Client waives its right to receive a verification statement in accordance with section 148 of the PPSA.
- 14.6 The Client shall unconditionally ratify any actions taken by the Contractor under clauses 14.1 to 14.5.

15. Security and Charge

- 15.1 In consideration of the Contractor agreeing to provide Works, the Client charges all of its rights, title and interest (whether joint or several) in any land, realty or other assets capable of being charged, owned by the Client either now or in the future, to secure the performance by the Client of its obligations under these terms and conditions (including, but not limited to, the payment of any money).
- 15.2 The Client indemnifies the Contractor from and against all the Contractor's costs and disbursements including legal costs on a solicitor and own client basis incurred in exercising the Contractor's rights under this clause.
- 15.3 The Client irrevocably appoints the Contractor and each director of the Contractor as the Client's true and lawful attorney/s to perform all necessary acts to give effect to the provisions of this clause 15 including, but not limited to, signing any document on the Client's behalf.

16. Client's Disclaimer

- 16.1 The Client hereby disclaims any right to rescind, or cancel any contract with the Contractor or to sue for damages or to claim restitution arising out of any inadvertent misrepresentation made to the Client by the Contractor and the Client acknowledges that the Works are bought relying solely upon the Client's skill and judgment.

17. Defects and Warranties

- 17.1 The Client shall inspect the Works on completion (Materials on delivery) and shall within seven (7) days of such time (time being of the essence) notify the Contractor of any alleged defect, error or omission, shortage in quantity, damage or failure to comply with the description or quote. The Client shall afford the Contractor an opportunity to review the Works (inspect the Materials) within a reasonable time following such notification if the Client believes the Works are defective in any way. If the Client shall fail to comply with these provisions the Works shall be presumed to be free from any defect or damage. For defective Works, 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) rectify or re-provide the Works (or repair or replace the Materials).

- 17.2 Materials will not be accepted for return other than in accordance with 17.1 above.
- 17.3 To the extent permitted by statute, no warranty is given by the Contractor as to the quality or suitability of the Works for any purpose and any implied warranty, is expressly excluded. The Contractor shall not be responsible for any loss or damage to the Works, or caused by the Works, or any part thereof however arising.
- 18. Consumer Guarantees Act 1993**
- 18.1 If the Client is acquiring Works for the purposes of a trade or business, the Client acknowledges that the provisions of the Consumer Guarantees Act 1993 do not apply to the provision of Works by the Contractor to the Client.
- 19. Intellectual Property**
- 19.1 Where the Contractor has designed, drawn, written plans or a schedule of Works, or created any Materials for the Client, then the copyright in all such designs, drawings, documents, plans, schedules and Materials shall remain vested in the Contractor, and shall only be used by the Client at the Contractor's discretion.
- 19.2 The Client warrants that all designs, specifications or instructions given 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.
- 19.3 The Client agrees that the Contractor may (at no cost) use for the purposes of marketing or entry into any competition, any documents, designs, drawings, plans or Materials (or any digital media thereof) which the Contractor has created for the Client.
- 20. Default and Consequences of Default**
- 20.1 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.
- 20.2 If the Client owes the Contractor any money the Client shall indemnify the Contractor from and against all costs and disbursements incurred by the Contractor in recovering the debt (including but not limited to internal administration fees, legal costs on a solicitor and own client basis, the Contractor's collection agency costs, and bank dishonour fees).
- 20.3 Further to any other rights or remedies the Contractor may have under this agreement, if the Client has made payment to the Contractor by cheque or credit card, and the transaction is subsequently reversed, the Client shall be liable for the amount of the reversed transaction, in addition to any further costs incurred by the Contractor under this clause 20, where it can be proven that such reversal is found to be illegal, fraudulent or in contravention to the Client's obligations under this agreement.
- 20.4 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) under these terms and conditions the Contractor may suspend or terminate the provision of Works to the Client. 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.
- 20.5 Without prejudice to the Contractor's other remedies at law the Contractor shall be entitled to cancel all or any part 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 if:
- (a) any money payable to the Contractor becomes overdue, or in the Contractor's opinion the Client will be unable to make a payment when it falls due;
 - (b) the Client becomes insolvent or bankrupt, 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.
- 21. Cancellation**
- 21.1 The Contractor may cancel any contract to which these terms and conditions apply or cancel provision of the Works at any time before the Works have commenced by giving written notice to the Client. On giving such notice the Contractor shall repay to the Client any sums paid in respect of the Price, less any amounts owing by the Client to the Contractor for Materials already performed. The Contractor shall not be liable for any loss or damage whatsoever arising from such cancellation.
- 21.2 In the event that the Client cancels the Works, the Client shall be liable for any Works provided by the Contractor up to the date of cancellation and all loss incurred (whether direct or indirect) by the Contractor as a direct result of the cancellation (including, but not limited to, any loss of profits).
- 21.3 Cancellation of orders for Materials made to the Client's specifications, or for non-stocklist items, will definitely not be accepted once production has commenced, or an order has been placed.
- 22. Privacy Act 1993**
- 22.1 The Client authorises the Contractor or the Contractor's agent to:
- (a) access, collect, retain and use any information about the Client;
 - (i) (including any overdue fines balance information held by the Ministry of Justice) for the purpose of assessing the Client's creditworthiness; or
 - (ii) for the purpose of marketing products and services to the Client.
 - (b) disclose information about the Client, whether collected by the Contractor from the Client directly or obtained by the Contractor from any other source, to any other credit provider or any credit reporting agency for the purposes of providing or obtaining a credit reference, debt collection or notifying a default by the Client.
- 22.2 Where the Client is an individual the authorities under clause 22.1 are authorities or consents for the purposes of the Privacy Act 1993.
- 22.3 The Client shall have the right to request the Contractor for a copy of the information about the Client retained by the Contractor and the right to request the Contractor to correct any incorrect information about the Client held by the Contractor.
- 23. Dispute Resolution**
- 23.1 All disputes and differences between the Client and the Contractor touching and concerning this agreement shall be referred to arbitration under a single arbitrator agreed upon by both parties, or failing agreement, by two arbitrators (one to be appointed by each party) and their umpire (appointed by them prior to arbitration), such arbitration to be carried out in accordance with provisions of the Arbitration Act 1996.
- 24. Construction Contracts Act 2002**
- 24.1 The Client hereby expressly acknowledges that:
- (a) the Contractor has the right to suspend the Works within five (5) working days of written notice of its intent to do so if a payment claim is served on the Client, and:

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- (i) the payment is not paid in full by the due date for payment and no payment schedule has been given by the Client; or
 - (ii) a scheduled amount stated in a payment schedule issued by the Client in relation to the payment claim is not paid in full by the due date for its payment; or
 - (iii) the Client has not complied with an adjudicator's notice that the Client must pay an amount to the Contractor by a particular date; and
 - (iv) the Contractor has given written notice to the Client of its intention to suspend the carrying out of construction work under the construction contract.
- (b) if the Contractor suspends the Works, it:
- (i) is not in breach of contract; and
 - (ii) is not liable for any loss or damage whatsoever suffered, or alleged to be suffered, by the Client or by any person claiming through the Client; and
 - (iii) is entitled to an extension of time to complete the contract; and
 - (iv) keeps its rights under the contract including the right to terminate the contract; and may at any time lift the suspension, even if the amount has not been paid or an adjudicator's determination has not been complied with.
- (c) if the Contractor exercises the right to suspend the Works, the exercise of that right does not:
- (i) affect any rights that would otherwise have been available to the Contractor under the Contractual Remedies Act 1979; or
 - (ii) enable the Client to exercise any rights that may otherwise have been available to the Client under that Act as a direct consequence of the Contractor suspending the Works under this provision.

25. General

- 25.1 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. 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.
- 25.2 These terms and conditions and any contract to which they apply shall be governed by the laws of New Zealand, and are subject to the jurisdiction of the Christchurch courts of New Zealand.
- 25.3 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 (alternatively the Contractor's liability shall be limited to damages which under no circumstances shall exceed the Price).
- 25.4 The Client shall not be entitled 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.
- 25.5 The Contractor may license or sub-contract all or any part of its rights and obligations without the Client's consent.
- 25.6 The Client agrees that the Contractor may amend these terms and conditions at any time. If the Contractor makes a change to these terms and conditions, then that change will take effect from the date on which the Contractor notifies the Client of such change. The Client will be taken to have accepted such changes if the Client makes a further request for the Contractor to provide any Works to the Client.
- 25.7 Neither party shall be liable for any default due to any act of God, war, terrorism, strike, lock-out, industrial action, fire, flood, storm, earthquake, or other event beyond the reasonable control of either party.
- 25.8 The Client warrants that it has the power to enter into this agreement and has obtained all necessary authorisations to allow it to do so, it is not insolvent and that this agreement creates binding and valid legal obligations on it.