

# STANDARD TERMS AND CONDITIONS

## 1 Definitions

**Seller** means SMYJ Pty Ltd ABN 12 625 744 729 or any Related Body Corporate as defined by the *Corporations Act (2001)* (Cth).

**Customer** means the entity which orders Goods and requires Services (as applicable) from the Seller or to which Goods are delivered and Services are supplied (as applicable) by the Seller.

**Agreement** means the contract formed between the Seller and the Customer constituted by contract details (if any) each order, these Terms and Conditions, and any schedules attached.

**Goods** means the goods purchased or ordered by the Customer from the Seller. GST means goods and services tax imposed in Australia by the GST law.

**GST Law** means *A New Tax System (Goods and Services Tax) Act 1999* (Cth). **Order** means an order by the Customer to the Seller requesting the supply of Goods or performance of Services.

**Permitted Security Interest** means any security interest which the Seller consents to or otherwise agrees in writing with the Customer will be a Permitted Security Interest for the purposes of these terms and conditions.

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

**PPSR** means the Personal Property Security Register.

**PPS Regulations** means the *Personal Property Securities Regulations 2010* (Cth).

**Purchase Money Security Interest** that has the meaning prescribed to it in the PPSA.

**Security Interest** includes any security interest under the PPS Act.

In these terms and conditions, unless the context otherwise requires, the following terms and expressions have the same meanings given to them in the PPSA or the PPS Regulations (as applicable): after-acquired property, circulating asset, collateral, control, commingled goods, financial property, financing change statement, financing statement, possession, purchase money security interest, security agreement and verification statement.

**Services** means the services performed by the Seller for the Customer.

## 2 General

2.1 Any quotation made by the Seller to the Customer is not an offer to sell or provide Goods to the Customer, nor does it give rise to any obligation on the Seller to sell Goods to the Customer.

2.2 An Order constitutes an offer by the Customer to purchase Goods from the Seller in accordance with the Order, the Agreement, and these Terms and Conditions.

2.3 Orders provided by the Customer must:

- (1) be in writing and submitted electronically;
- (2) specify the Goods and quantities required; and
- (3) specify the delivery location and delivery date.

2.4 An Order does not become binding until accepted by the Seller. An Order is accepted on the first to occur of:

- (1) the Seller advising the Customer of acceptance in writing or signing the Order; and
- (2) any act undertaken by the Seller consistent with fulfilling the Order.

2.5 If there is any inconsistency in this Agreement, to the extent of that inconsistency, unless expressly agreed in writing by duly authorised officers of the Seller, the terms prevail in the following order: contract details (if any), these Terms and Conditions and any Order.

2.6 It is the Customer's responsibility when placing an Order to ensure that the Goods ordered conform to the Customer's requirements and are suitable and sufficient for the Customer's purpose.

2.7 To the extent permitted by law, the Seller will not accept the return of, or give credit for, any Goods accepted by the Customer.

2.8 It is the Customer's responsibility to obtain any approvals, licences or permits necessary for:

- (1) the Customer to perform its obligations under the Agreement; and
- (2) the use or sale of the Goods by the Customer.

2.9 All descriptive specifications, performance figures, drawings, data, dimensions and weights furnished by the Seller or contained in catalogues, price lists or advertisements are by way of general description of the Goods only and do not form part of the Agreement.

2.10 It is the Customer's responsibility to provide all information necessary to enable the Seller to provide the Goods in accordance with the Customer's requirements and the Customer is responsible for any costs arising directly or indirectly from any error or omission in that information or any delay in providing that information.

2.11 For Orders of a specified quantity of Goods with a non-specified delivery date, if the Customer does not specify a delivery date for any of the Goods within six (6) months of the date of the Order, then the delivery date for the Order will be six (6) months from the date of the Order, unless otherwise agreed in writing between the Customer and the Seller.

2.12 In the event of any dispute concerning any Order (including any question of identity, delegation or authority or any telephone, facsimile, email, ecommerce or computer-generated order), the internal records of the Seller will be conclusive evidence of what was ordered.

2.13 Each Order the Customer places is, a representation by it made at the time that it is, and will remain in the future, solvent and able to pay all of its debts as and when they fall due.

2.14 The Customer acknowledges and agrees that any failure to pay the Seller in accordance with this Agreement is conclusive evidence that the Customer has no reasonable grounds for making the representation referred to in clause 2.13 and that the representations were unconscionable, misleading and deceptive.

2.15 When any Order is placed, the Customer must inform the Seller of any material facts which would or might reasonably affect the commercial decision by the Seller to accept the Order. The Customer is responsible for any costs arising directly or indirectly from any failure or delay in providing the material facts to the Seller

## 3 Price

3.1 Prices quoted by the Seller for Goods are based on the full quantities specified and do not necessarily operate pro rata for any greater or less quantities.

3.2 Prices quoted by the Seller for Goods are exclusive of GST.

3.3 Prices quoted by the Seller for Goods are based on the then present rates and costs of materials including paper, resin, labour, freight, currency exchange rates, insurance, customs agents and carriers' fees, government tariffs, duties and taxes and are subject to increase in respect of any variation in such rates or costs or the method of assessment of the same occurring during the Term of the Agreement before delivery of the Goods to the Customer. Otherwise, prices quoted are not subject to change within thirty (30) days from the date of quotation.

3.4 The Customer acknowledges that in order to manufacture the Goods, the Seller must acquire or develop a change part for the Goods and that as a result, the Seller may require the Customer to acquire a minimum quantity of the Goods.

## 4 Terms of payment

4.1 The Seller may require a deposit on Order and any balance of the price owing must be paid either before or on delivery of the Goods to the Customer (or on the date that delivery is deemed to have taken place in accordance with these Terms and Conditions), unless the Seller has agreed to provide the Goods to the Customer on credit terms.

4.2 Prices quoted are strictly net and payment in full must be made in accordance with the Agreement and within the times stated on either the quotation or the invoice with respect to the relevant Goods. If the times for payment are stated in this Agreement, the quotation and the invoice, then the time stated on the invoice applies.

4.3 Interest must be paid by the Customer on overdue accounts calculated daily from the day following the day upon which payment should have been made, at the rate of eleven (11%) per cent per annum and without any demand being necessary.

4.4 Upon demand being made by the Seller, the Customer must indemnify the Seller against all costs (including legal costs on a solicitor/client basis), expenses or other sums incurred by the Seller in exercising any right or remedy available to it upon default by the Customer, which sum will also carry interest at the rate specified above if unpaid within one (1) calendar month of demand having been made.

4.5 Any quotation provided which contains a provision to supply Goods "ex stock" is subject to fulfilment of prior orders at the date of receipt of the Customer's Order.

## 5 Retention of title, delivery, risk and property

5.1 Any date quoted by the Seller for delivery of Goods is an estimate only. The Seller is not liable to the Customer for any loss or damage, howsoever arising, even if arising out of the negligence or fault of the Seller for failure to deliver on or before the quoted date.

5.2 The Seller will provide reasonable written notice to the Customer as to when the Goods will be delivered.

5.3 The Customer must accept and pay for Goods on the date for delivery advised to it by the Seller.

5.4 Unless as set out otherwise in this Agreement, the Goods will be delivered to Customer ex Works or EXW (Incoterms 2010 Rules).

5.5 The Seller, at its discretion, may agree to act as agent for the Customer for delivery beyond the Seller's premises and in that regard:

- (1) all costs of carriage and insurance must be paid by the Customer;
- (2) risk in the Goods transfers to the Customer on pick up of the Goods from the Seller's premises by the carrier and the Seller is not liable for any damage caused to the Goods whilst they are in transit; and
- (3) the Customer, at its expense must provide labour, cranes or forklift at the point of delivery as well as reasonable access to point of delivery for offloading of Goods without delay.

5.6 Where the Seller agrees to deliver the Goods to the premises of the Customer and where the Seller contracts with a carrier to do so, delivery of the Goods to the carrier in all circumstances constitutes delivery, and risk in the Goods transfers, to the Customer.

5.7 A certificate purporting to be signed by an officer of the Seller, or any signed delivery docket, confirming delivery is conclusive evidence of delivery.

5.8 As long as the Customer owes the Seller any part of the sale price for Goods supplied at any time, the Seller retains the legal title in all Goods supplied. The Customer must keep such Goods stored separately during the time it has them in such a way that the Goods remain identifiable and must hold such Goods as bailee for the Seller. When such Goods are filled or used, even with loss of identity, legal title to the resultant product vests in the Seller.

5.9 The Seller has:

- (1) the right to re-entry and inspection of the Customer's premises to support the property reservation; and
- (2) the power to repossess any Goods to which it retains title when any payment due to the Seller by the Customer is overdue.

5.10 If the Customer resells the Goods referred to above before all moneys payable by the Customer to the Seller have been paid, the Customer agrees that it holds the proceeds of re-supply of the Goods on trust for, and as agent for, the Seller immediately when they are receivable or received, such proceeds to be kept in a separate account.

5.11 Seller, at its discretion, may deliver the Goods ordered by instalments (in which case each instalment is subject to a separate agreement for sale) without any liability to the Customer arising whatsoever.

5.12 If after fourteen (14) days from the date on which the Goods are ready for despatch, delivery is delayed for any reason beyond the Seller's reasonable control, the Seller may store the Goods at its premises or elsewhere and the cost of storage, handling and insurance is payable by the Customer on demand by the Seller.

5.13 No delivery may be deferred except with the written consent of the Seller.

5.14 It is further acknowledged and agreed that:

- (1) the retention of title clause in this Agreement constitutes a security agreement for the purposes of the PPSA which creates a Security Interest in all Goods, including any Commingled Goods. It is the intention of the Seller and the Customer that upon registration of the Seller's Security Interest on the PPSR a Purchase Money Security Interest will result; and
- (2) until such time as ownership of the Goods passes from the Seller to the Customer, the Seller may give notice in writing to the Customer to return the Goods to the Seller. Upon such notice, the Customer's rights to obtain ownership or any other interest in the Goods ceases.

## 6 Cancellation

An Order may only be cancelled, varied or suspended with the written consent of the Seller and in the event of such cancellation, variation or suspension, the Seller may charge the Customer any costs, expenses or charges incurred by the Seller in preparation for, and in the execution of, an Order which may also include an amount equal to 50% of the net profits lost by the Seller as a result of the cancellation, variation or suspension.

## 7 Quantities

No claim for shortage of delivery or shortfall or excess in capacity or performance of less than 10% of that ordered will be made by the Customer, and in any event, the Customer's remedy will be at the Supplier's option to either replace the Goods or provide a refund of the unit price of the undelivered Goods. Excess delivery of up to 10% of quantities ordered will be accepted by the Customer and payment made for such excess quantities in accordance with this Agreement.

## 8 Containers

This clause 9 applies to any pallets and/or dividers (**Pallets**) in or on which Goods are delivered to the Customer.

If the Customer returns any Pallet to the Seller in good order and condition and within twelve (12) months of the original delivery of the relevant Pallet to the

Customer, the Seller will refund any amount paid by the Customer for the relevant Pallet. If any Pallet is returned by the Customer other than in good order and condition or beyond the 12-month period, the Seller may refund to the Customer part of the amount originally paid by the Customer for that Pallet having regard to its actual condition upon return to the Seller. Pallets will be deemed to be not returned by the Customer until received into the Seller's premises.

## 9 Description and Specification

9.1 The Customer warrants that any Goods manufactured, constructed or supplied by the Seller which are based in whole or in part upon designs, drawings, specifications, or intellectual property supplied to the Seller by or on behalf of the Customer do not breach/infringe the intellectual property rights of any third party. The Customer indemnifies and must keep indemnified and hold harmless the Seller against any action, loss, cost, claim, or damage that may be brought against or suffered by the Seller for any breach of this warranty by the Customer.

9.2 The Seller does not warrant or guarantee, and it is not a term of the Agreement that any Goods manufactured, constructed or supplied by the Seller which are based upon any designs, drawings or specifications supplied to the Customer by or on behalf of the Customer will achieve any standard of performance or capacity whatsoever and the Customer acknowledges that it does not rely on the skill and judgment of the Seller for the fitness for any purpose of any Goods so manufactured, constructed or supplied.

## 10 Access

10.1 In respect of any work done or Services performed on the Customer's premises or elsewhere other than at the Seller's premises, subject to any written agreement to the contrary, it is the duty of the Customer to ensure that the conditions under which the work or Services has to be performed, the layout, means of access, accessibility of the different parts of the subject matter being worked upon or handled and other material circumstances are suitable to the Seller, failing which the Seller is entitled to charge a reasonable increase in the price having regard to the prevailing circumstances.

## 11 Inspection and Acceptance

11.1 Upon delivery of Goods, the Customer may inspect those Goods at its expense.

11.2 If the Customer, acting reasonably, believes that some or all of the Goods have not been provided in accordance with the Agreement including shortages, defects or other non-conformance with any Specifications, the Customer must provide written notice to the Seller specifying the details of the non-conformance within seven (7) days of the date of delivery. If the Customer fails to give any such written notice to the Seller, the Customer will be deemed to have irrevocably accepted the Goods and the Goods will be deemed to have been provided in accordance with the Agreement.

11.3 The Seller will arrange for the Goods to be inspected to determine whether they are defective or non-conforming with any Specifications, and if, acting reasonably, the Seller agrees they are due to the fault of the Seller, the Seller will either (at its option) repair or replace the Goods, or pay the cost of repairing or replacing the Goods. The Seller may charge the Customer a fee for its reasonable costs of inspecting the Goods, however any fee charged will be refunded or waived if the Seller determines the Goods are defective or non-conforming due to the fault of the Seller.

11.4 The Seller reserves the right to apply a restocking fee of \$25.00 or 15% of Invoice value (whichever is greater) for Goods returned as a result of an error in purchasing by the Customer.

## 12 Force Majeure

The Seller is not liable for failure or delay in the supply of the Goods and/or the Services due in any part to any cause beyond the control of the Seller such as, but not limited to, any act or neglect of any carrier, subcontractor, manufacturer or supplier of the Seller, acts of God such as fire, explosion, earthquake, lightning, storm, hurricane, typhoon, perils of the sea, flood, drought, epidemics, pandemics, or strikes, lockouts, bans or other industrial disturbances, or war, civil riot or commotion, or government restrictions, interference, order or request, by-laws, rules or regulations, or order of any competent authority. No such failure or delay entitles the Customer to terminate the Agreement and the Seller's obligations to the Customer under this Agreement will be suspended without liability on the part of the Seller while such cause exists. No such failure or delay will entitle the Customer to withhold or delay any payments due to the Seller.

## 13 Intellectual Property

13.1 The Seller owns all copyright and any other intellectual property rights in and to all work, art, film, tooling, drawings, specifications, models, photographs, documents and software produced by it in connection with the supply of the Goods and/or Services.

13.2 If any Goods and/or Services are supplied in accordance with the Customer's designs and specifications, the Customer warrants that the manufacture and supply of such Goods and/or Services will not infringe the intellectual property rights of any third party and the Customer indemnifies the Seller against any liability in the event that the manufacture and supply of the Goods and/or Services does infringe the intellectual property rights of any third party. The Seller is not liable to the Customer for any infringement or unauthorised use of any patent, trademark, design, copyright or any other intellectual property right arising out of performance in accordance with the Agreement. If any dispute or claim arises with respect to any such matter, then the Seller may terminate the Agreement by notice in writing to the Customer without any liability on the part of the Seller.

## 14 Default

14.1 If any of the following events occur then there is a **Default**:

- (1) The Customer goes into administration, receivership or liquidation.
- (2) The Customer assigns its property for the benefit of creditors, or has a receiver or official manager appointed to any of its assets.
- (3) Execution is levied upon the assets of the Customer for an amount in excess of \$1,000.00 and is not within seven (7) days satisfied.
- (4) The Customer fails to make any payment to the Seller under the Agreement on the due date for that payment.
- (5) The Customer breaches any provision of the Agreement.

14.2 If a Default occurs then the Seller, without prejudice to any other remedies available to it, may do any one or more of the following:

- (1) Suspend production of the Goods.
- (2) Decline to deliver the Goods, or any balance of the Goods still due under the Agreement.
- (3) Stop any Goods in transit and have them returned, at the expense of the Customer, to the Seller.
- (4) Otherwise cease to perform any of its obligations to Customer, under the Agreement or otherwise.
- (5) Terminate the Agreement without incurring any liability at law or in equity and without prejudice to the rights to recover amounts owing to it by Customer and/or other damages.
- (6) Enter onto any premises and repossess any Goods already delivered and whether or not property/title in such Goods has passed to the Customer in respect of which entry the Customer indemnifies the Seller and will keep the Seller indemnified for all damages for which the Seller may be responsible.

(7) Recover from the Customer the contract price together with default interest in accordance with clause 5.3 for all Goods delivered and for freight storage handling and any other expenses incurred by the Seller.

(8) To sell the Goods elsewhere and require the Customer to pay as damages any difference between the sale price received in that regard and the contract price for those Goods.

(9) For Orders of a specified quantity of Goods with a non-specified delivery date, require immediate payment for all Goods the subject of that Order.

## 15 Warranty and liability of Seller

15.1 To the extent permitted by law, liability of the Seller for any breach of the Agreement by the Seller, tort including negligence or otherwise, non-conformance of the Goods with any Specifications, late or non-delivery or for breach of any conditions, guarantee or warranty implied in the Agreement by law, solely and directly attributable to the Seller, is limited to one of the following, at the Seller's option:

- (1) In the case of Goods:
  - (a) the replacement of the Goods or the supply of equivalent Goods;
  - (b) the repair of the Goods;
  - (c) the payment of the actual, reasonable, documented and validated costs of replacing the Goods or of acquiring equivalent Goods;
  - (d) the payment of the actual, reasonable, documented and validated cost of having the Goods repaired.
- (2) In the case of Services:
  - (a) the supplying of the Services again, or
  - (b) the payment of the actual, reasonable, documented and validated cost of having the Services supplied again.

15.2 To the full extent permitted by law, all other warranties or liabilities imposed or implied, whether by law or by statute, are expressly excluded.

15.3 The Customer assumes all risk and liability resulting from the use of the Goods either alone or in conjunction with other Goods or materials even if the Seller had or should have had prior knowledge of use to which the Goods would be put.

15.4 To the extent permitted by law, the Seller is not liable to the Customer for any indirect or consequential losses, loss of profits or use, loss of opportunity, loss of revenue, any rectification costs or third party claims in connection with providing the Goods.

15.5 The Seller's maximum liability to the Customer for all claims in connection with this Agreement under any circumstances will not exceed the price paid for the Goods and/or Services supplied by the Seller which gave rise to that claim.

15.6 In the event that the Goods are covered by insurance taken out by the Seller, the Seller will only be liable for any amounts recovered under that insurance policy.

15.7 As soon as any of the facts or matters which form any part of any claim or complaint whatsoever become known to the Customer, the Customer must immediately notify the Seller in writing of those facts or matters.

15.8 The Seller is not liable in any circumstances for any:

- (1) defects or damage caused in whole or in part by misuse, abuse, neglect, electrical or other overload, non-suitable lubricant, improper installation repair or alteration (other than by the Seller) or accident;
- (2) any transport installation removal labour or other costs;
- (3) Goods not manufactured by it, but the Seller will endeavour to pass on to the Customer the benefit of any claim made by the Seller and accepted by the Customer and the benefit of any claim made by the Seller and accepted by the manufacturer of such Goods under a warranty given by the manufacturer;
- (4) technical advice or assistance given or rendered by it to the Customer whether or not in connection with the manufacture, construction or supply of Goods for or to the Customer, provided always that the Seller has rendered such Services with due care and skill and that any materials supplied in connection with those Services are reasonably fit for the purpose for which they are supplied; or
- (5) tooling and dies.

15.9 Except to the extent solely and directly caused by the gross negligence or wilful misconduct of the Seller, the Customer agrees to indemnify the Seller and keep the Seller indemnified against any claim, including any legal fees and expenses the Seller incurs in order to enforce its rights, for any loss or damage to the Goods or property, personal injury or death, or infringement of third party rights in connection with the provision and use of the Goods including, but not limited to:

- (1) information upon a label or carton used under the Agreement;
- (2) a defect in, the Seller acting on or being unable to use or act on, the Specifications or requirements the Customer provides; or
- (3) the Customer's, or a third party's, improper storage, handling, transport, sale or consumption of the Goods, or anything they contain, previously handled by the Seller.

15.10 All patterns, dies or other tooling manufactured or obtained by the Seller on behalf of the Customer will be at the sole cost of the Customer. The Seller will use its reasonable endeavours to maintain all such items in good order and condition unless the Seller, in its sole discretion, determines that the effective working life of such items has expired in which case the Seller will notify the Customer accordingly. If within three (3) months after notifying the Customer of the Seller's intention to dispose of such items, and the Customer fails to claim possession of them, the Seller will dispose of them at the Customer's expense. The Customer must insure such items against all risks whilst in the Seller's custody. The Seller is not responsible for any loss, damage or injury occurring to such items unless such loss, damage or injury has been solely and directly occasioned by the gross negligence or wilful misconduct of the Seller. Any claim for such loss, damage, or injury may not exceed the actual, reasonable, documented and validated cost of restoring them to good order or condition or replacing them, whichever may be the less expensive.

15.11 The Customer is not entitled to claim possession of any Goods or any items and products or materials provided by the Customer to the Seller until payment in full of all amounts owing for any reason to the Seller by the Customer has been made, including any amount owing under the Agreement (or any other arrangement), and in addition to any right of lien to which the Seller may be entitled.

15.12 The Seller is entitled to a general lien on the Goods or all such items and products or materials provided by the Customer to the Seller and which are in the Seller's possession for the unpaid price of any Goods sold by the Seller under the Agreement or any other contract and any moneys owing by the Customer to the Seller.

## 16 Miscellaneous

16.1 The Agreement is governed and construed in accordance with the law of the State in which the Goods are delivered.

16.2 This Agreement is the entire agreement between the parties with respect to the supply of Goods and/or Services to the Customer by the Seller, and any terms and conditions submitted by the Customer to the Seller will be of no effect or application.

16.3 All notices to be served upon the Customer will be duly served if left at or sent by ordinary prepaid post, or by email, to the last known address of the Customer. The Customer will be deemed to have received any notice two (2) days after

- posting or if emailed before 5pm on a business day, that day, if after 5pm, then the next business day.
- 16.4 The Customer may not assign any of its rights or obligations under the Agreement without the prior written consent of the Seller. The Seller may assign any of its rights or obligations under the Agreement without the prior written consent of the Customer.
- 16.5 No conduct by the Seller with respect to any default of the Customer in the performance of any obligation or condition of the Agreement will be a waiver of that or any other obligations or condition. A waiver is valid only if in writing and signed by the Seller.
- 16.6 This Agreement may be amended, modified or superseded only in writing by the parties.
- 16.7 Should any provision of this Agreement be declared null, void or unenforceable by any competent government agency or court, this will not affect the other provisions of this Agreement which are capable of severance and which will continue unaffected.
- 16.8 The termination or expiration of this Agreement will not abrogate, impair, release or extinguish any debt, obligation, or liability of either party incurred or arising prior to the date of termination or expiration of this Agreement; and all undertakings, obligations, releases or indemnities, which by their terms or by reasonable implication are to survive, or are to be performed in whole or in part after the termination or expiration of this Agreement will survive.
- 16.9 The singular includes the plural and vice versa, words importing any gender include every other gender and where there is more than one Customer, those Customers are bound to the Seller jointly and severally.
- 16.10 If the Customer is a corporation (with the exception of a public listed company), it must advise the Seller of any alteration to its corporate structure (for example, by changing directors, shareholders, or its constitution). In the case of a change of directors or shareholders, the Seller may ask for new guarantors to sign a guarantee and indemnity.
- 16.11 If the Customer is a corporation, the Customer warrants that it has signed this Agreement in accordance with section 127 of the *Corporations Act 2001* (Cth) and that its directors will enter into a guarantee and indemnity with the Seller in relation to the Customer's obligations to the Seller.
- 17 Credit**
- 17.1 If any Goods are supplied to the Customer on credit, the Seller may need to disclose to a credit reporting agency certain information about the Customer when assessing the Customer's application for credit and managing the Customer's account with the Seller. The Customer authorises the Seller to disclose such information to a credit reporting agency.
- 17.2 The Customer agrees that the Seller may obtain information about the Customer from any business which provides information about the commercial creditworthiness of persons for the purposes of assessing the Customer's application to purchase the Goods on credit and collecting any overdue amounts.
- 17.3 The Seller may refuse to supply the Goods to the Customer on credit on the basis of the Seller's credit assessment of the Customer.
- 17.4 The Customer represents to the Seller, and acknowledges, that any credit provided to the Customer by the Seller is provided and will be applied wholly or predominantly for commercial purposes.
- 17.5 The Seller reserves the right to vary the terms of credit or withdraw credit provided under this Agreement at any time, with notice to the Customer, whether the Customer is in default under the terms of this Agreement or not, at its sole discretion without liability to the Customer or any other party.
- 17.6 Upon cancellation of any credit offered to the Customer, all liabilities incurred by the Customer become immediately due and payable to the Seller.
- 18 Privacy**
- The Customer acknowledges the Privacy Policy of the Seller located on the Seller's website and agrees to the Seller collecting, using and disclosing personal information of the Customer for various purposes, including to:
- (1) assess creditworthiness in the above paragraph "Credit Assessment";
  - (2) supply the Goods to the Customer and the management of the Customer's account;
  - (3) communicate to the Customer about the Goods which the Seller or its partners or affiliates may provide to the Customer;
  - (4) implement the Agreement; and
  - (5) comply with relevant laws.
- 19 Security**
- 19.1 The Customer hereby acknowledges that these Terms and Conditions constitute a security agreement which creates a Security Interest in favour of the Seller and in all Goods supplied by the Seller to the Customer and all after acquired Goods supplied to the Customer by the Seller (or for the Customer's account) to secure the payment from time to time for Goods, including future advances. The Customer agrees to grant to the Seller a Purchase Money Security Interest.
- 19.2 The Customer gives the Seller a Security Interest in all of its present and after acquired property in which Goods supplied or financed by the Seller have been attached or incorporated, including any Commingled Goods and in any proceeds of sale of Goods.
- 19.3 The Customer charges in favour of the Seller all of its estate and interest in any real property that the Customer owns at present and in the future with the amount it owes to the Seller under this Agreement from time to time.
- 19.4 The Customer charges in favour of the Seller all of its estate and interest in any personal property that the Customer owns at present and in the future with the amount it owes to the Seller under this Agreement from time to time.
- 19.5 The Customer appoints as its duly constituted attorney the Seller's company secretary from time to time to execute in the Customer's name and as the Customer's act and deed any real property mortgage, bill of sale or consent to any caveat the Seller may choose to lodge against real property that the Customer may own in any Land Titles Office in any state or territory of Australia, even though the Customer may not have defaulted in carrying out its obligations under this Agreement.
- 19.6 Where the Customer has previously entered into an agreement with the Seller by which the Customer has granted a charge, mortgage or other security over real or personal property, those charges, mortgages or other security interests will continue and co-exist with the obligations and security interests created in this Agreement. The Seller may, at its election, vary the terms of such previous charges, mortgages or other securities to reflect the terms in this Agreement.
- 20 Costs**
- 20.1 The Customer must pay for its own legal, accounting and business costs and all costs incurred by the Seller relating to any default by the Customer.
- 20.2 The Customer must also pay for all stamp duty and other taxes payable on this Agreement (if any).
- 20.3 The Customer will pay the Seller's costs and disbursements incurred in pursuing any recovery action, or any other claim or remedy, against the Customer, including collection costs, debt recovery fees and legal costs on an indemnity basis. Such costs and disbursements will be due and payable by the Customer to the Seller irrespective of whether pursuit of the recovery action, claim or remedy is successful.
- 20.4 The Customer acknowledges and agrees that payments by the Customer will be applied by the Seller as follows.
- (1) Firstly, in payment of any and all collection costs and legal costs in accordance with clause 20.3.
  - (2) Secondly, in payment of any interest required to be paid under this Agreement.
  - (3) Thirdly, in payment of the outstanding invoice(s).
- 21 Set-off**
- 21.1 All payments required to be made by the Customer under this Agreement will be made free of any set-off, or counterclaim and without deduction or withholding.
- 21.2 Any payments required to be made by the Seller to the Customer may be set off against any amounts which may be or may become payable to the Seller by the Customer.
- 22 General Covenants**
- 22.1 Until such time as payment in full has been received by the Seller from the Customer in respect to an Order, the Customer covenants to the Seller not to create, cause or permit to exist any other Security Interest over any Goods the subject of the applicable Order, other than a Permitted Security Interest. The Customer further covenants that it will comply with the terms of each Permitted Security Interest binding on it in respect of the relevant Goods from time to time and will ensure that:
- (1) there is no increase in the amount secured under a Permitted Security Interest (excluding any part of a Permitted Security Interest which is a purchase money security interest); and
  - (2) there is no variation to a Permitted Security Interest that increases the collateral of the subject of the Permitted Security Interest, other than in the case of a purchase money security interest, without obtaining the prior written consent of the Seller.
- 22.2 The Customer covenants to the Seller that it will sign anything and do anything the Seller requires to further or more effectively secure the Seller's rights over the applicable Goods or under the Agreement or these Terms and Conditions. This includes anything the Seller requires in order for it to:
- (1) register and maintain (including renew before expiry) one or more financing statements in relation to any Security Interest in the relevant Goods created by these Terms and Conditions and/or any Order;
  - (2) remove any financing statement which is registered against the Customer or in relation to a Security Interest which is not a Permitted Security Interest; and
  - (3) obtain possession or control of any Goods for the purposes of perfecting any Security Interest in that property by possession or control for the purposes of the PPS Act.
- 22.3 The Customer waives its rights to receive a verification statement in respect of any financing statement or financing change statement registered by or on behalf of the Seller under the PPSA to the extent permitted by the PPSA and agrees to that as between the Seller and the Customer, to the extent permitted by the PPSA, the Customer will have no rights under (or by reference to) sections 95, 96, 117, 118, 120, 121(4), 123, 125, 126, 128, 129, 130, 132(3)(d), 132(4), 134(1), 135, 142 and 143 of the PPSA.
- 23 Trustee capacity**
- 23.1 If the Customer is the trustee of a trust (whether disclosed to the Seller or not), the Customer warrants to the Seller that:
- (1) the Customer enters into this Agreement in both its capacity as trustee and in its personal capacity;
  - (2) the Customer has the right to be indemnified out of trust assets;
  - (3) the Customer has the power under the trust deed to sign this Agreement; and
  - (4) the Customer will not retire as trustee of the trust or appoint any new or additional trustee without advising the Seller.
- 23.2 The Customer must give the Seller a copy of the trust deed upon request.
- 24 Partnership**
- 24.1 If the Customer enters into this Agreement as partners, the Customer warrants that all of the partners have signed this Agreement and that all of the partners will enter into a guarantee and indemnity with the Seller in relation to the Customer's obligations to the Seller.
- 24.2 If the Customer is a partnership, it must not alter its partnership (for example, adding or removing partners or altering its partnership agreement) without advising the Seller. In the case of a change of partners, the Seller may ask for new guarantors to sign a guarantee and indemnity.
- 25 Confidentiality**
- 25.1 Each party will not, without the written consent of the other, use or disclose to any third party (except approved employees, contractors and advisers) any Confidential Information of the other party, except in performing its obligations under this Agreement.
- 25.2 Clause 25.1 does not apply where:
- (1) disclosure is required by law or by a valid order of a court of competent jurisdiction or of a government or regulatory agency;
  - (2) the Confidential Information is in the public domain through no breach of this Agreement or fault or action of the recipient, its employees or subcontractors;
  - (3) the Confidential Information was received by the recipient on a non-confidential basis from a third party who is not prohibited from disclosing it;
  - (4) the Confidential Information was already in the possession of recipient with the full right to disclose prior to its receipt from Discloser; or
  - (5) the Confidential Information was independently developed by an employee of recipient who had no access to the Confidential Information.
- 25.3 The recipient acknowledges that any disclosure or misappropriation of the discloser's Confidential Information in violation of this Agreement may cause irreparable harm to the discloser and, agrees that the discloser will have the right to apply to a court of competent jurisdiction for an order restraining any further disclosure or misappropriation and for all other relief the discloser deems appropriate. The rights of the discloser are in addition to remedies otherwise available at law or in equity.
- 25.4 These obligations of confidentiality will survive termination of this Agreement.
- 25.5 For the purposes of this Agreement, Confidential Information of a party is any information (not generally available to the public) a party identifies as being confidential or which would reasonably be regarded as confidential and includes without limitation, this Agreement, information relating to the party's intellectual property rights, organisational structure, financial position, personnel, policies and business strategies (whether verbal or written, in tangible or intangible form).
- 26 Electronic Execution**
- This Agreement may be executed using any electronic means and the parties intend that such electronic means of execution will legally bind the parties to the terms of this Agreement with the same effect as if the signature was an original signature.