

# AGREED TERMS AND CONDITIONS OF SALES AND SUPPLY

## 1 DEFINITIONS AND INTERPRETATION

1.1 **(Definitions):** Unless the context requires otherwise:

**Buyer** means the purchaser of the Product.

**Colour** means that colour in accordance with the noted Pantone colour code provided in the Order.

**Commencement Date** means that date that the Seller issues a tax invoice in accordance with clause 3.3.

**Confidential Information** means the Order, any payment information provided by the Buyer to the Seller and the Product (to the extent information about the Product is not in the public domain).

**Custom Design** means the design of the Buyer and required for the Product where noted in the Order, that is not part of the standard range of the Seller.

**Department** means that business unit of the Seller that will make the Product and brand the Product with its business name.

**Deposit** means that amount as noted in the Order, to be paid on the Commencement Date.

**Description** means a brief identifying description of the Product.

**Event of Default** means in the case of either party:

(a) an Insolvency Event occurs; or

(b) a party commits a breach of its obligations under these Terms which

(i) if capable of being remedied, is not remedied within five (5) business days of notice from the other party, specifying the breach and requiring it to be remedied; or

(ii) is not capable of remedy.

**Fabrication Requirements** means, where the Order is an Ausmetal Engineering order, those requirements that the Product is to be manufactured in accordance with, as noted in the Order.

**GST** refers to the goods and services tax under *A New Tax System (Goods and Services) Act 1999* ("GST Act") and the terms used have the meanings as defined in the GST Act.

**Guarantor** means the person/s who have agreed to guarantee the buyer's obligations under this agreement.

**Insolvency Event** means bankruptcy, administration, compromise, arrangement, amalgamation, reconstruction, winding up, dissolution and assignment for or compromise with creditors, not paying any debt as and when it falls due, and 'Insolvent' will be construed accordingly.

**Install Required** means where 'yes' is selected in the Order, that the cost to install the Product at the Place of Install is required at the Place of Install and is included in the Price.

**Order** means the 'Order Form' at the front of these Terms, submitted by the Buyer as a standing offer (until withdrawn by written notice to the Seller) for the purposes of the Seller determining whether to provide the Product to the Buyer in accordance with the Terms.

**Place of Install** means that place as noted in the Order.

**Product** means the product to be supplied by the Seller to the Buyer as outlined under the 'order details' in the Order and in accordance with the Fabrication Requirements.

**Price** shall mean the price payable for the Product as noted on the Order.

**Seller** means Ausmetal Engineering Unit Trust ABN 51 267 763 310.

**Taxes** means any tax, GST, levy, impost, duty, charge, deduction, compulsory loan or withholding of whatever kind (together with any related interest, penalty, fine or expense) that is imposed by law or any government agency.

**Terms** means these 'Agreed terms and conditions of sale and supply'.

**Third Party Requirements** means those items provided in the Order, which the Buyer requires to be installed or otherwise fitted by to the Product but which will be undertaken by a party noting being the Seller.

**Quote** means an email, proposal or other document of the Seller provided to the Buyer estimating a price for a product requested by the Buyer.

1.2 **(Interpretation):** The following rules of interpretation apply:

(a) headings are for convenience only and do not affect interpretation;

(b) the singular includes the plural and vice versa;

(c) a gender includes all genders;

(d) where a word or phrase is defined, its other grammatical forms have a corresponding meaning;

(e) a reference to a person includes a body corporate, an unincorporated body or other entity and vice versa;

(f) a reference to a clause, annexure or schedule is to a clause of, or annexure or schedule to this document;

(g) a reference to any party to this document or any other agreement or document includes the party's successors and permitted assigns;

(h) a reference to any agreement or document is to that agreement or document as amended, novated, supplemented, varied or replaced from time to time, except to the extent prohibited by this document;

(i) a reference to any legislation or to any provision of any legislation includes any modification or re-enactment of it, any legislative provision substituted for it and all regulations and statutory instruments issued under it;

(j) a reference to a right or obligation of any 2 or more persons confers that right, or imposes that obligation, as the case may be, jointly and severally;

(k) a reference to conduct includes any omission and any statement or undertaking, whether or not in writing;

(l) a reference to writing includes a facsimile transmission and any means of reproducing words in a tangible and permanently visible form;

(m) mentioning anything after include, includes or including does not limit what else might be included.

(n) these conditions (which shall only be waived in writing signed by the Seller) shall prevail over all conditions of the buyer's order to the extent of any inconsistency.

(o) nothing in these conditions shall be read or applied so as to exclude, restrict or modify or have the effect of excluding, restricting or modifying any condition, warranty, guarantee, right or remedy implied by law (including the *Australian Consumer Law* or *Competition and Consumer Act 2010* (Cth)) and which by law cannot be excluded, restricted or modified.

## 2 ACCEPTANCE

2.1 The Buyer seeks to engage the Seller to produce the custom handmade Product in accordance with the Order and the Seller accepts such engagement and agrees to provide the Product to the Buyer subject to these Terms.

2.2 The Buyer warrants that the information provided in the Order is accurate, correct and complete and is supplied for the purposes of the Seller manufacturing the Product.

2.3 These Terms shall be deemed to have commenced on the Commencement Date and shall continue in effect until the earlier of:

(a) the Product has been delivered to the Buyer; or

(b) these Terms are terminated in accordance with clause 18.

2.4 Where more than one Buyer has entered into this agreement, the Buyers and Guarantors shall be jointly and severally liable for all payments of the Price.

2.5 These terms and conditions may only be amended with the Seller's consent in writing and shall prevail to the extent of any inconsistency with any other document or agreement between the Buyer and the Seller.

2.6 The Buyer shall give the Seller not less than fourteen (14) days prior written notice of any proposed change of ownership of the Buyer or any change in the Buyer's name and/or any other change in the Buyer's details (including but not limited to, changes in the Buyer's address or facsimile number). The Buyer shall be liable for any loss incurred by the Seller as a result of the Buyer's failure to comply with this clause.

2.7 Any Quote given by the Seller to the Buyer, prior to the provision of an Order:

(a) is only valid for 14 days; and

(b) is at all times subject to an Order and these Terms being entered into.

## 3 PRICE AND PAYMENT

3.1 Any information provided by the Seller to the Buyer, including a price list, does not constitute an offer to sell but constitutes an invitation to treat only, and is subject to:

(a) the availability of the components comprised in the Product;

(b) third party suppliers required to manufacture or complete the Product; and

(c) payment in accordance with clause 3.9,

which may change from time to time.

3.2 An Order made by the Buyer to purchase the Product which is accepted by the Seller and the contract made by that acceptance (**Supply Contract**) are subject to these Terms.

3.3 The Order placed by the Buyer with the Seller is an offer to purchase the Product for the Price at that date of order (plus any delivery charges, Taxes or other applicable charges payable by the Buyer, unless stated otherwise in the Order) and a Supply Contract is only deemed as accepted by the Seller upon issue of a tax invoice for the Supply Contract from the Seller to the Buyer.

3.4 The Supply Contract is not subject to any terms and conditions put forward by the Buyer, including those on any purchase order.

3.5 The Price is at all times subject to:

- (a) clear and immediate instructions from the Buyer when requested by the Seller;
  - (b) no change in design or materials, including but not limited to Colour, from the Buyer after the Commencement Date;
  - (c) no change to the Place of Install after the Commencement Date;
  - (d) all Owner Requirements have occurred to the Place of Install (as applicable) prior to the installation of the Product at the Place of Install; and
  - (e) no variation to the Supply Contract.
- 3.6 Where any obligation in clause 3.5 has or hasn't occurred (as the context requires) the Seller may give notice to the Buyer of the revised Price.
- 3.7 The Buyer must pay all Taxes in relation to the Supply Contract (other than the Seller's income tax).
- 3.8 The Seller reserves the right to change the Price in the event of a variation to any Supply Contract.
- 3.9 Commencement of the fabrication of the Product is at all times subject to the Deposit:
- (a) being paid on or before the Commencement Date; and
  - (b) being received in clear funds into the nominated bank account of the Seller.
- 3.10 The Seller will apply the Deposit to the Price.
- 3.11 At the Seller's sole discretion payment for any Supply Contract, or the remainder of any Supply Contract if a Deposit has been paid:
- (a) shall be due on delivery of the Product; or
  - (b) shall be due before delivery of the Product; or
  - (c) shall be due in accordance with the payment terms recorded on the tax invoice issued by the Seller for that Supply Contract.
- 3.12 Time for payment of the Supply Contract shall be of the essence. If no time is stated then payment shall be due at the time of delivery of the Product.
- 3.13 Payment of a Supply Contract must be made by bank cheque, electronic transfer or by direct credit, or by any other method as required by the Seller in its sole discretion.
- 3.14 A certificate signed by a Director, Secretary, Officer, Financial Controller or Credit Manager of the Seller or any person duly authorised from time to time by the Seller shall be conclusive evidence of the amount of indebtedness of the Buyer to the Seller.
- 3.15 On the Commencement Date, the Seller may (but is not obligated to):
- (a) allocate a date that the Product manufacturing process will commence; and/or
  - (b) provide a timeframe for certain events to occur throughout the manufacturing process of the Product.

#### **4 DELIVERY OF THE PRODUCT**

- 4.1 Delivery of the Product shall take place when the Buyer takes possession of the Product:
- (a) at the Place of Install once the Product has been fully installed;
  - (b) otherwise where the Buyer:
    - (i) requests the Product is shipped to them; or
    - (ii) that Installed Required is not necessary,
 then
    - (iii) at the Buyer's nominated address (in the event that the Product is delivered by the Seller or the Seller's nominated carrier); or
    - (iv) at the place that the Buyer takes physical possession of the Product.
- 4.2 At the Seller's sole discretion the costs of delivery are:
- (a) in addition to the Price; or
  - (b) for the Buyer's account.
- 4.3 The Buyer must make all arrangements necessary to take delivery of the Product whenever it is tendered for delivery. In the event that the Buyer is unable to take delivery of the Product as arranged then the Seller shall be entitled to charge to the Buyer, in addition to the Price, all reasonably incurred fees for redelivery including the Seller's full cost of transport, storage, administration and any other additional fees incurred by the Seller.
- 4.4 Delivery of the Product to a third party as nominated by the Buyer is deemed and accepted to be delivery effected as if delivered directly to the Buyer.
- 4.5 The Seller may deliver the Product by separate instalments. Each separate instalment shall be invoiced and paid in accordance with the provisions of these Terms.
- 4.6 The Buyer must take delivery of the Product tendered notwithstanding:
- (a) the Colour as applied to the Product differs the Colour as it appeared on a device, brochure or other marketing material; or
  - (b) any reasonable imperfection on the Product as a result of the handmade fabrication process.

- 4.7 The failure of the Seller to deliver shall not entitle either party to treat the Supply Contract as repudiated.
- 4.8 The Seller shall not be liable for any loss or damage whatsoever due to failure by the Seller to deliver the Product, in full, promptly or at all.
- 4.9 The Buyer shall be responsible for providing correct delivery details to the Seller.
- 4.10 The Seller's obligation to deliver the Product shall be discharged on arrival of the Product at the Buyer's nominated delivery destination, nominated agent or carrier or the delivery address appearing on the invoice.

#### **5 RISK**

- 5.1 All risk for Product supplied by the Seller to the Buyer passes to the Buyer entirely on delivery of the Product.
- 5.2 If the Product is damaged or destroyed following delivery but prior to title/ownership passing to the Buyer, the Seller is entitled to receive all insurance proceeds payable for the Production. The production of these terms and conditions by the Seller is sufficient evidence of the Seller's rights to receive the insurance proceeds without the need for any person dealing with the Seller to make further enquiries.

#### **6 TITLE**

- 6.1 The Buyer understands, acknowledges and agrees the Seller reserves all rights under law including full retention of title over all the Product supplied to the Buyer until all monies due and payable by the Buyer (including costs, fees, charges and interest pursuant to these Terms) are remitted in full cleared funds to the Seller in addition to the following terms:
- (a) the Seller retains full legal ownership of the Product supplied until the Buyer has remitted all sums due and payable to the Seller including costs, fees, Taxes and interest;
  - (b) the Seller retains the full legal right to enter the Buyer's premises (or the premises where the Product is located) without liability for trespass, criminal charges, or any other resulting reasonable level of damage for the purpose of re-taking possession of the Product supplied by the Seller;
  - (c) to keep or re-sell the recovered Product and apply such sale funds to the remaining debt of the Buyer.
- Notwithstanding the provisions above the Seller retains rights at law to pursue an action against the Buyer for any sum remaining as due and payable to the Seller.
- 6.2 Receipt by the Seller of any form of payment other than cash shall not be deemed to be payment until that form of payment has been honoured, cleared and recognised as cleared funds and is not subject to a claim as a preference. Until the Seller has cleared funds ownership or rights in respect of the Product shall continue to remain entirely with the Seller.
- 6.3 It is further agreed that:
- (a) the Product shall be kept separate and identifiable until the Seller has received full payment and all other obligations of the Buyer are met and extinguished; and
  - (b) until such time as ownership of the Product shall pass from the Seller to the Buyer the Seller may give notice in writing to the Buyer to return the Product to the Seller. Upon such notice the rights of the Buyer to obtain ownership or any other interest in the Product shall cease; and
  - (c) the Seller shall have the right of stopping the Product in transit whether or not delivery has been made; and
  - (d) if the Buyer fails to return the Product to the Seller then the Seller or the Seller's agent may enter upon and into land and premises owned, occupied or used by the Buyer, or any premises as the invitee of the Buyer, where the Product is situated and take possession of the Product; and
  - (e) the Buyer is only a bailee of the Product and until such time as the Seller has received payment in full for the Product then the Buyer shall hold any proceeds from the sale or disposal of the Product, up to and including the amount the Buyer owes to the Seller for the Product, on trust for the Seller; and
  - (f) the Buyer shall not charge the Product in any way nor grant nor otherwise give any interest in the Product while it remains the property of the Seller; and
  - (g) the Seller can issue proceedings to recover the Price of the Product sold notwithstanding that ownership of the Product may not have passed to the Buyer; and
  - (h) until such time that ownership in the Product passes to the Buyer, if the Product is converted into other products, the parties agree that the Seller will be the owner of the end products.

#### **7 SECURITY INTEREST**

- 7.1 If clause 6 for any reason does not apply, the Buyer grants a security interest to the Seller in each and every part of the Product as security for payment for that part and each other part or parts of the Product and for other amounts owing by the Buyer to the Seller.
- 7.2 The Buyer agrees to do anything that the Seller reasonably requires to ensure that the Seller has a perfected security interest in the Product and

a purchase money security interest in each part of the Product to the extent of the Price.

## 8 PPSA

8.1 In these Terms:

**PPSA** means the *Personal Property Securities Act 2009* (Cth);

**financing statement** has the meaning given to it by the PPSA;

**financing change statement** has the meaning given to it by the PPSA;

**security agreement** means the security agreement under the PPSA created between the Buyer and the Seller by these terms and conditions; and

**security interest** has the meaning given to it by the PPSA.

**Prescribed Threshold** means \$5,000 or such greater amount prescribed under any regulation to the PPSA.

8.2 Where the Price exceeds the Prescribed Threshold, the Buyer acknowledges and agrees that the Order and these Terms:

- (a) constitute a security agreement for the purposes of the PPSA; and
- (b) create a security interest in the Product to be supplied by the Seller to the Buyer.

8.3 The Buyer undertakes to:

- (a) promptly sign any further documents and/or provide any further information (such information to be complete, accurate and current in all respects) which the Seller may reasonably require to:
  - (i) register a financing statement or financing change statement in relation to a security interest on the Personal Property Securities Register;
  - (ii) register any other document required to be registered by the PPSA; or
  - (iii) correct a defect in a statement referred to in clause 8.3(a)(i) or 8.3(a)(ii);
- (b) indemnify, and upon demand reimburse, the Seller for all expenses incurred in registering a financing statement or financing change statement on the Personal Property Securities Register established by the PPSA or releasing the Product charged thereby;
- (c) not register a financing change statement in respect of a security interest without the prior written consent of the Seller; and
- (d) not register, or permit to be registered, a financing statement or a financing change statement in relation to the Product in favour of a third party without the prior written consent of the Seller.

8.4 The Seller and the Buyer agree that sections 96 and 125 of the PPSA do not apply to the security agreement created by these Terms.

8.5 The Buyer hereby waives its rights to receive notices under sections 95, 118, 121(4), 130, 132(3)(d) and 132(4) of the PPSA.

8.6 The Buyer waives its rights as a grantor and/or a debtor under sections 142 and 143 of the PPSA.

8.7 Unless otherwise agreed to in writing by the Seller, the Buyer waives its right to receive a verification statement in accordance with section 157 of the PPSA.

## 9 BUYER'S DISCLAIMER

9.1 The Buyer hereby disclaims any right to rescind, or cancel any contract, including any Supply Contract, with the Seller or to sue for damages or to claim restitution arising out of any inadvertent misrepresentation made to the Buyer by the Seller and the Buyer acknowledges that the Product is bought relying solely upon the Buyer's skill and judgement.

## 10 DEFECTS

10.1 The Buyer shall inspect the Product immediately on delivery. Any notice of defect, shortfall or any other variance, other than those noted in clause 4.6, shall be made expressly in writing to the Seller within 24 hours of delivery, with time being of the essence.

10.2 The Seller's liability of defects is limited, at the Seller's sole discretion, to either replacement or repair of defective goods only. The Seller expressly denies any liability for costs associated with the removal, installation or re-installation of or any other costs in rectifying defect claims.

## 11 COMPETITION AND CONSUMER ACT 2010 (CCA)

11.1 Under applicable State, Territory and Commonwealth Law (including, without limitation to the CCA), certain statutory implied guarantees and warranties (including, without limitation the statutory guarantees under the CCA) may be implied into these terms and conditions (Non-Excluded Guarantees).

11.2 The Seller acknowledges that nothing in these terms and conditions purports to modify or exclude the Non-Excluded Guarantees.

11.3 Except as expressly set out in these terms and conditions or in respect of the Non-Excluded Guarantees, the Seller makes no warranties or other representations under these terms and conditions including but not limited to the quality or suitability of the Product. The Seller's liability in respect of these warranties is limited to the fullest extent permitted by law.

11.4 If the Buyer is a consumer within the meaning of the CCA, the Seller's liability is limited to the extent permitted by section 64A of Schedule 2 CCA.

11.5 If the Seller is required to replace the Product under this clause or the CCA, but is unable to do so, the Seller may refund any money the Buyer has paid for the Product.

11.6 If the Buyer is not a consumer within the meaning of the CCA, the Seller's liability for any defect or damage in the Product is:

- (a) limited to the value of any express warranty or warranty card provided to the Buyer by the Seller at the Seller's sole discretion;
- (b) limited to any warranty to which the Seller is entitled, if the Seller did not manufacture the Product;
- (c) otherwise negated absolutely.

11.7 Notwithstanding this clause or clause 10, 12 or 13 but subject to the CCA, the Seller shall not be liable for any defect or damage which may be caused or partly caused by or arise as a result of:

- (a) the Buyer failing to properly maintain or store the Product;
- (b) the Buyer using the Product for any purpose other than that for which they were designed;
- (c) the Buyer continuing the use of the Product after any defect became apparent or should have become apparent to a reasonably prudent operator or user;
- (d) the Buyer failing to follow any instructions or guidelines provided by the Seller; and
- (e) fair wear and tear, any accident or act of God.

11.8 Notwithstanding anything contained in this clause or clause 12, if the Seller is required by a law to accept return then the Seller will only accept return on the conditions imposed by that law.

## 12 RETURNS

12.1 Subject to Clause 11, returns will only be accepted provided that:

- (a) the Buyer has complied with the provisions of clause 10.1; and
- (b) the Seller has agreed in writing to accept the return of the Product; and
- (c) the Product is returned to the Seller at the Buyer's cost within ten (10) days of the delivery date; and
- (d) the Seller will not be liable nor accept return of the Product which have not been stored, used or transported in a proper manner; and
- (e) the Product is returned in the condition in which it was delivered and with all packaging material, brochures and instruction material in as new condition as is reasonably possible in the circumstances.

12.2 The Seller will not accept the return of Product for credit.

## 13 WARRANTIES

13.1 For any:

- (a) Third Party Requirement; and
- (b) component incorporated into the Product that is not manufactured by the Seller ("**Component**"),

the warranty shall be the current warranty provided by the manufacturer of those goods or Component.

13.2 The Seller shall not be bound by nor be responsible for any term, condition, representation or warranty other than that which is given by the manufacturer of that Component.

13.3 The Seller is not bound by nor responsible for any term, condition, representation or warranty with respect to any Third Party Requirement.

13.4 Unless otherwise stated and to the extent permitted by law, any Third Party Requirement, once affixed or installed to the Product, will void any warranty in relation to the Product.

## 14 DEFAULT ON PAYMENT

14.1 (**Credit facility**): The Buyer acknowledges that completion of the Order, these Terms or any time, other than cash on delivery, noted on an invoice issued by the Seller does not form the basis of a credit facility. The Buyer further acknowledges any credit facility that may be deemed from any time to pay an invoice provided by the Seller for the Buyer may at any time be suspended or withdrawn for convenience by the Seller without notice. Any time to pay suspended or withdrawn by the Seller will result in the full sum, including costs and interest, being payable immediately to the Seller in the entire sum due plus costs and interest pursuant to these Terms.

14.2 (**Interest**): The Buyer acknowledges and agrees in respect of any amount as may from time to time be overdue to the Seller, will result in the full sum of account being due and payable to the Seller immediately. The Buyer acknowledges and agrees the Seller may apply interest calculated daily to any amount overdue at a rate of two and one half percent (2.50%) per calendar month.

14.3 (**Costs and other expenses**): The Buyer acknowledges and agrees to pay all expenses (including all and any fees, charges or commission charged by a collection agency, solicitor or consultant and all and any fees and charges charged by a solicitor on a solicitor/client basis) which the Seller may incur in the process of recovering any sum due and payable by the Buyer to the Seller.

## 15 CANCELLATION

- 15.1 The Seller may cancel any Supply Contract to which these Terms apply or cancel delivery of the Product at any time before the Product is delivered by giving written notice to the Buyer. On giving such notice the Seller shall repay to the Buyer any sums paid in respect of the Supply Contract cancelled. The Seller shall not be liable for any loss or damage whatever arising from such cancellation.
- 15.2 In the event that the Buyer cancels any Supply Contract, for whatever reason, the Buyer shall be liable for any loss incurred by the Seller (including, but not limited to, any loss of profits) up to the time of cancellation.

## 16 PRIVACY ACT 1988

- 16.1 The Buyer agrees for the Seller to obtain from or disclose to a credit reporting agency or third party a credit report containing personal information about the Buyer in relation to these Terms.
- 16.2 The Buyer agrees that the Seller may exchange information about the Buyer with those credit providers named in a consumer credit report issued by a credit reporting agency for the following purposes: to notify other credit providers of a default by the Buyer; and/ or to exchange information with other credit providers as to the status of this credit account, where the Buyer is in default with other credit providers; and/ or to assess the creditworthiness of the Buyer.
- 16.3 The Buyer consents to the Seller being given a consumer credit report to collect overdue payment on commercial credit (Section 18K(1)(h) Privacy Act 1988).
- 16.4 The Buyer agrees that personal credit information provided may be used and retained by the Seller for the following purposes (and for other purposes as shall be agreed between the Seller and the Buyer or required by law from time to time): the provision of the Product; and/ or the marketing of the Product by the Seller, its agents or distributors; and/ or analysing, verifying and/ or checking the Seller's credit, payment and/ or status in relation to the provision of the Product; and/ or processing of any payment instructions, direct debit facilities and/ or credit facilities requested by the Buyer.
- 16.5 The Seller may give information about the Buyer to a credit reporting agency for the following purposes: to obtain a consumer credit report about the Buyer and/ or allow the credit reporting agency to create or maintain a credit information file containing information about the Buyer. The information given to the credit reporting agency may include: personal particulars (the Buyer's name, sex, address, previous addresses, date of birth, name of employer and driver's licence number); advice that the Seller is a current credit provider to the Buyer; advice of any overdue accounts, loan repayments, and/ or any outstanding monies owing which are overdue by more than sixty (60) days, and for which debt collection action has been started; that the Buyer's overdue accounts, loan repayments and/ or any outstanding monies are no longer overdue in respect of any default that has been listed; information that, in the opinion of the Seller, the Buyer has committed a serious credit infringement (that is, fraudulently or shown an intention not to comply with the Buyer's credit obligations); advice that cheques drawn by the Buyer for one hundred dollars (\$100) or more, have been dishonoured more than once; that credit provided to the Buyer by the Seller has been paid or otherwise discharged.

## 17 GENERAL

- 17.1 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.
- 17.2 These Terms and any Supply Contract to which they apply shall be governed by the laws of Queensland and are subject to the jurisdiction of the courts of Queensland.
- 17.3 The Seller shall be under no liability whatever to the Buyer for any indirect loss and/ or expense (including loss of profit) suffered by the Buyer arising out of a breach by the Seller of these Terms.
- 17.4 In the event of any breach of these Terms by the Seller the remedies of the Buyer shall be limited to damages which under no circumstances shall exceed the Price of the Product.
- 17.5 The Buyer shall not be entitled to set off against or deduct from the Price any sums owed or claimed to be owed to the Buyer by the Seller.
- 17.6 The Seller may license or sub-contract all or any part of its rights and obligations without the Buyer's consent.
- 17.7 The Buyer agrees that the Seller may amend these Terms at any time. If the Seller makes a change to these Terms, then that change will take effect from the date on which the Seller notifies the Buyer of such change.
- 17.8 Neither party shall be liable for any default due to any act of God, war, terrorism, strike, lock-out, industrial action, fire, flood, drought, storm or other event beyond the reasonable control of either party.
- 17.9 The failure by the Seller to enforce any provision of these Terms shall not be treated as a waiver of that provision, nor shall it affect the Seller's right to subsequently enforce that provision.
- 17.10 The Buyer warrants that it has the power to enter into the Order and these Terms and has obtained all necessary authorisations to allow it to do so, it is not insolvent and that the Order and these Terms creates binding and valid legal obligations on it.

- 17.11 The Buyer acknowledges and agrees in the event of the Buyer being a trust:
- that all assets of the trust and the trustee(s) of the trust shall be held personally liable for any sum due to the Seller including costs, fees and interest pursuant to this agreement; and
  - that the trustee(s) have a right to be fully indemnified for their obligations under these Terms out of the property the trustee(s) hold on trust;
  - that the Seller's rights under these Terms have priority over the interest of the beneficiaries of the trust;
  - that the trustee(s) of the trust of the Buyer will exercise or hold for the Seller, the trustee(s) right of indemnity from the trust fund and the beneficiaries when the Seller asks the trustee(s) to do so, so the Buyer can pay the Seller any monies owned under these Terms.

17.12 The Seller may at any time assign its rights under these Terms without the consent of the Buyer.

17.13 The Buyer must not assign its rights or obligations under these Terms without the prior written consent of the Seller, such consent may be approved or refused with or without reasons in the discretion of the Seller.

17.14 Where the Buyer is a company or trust, the Buyer must notify the Seller not less than 14 days before any change in ownership, change in particulars, any alteration or addition to shareholders or directors, and any change, alteration or addition in the Buyer's internal structure and senior management.

## 18 TERMINATION

- 18.1 The Seller may terminate these Terms if any one (1) invoice remains outstanding for more than 60 days.
- 18.2 Either party may terminate these Terms immediately by notice in writing to the other party if:
- the other party commits an Event of Default; and
  - an Event of Default occurs in relation to the other party.
- 18.3 Termination of these Terms does not affect any accrued rights or remedies of either party.
- 18.4 Upon termination of these Terms, the Buyer will within five (5) days deliver up the Product if it has not been paid for to the Seller or immediately pay the Price for the Product under the Supply Contract.

## 19 GUARANTEE AND INDEMNITY

- 19.1 Each Guarantor in consideration of the Seller agreeing to supply the Product to the Buyer (or continuing to supply goods and services) and for any other valuable consideration unconditionally and irrevocably:
- guarantees the due and punctual payment to the Seller of all moneys which are now owing to the Seller by the Buyer and all further sums of money from time to time owing to the Seller by the Buyer in respect of goods and services supplied or to be supplied by the Seller to the Buyer or any other liability of the Buyer to the Seller, and the due observance and performance by the Buyer of all its obligations contained or implied in any contract with the Seller, including but not limited to the Agreed Terms & Conditions of Sales and Supply signed by the Buyer and annexed to this Guarantee and Indemnity.
  - holds harmless and indemnifies the Seller on demand as a separate obligation against any liability (including but not limited to damages, costs, losses and legal fees calculated on a solicitor and own client basis) incurred by, or assessed against, the Seller in connection with:
    - the supply of goods and/ or services to the Buyer;
    - the recovery of moneys owing to the Seller by the Buyer including the enforcement of this Guarantee and Indemnity, and including but not limited to the Seller's nominees costs of collection and legal costs; or
    - moneys paid by the Seller with the Buyer's consent in settlement of a dispute that arises or results from a dispute between, the Seller, the Buyer, and a third party or any combination thereof, over the supply of goods and/ or services by the Seller to the Buyer.
- 19.2 Each Guarantor further acknowledges and agrees that if for any reason the Buyer does not pay any amount owing to the Seller the Guarantor will immediately on demand pay the relevant amount to the Seller.
- 19.3 This clause shall constitute an unconditional and continuing guarantee and indemnity and accordingly shall be irrevocable and remain in full force and effect until the whole of moneys owing to the Seller by the Buyer and all obligations herein have been fully paid, satisfied and performed.
- 19.4 No granting of credit, extension of further credit, or granting of time and no waiver, indulgence or neglect to sue on the Seller's part (whether in respect of the Buyer or any one or more of any other Guarantor(s) or otherwise) and no failure by any named Guarantor to properly execute this Guarantee and Indemnity shall impair or limit the liability under this Guarantee and Indemnity of any Guarantor. Without affecting the Buyer's obligations to the Seller, each Guarantor shall be a principal debtor and liable to the Seller accordingly.

- 19.5 If any payment received or recovered by the Seller is avoided by law such payment shall be deemed not to have discharged the liability of the Guarantor, and the Guarantor and the Seller shall each be restored to the position in which they would have been had no such payment been made.
- 19.6 The term "Guarantor" shall, if there is more than one person named as Guarantor, mean and refer to each of them individually and all of them together unless the context otherwise requires, and the other obligations and agreements on the part of the Guarantor contained in this Guarantee and Indemnity shall bind them jointly and severally.
- 19.7 Each Guarantor irrevocably authorises the Seller to obtain from any person or company any information which the Seller may require for credit reference purposes. Each Guarantor irrevocably authorises the Seller to provide to any third party, in response to credit references and enquiries about the Guarantor or by way of information exchange with credit reference agencies, details of this Guarantee and Indemnity and any subsequent dealings that the Guarantor may have with the Seller as a result of this Guarantee and Indemnity being actioned by the Seller.
- 19.8 The obligations under this clause shall be a continuing guarantee and will not in any way waived or affected by any time or indulgence by the Seller to the Buyer.

## 20 SECURITY AND CHARGE

- 20.1 Despite anything to the contrary contained herein or any other rights which the Seller may have howsoever where the Buyer and/or the Guarantor is the owner of land, realty or any other asset capable of being charged, both the Buyer and the Guarantor mortgage and/or charge all of their joint and/or several interest in the land, realty or any other asset to the Seller or the Seller's nominee to secure all amounts and other monetary obligations payable under these Terms. The Buyer and/or the Guarantor acknowledge and agree that the Seller (or the Seller's nominee) shall be entitled to lodge where appropriate a caveat, which caveat shall be withdrawn once all payments and other monetary obligations of the Buyer have been met.
- 20.2 Should the Seller elect to proceed in any manner in accordance with this clause and/or its sub-clauses, the Buyer and Guarantor shall indemnify the Seller from and against all the Seller's costs and disbursements including legal costs on a solicitor and own client basis.
- 20.3 Each Buyer and Guarantor irrevocably nominate constitute and appoint the Seller, any one of its directors, trustees, managers or other nominee as the Buyer's and Guarantor's true and lawful attorney to perform all necessary acts to give effect to the provisions of this clause. Such acts will extend but are not limited to executing any instrument on behalf of the Buyer which secures (on terms in the discretion of the Seller) the Seller's interest in the Buyer's or Guarantor's land or other securities created under this agreement, to registering a financing statement or financing change statement in relation to a security interest on the Personal Property Securities Register; or to registering any other document required to be registered by the PPSA or any other law.
- 20.4 The Buyer and the Guarantor authorise the Seller to act on the power of attorney despite any actual implied or perceived conflict of interest. The Buyer and Guarantor also agree that any action taken which may benefit the interest of the Seller will be deemed to benefit the interest of the Buyer as well.

## 21 CONFIDENTIALITY

- 21.1 Each party agrees that any Confidential Information disclosed to the other party will be kept confidential.

## 22 AUTHORITY

- 22.1 By entering into these Terms, the Buyer gives to the Seller and each of the Seller's directors, employees, contractors and agents an irrevocable authority to:
- (a) enter the Place to Install;
  - (b) rearrange the Place to Install; and
  - (c) cut into and otherwise irreversibly alter the Place to Install in order to affix and install the Product.

## 23 INTELLECTUAL PROPERTY

- 23.1 The Seller does not, and nothing in these Terms, grants or transfers any right, title or interest in any intellectual property of the Seller to the Buyer.

- 23.2 By submitting the Order, the Buyer agrees that the Seller may take photographs of the Product as finished, with or without the Place to Install, which may contain identifying the Place to Install and the Seller may use the photographs for any publicity or marketing campaign of the Seller or its associated entities, in any media whatsoever without royalties or compensation to the Buyer.

## 24 LOADING

- 24.1 The Buyer acknowledges that it is solely responsible to check the weight loading limit of the floor and/or wall at the Place of Install to avoid overloading. Any weight of the Product given by the Seller in writing or verbally is an estimate only. The Buyer should not rely on any estimate given when determining if the floor or wall at the Place of Install will be overloaded.

## 25 CUSTOM DESIGN

- 25.1 Where the Buyer requests the Seller to Custom Design the Product, the Seller will produce and manufacture the Product in accordance with the Custom Design ("**Resulting Product**") subject to:
- (a) the Buyer is at all times responsible for the Custom Design and the Resulting Product;
  - (b) the Seller will not undertake any form of testing whatsoever of the Resulting Product;
  - (c) the Seller does not provide a warranty of any kind in relation to the Custom Design and/or the Resulting Product;
  - (d) the Buyer releases and forever holds harmless the Seller for any damage (of whatever kind any nature, and any third party) and any injury howsoever, the Place to Install, the Buyer and/or any third party;
  - (e) the Seller will rely on, in every aspect, the dimensions and measurements as supplied by the Buyer;
  - (f) the Buyer acknowledging that the Resulting Product may fail at any time;
  - (g) where additional work is required by the Seller to complete the Custom Design and/or the Resulting Product not scoped or provided by the Buyer, the Seller may in its discretion complete such items at the Seller's then hourly rate;
  - (h) the Buyer is solely responsible for any defects in the Resulting Product, which if the Buyer seeks are rectified, will be at the Seller's then hourly rate; and
  - (i) the acknowledgement of the Buyer, hereby given, that there is no sale by sample or sale by description of the Custom Design and/or the Resulting Product.
- 25.2 Where the Supply Contract is subject to a Custom Design, the Buyer acknowledges that it is unable to return, exchange or obtain a refund on the Resulting Product.

## 26 GST

- 26.1 GST means the same as in the GST Law.
- 26.2 GST Law means the same as "GST law" means in the *A New Tax System (Goods and Services Tax) Act 1999* (Cth).
- 26.3 Terms defined in the GST Law have the same meaning in clauses concerning GST.
- 26.4 Unless otherwise indicated, all amounts stated in this agreement are exclusive of GST.
- 26.5 If GST is payable on a taxable supply made by a party under this Agreement (the **Supplier**) to another party (the **Recipient**), the Supplier may recover from the Recipient of the supply the amount of that GST in addition to any consideration otherwise provided for.
- 26.6 The Recipient must make the payment of the GST amount referred to in clause at the same time and in the same manner as it provides the consideration for the relevant supply subject to the Recipient receiving a valid tax invoice before the due date for payment.
- 26.7 The Supplier must issue an adjustment note to the Recipient as soon as it becomes aware of an adjustment event relating to the supply and must refund to the Recipient any overpayment of GST.