

## TERMS AND CONDITIONS

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### 1 Dictionary

In these Terms and Conditions, the words below have the following meanings:

**Account Application** means the form approved by the Company and completed by the Customer for an account with the Company for the provision of Goods and/or Services.

**Agreement** means each Offer which is accepted by the Company under clause 3.2.

**Australian Consumer Law** means Schedule 2 of the *Competition and Consumer Act 2010* (Cth) and any equivalent State or Territory legislation.

**Business Day** means any day except a Saturday, Sunday or public holiday in Queensland.

**Change in Control** means, in relation to a party:

- (a) the person who Controls the party at the date that party first became bound by these Terms subsequently ceases to have Control of the party;
- (b) a person who does not Control the party at the date that the party first became bound by these Terms subsequently obtains Control of the party; or
- (c) if the party is Controlled by a group or consortium of persons, or if the group or consortium could Control the party were they to act collectively, any material change in the composition of that group or consortium.

**Credit Policy** means the Company's policy in respect of the provision of credit notes and account credits to its customers, a copy of which can be accessed from <https://www.tillys.com.au/buying-information>.

**Company** means Tilly's Crawler Parts Pty Ltd (ACN 673 487 431).

**Confidential Information** means all information disclosed by the Company to the Customer and includes these Terms and the prices of the Goods or Services but excludes information that:

- (a) is public knowledge or becomes available to the Customer from a source other than the Company (otherwise than as a result of a breach of confidentiality); or
- (b) is rightfully known to, or in the possession or control of the Customer and not subject to an obligation of confidentiality in accordance with the terms of an Agreement.

**Consequential Loss** means:

- (a) any form of indirect, special or consequential loss, including loss of reputation, loss of profits, loss of actual or anticipated savings, loss of bargain and loss of opportunity; and
- (b) loss which is beyond the normal measure of damages.

**Consumer** has the meaning provided to it in section 3 of the Australian Consumer Law.

**Consumer Guarantee** means a guarantee provided under Division 1 of Part 3-2 of the Australian Consumer Law.

**Control** has the meaning given in section 50AA of the *Corporations Act 2001* (Cth).

**Customer** means the entity or person named in the Account Application who has requested that Goods and/or Services be supplied to it by the Company.

**Default Rate** means the standard default contract rate which is fixed from time to time by the Queensland Law Society.

**Force Majeure Event** means any event arising from, or attributable to, acts, events, omissions or accidents which are beyond the reasonable control of a party including any fire, failure or shortage of power supplies or raw ingredients, abnormally inclement climate or weather conditions, flood, lightning, storm, explosion, earthquake, subsidence, structural damage, epidemic or other natural physical disaster, riot, disease, civil commotion, insurrection, political instability, armed conflict, war, terrorist action, strike or other labour difficulty or shortage, unavailability of transport providers, failure or inability to obtain any licence or the threat of any of the foregoing.

**Goods** means the goods to be supplied by the Company to the Customer under an Agreement.

**GST Act** means *A New Tax System (Goods and Services Tax) Act 1999* (Cth), as amended, varied or replaced from time to time.

**H&S Laws** means all applicable laws, regulations, codes of practice and guidelines concerning the health, safety and welfare of people at work.

**Insolvency Event** means, in relation to a body corporate, a liquidation or winding up or the appointment of a voluntary administrator, receiver, manager or similar insolvency administrator to that body corporate or any substantial part of its assets; in relation to an individual or partnership, the act of bankruptcy, or entering into a scheme or arrangement with creditors; in relation to a trust, the making of an application or order in any court for accounts to be taken in respect of the trust or for any property of the trust to be brought into court or administered by the court under its control; or the occurrence of any event that has substantially the same effect to any of the preceding events.

**Intellectual Property Rights** means any and all intellectual and industrial property rights anywhere in the world, including but not limited to the rights comprised in any patent, copyright, design, trade mark, plant breeders rights, eligible layout or similar right whether at common law or conferred by statute, rights to apply for registration under a statute in respect of those or like rights and rights to protect trade secrets and know how, throughout the world for the full period of the rights and all renewals and extensions.

**Invoice** has the meaning provided to it in clause 4.4.

**Loss** means any loss, liability, cost, expense, damage, charge, penalty, outgoing or payment however arising, whether present, unascertained, immediate, future or contingent and includes direct loss and Consequential Loss.

**Offer** has the meaning provided to it in clause 3.1.

**Order** means any order or other request by or for the Customer to the Company for it to supply to the Customer any Goods and/or Services, whether such order or request is written, verbal or implied in the circumstances and which may have been given in response to a Quote.

**PDH Goods or Services** means goods or services which, for the purposes of the Australian Consumer Law, are of a kind ordinarily acquired for personal, domestic or household use or consumption.

**Personnel** means any employee, officer, agent, or contractor of the Company who assists the Company in the delivery of Goods and/or provision of Services under an Agreement.

**Premises** means the premises of the Customer where, from time to time, Goods are delivered or stored and/or Services are provided by the Personnel.

**Purchase Price** has the meaning provided to it in clause 4.1, as may be varied under clause 4.2.

**Quotation or Quote** means a quote or proposal, if any, provided by the Company to the Customer in respect of the Goods and/or Services.

**Services** means the services to be supplied by the Company to the Customer under an Agreement.

**Specifications** means any physical, qualitative, technical or descriptive specifications, dimensions or other particulars of the Goods or Services or photographs or illustrations of the Goods which are to be supplied by the Company (including any tolerances which may exist between the Goods ordered and those actually delivered to the Customer) and which are provided by the Company to the Customer, including as part of Quote, Order, Price List, catalogue or other document which describes the Goods.

**Tax or Taxes** means any tax, levy, duty, charge, impost, fee, deduction, compulsory loan or withholding (including corporate tax, personal income tax, fringe benefits tax, payroll tax, withholding tax, excise and import duties, consumption tax, value added tax or any other taxes, levies or charges), which is assessed, levied, imposed or collected by any government agency, and includes any interest, fine, penalty, charge, fee or any other amount imposed on or in respect of any such amounts.

**Terms** means these Terms and Conditions.

**Trading Limit** means the value of any trading account facility granted by the Company to the Customer under the Account Application.

## 2 Application

These Terms apply to and govern the supply by the Company of Goods and Services to the Customer from time to time and, more specifically, apply to and govern the supply by the relevant Company of Goods and/or Services to the Customer which are to be provided under an Offer accepted by the Company.

## 3 Formation of Agreement

3.1 The Customer acknowledges and agrees that by submitting an Order the Customer makes an irrevocable offer to the Company for the Company to supply it with the Goods and/or Services on the terms of:

- (a) these Terms;
- (b) the Order; and
- (c) the Quote (if any),

(Offer).

3.2 A contract will be formed between the relevant Company and the Customer in respect of each Offer upon the earlier of the Company:

- (a) notifying the Customer, either verbally or in writing, that it accepts the Customer's Offer;
- (b) accepting, in full or part, payment from the Customer for any Goods or Services the subject of the Offer;
- (c) making delivery of the Goods the subject of the Offer to the Customer; or
- (d) performing the Services the subject of the Offer.

3.3 An Agreement formed under clause 3.2 will comprise these Terms, any Account Application, the Order (only to the extent that any additional terms in the Order are accepted by the Company in writing), the Quote (if any), the Credit Policy, and the Invoice.

3.4 The Company is not bound to accept any Offer and may decide not to accept any Offer for any reason and in the sole discretion of the Company.

## 4 Price and payment

4.1 Unless otherwise agreed by the parties, the price the Customer must pay for the Goods and/or Services under each Agreement will be the price for the Goods and/or Services specified in the Quote or, if there is no Quote, in the Order (**Purchase Price**).

4.2 The Company may, prior to delivery of the relevant Goods and/or Services amend the Purchase Price by notice in writing to the Customer and, if the Customer does not wish to accept the new Purchase Price it may terminate the Agreement by notice in writing to the Company and the Company must refund any monies already paid by the Customer in respect of that Agreement.

4.3 Unless otherwise expressly specified by the Company or in these Terms, all prices stated are stated exclusive of Taxes and the Customer is solely responsible for the payment of all Taxes levied or payable in respect of the Goods and/or Services and must immediately upon request by the Company provide the Company with evidence of payment of any Taxes.

4.4 The Company may invoice the Customer for the Purchase Price at any time following formation of the relevant Agreement (**Invoice**).

4.5 The Company may set off any amount owing by the Customer to the Company, whether or not due for payment, against any money due for payment by the Company to the Customer under any agreement, understanding or arrangement between the Company and the Customer.

4.6 Subject to clause 4.7, unless otherwise agreed in writing between the Customer and the Company the due date for payment by the Customer to the Company of the Purchase Price for the Goods and/or Services supplied pursuant to an Agreement (**Due Date**) is:

- (a) the due date agreed by the Company when accepting the Account Application but only if the value of the Invoice, combined with any outstanding amounts owed by the Customer to the Company, does not exceed any approved Trading Limit; or

- (b) if the conditions set out in paragraph (a) are not satisfied, prior to the scheduled date of delivery for the Goods or performance of the Services.

4.7 If:

- (a) the Customer has previously failed to make any payment to the Company by the due date for that payment (whether under these Terms or otherwise); or
- (b) the creditworthiness of the Customer is, in the Company's sole opinion, unsatisfactory,

the Company may require payment of the Purchase Price in full prior to the Company delivering the relevant Goods or providing the Services.

4.8 If the Customer fails to make any payment by the Due Date, breaches any term of an Agreement or is the subject of an Insolvency Event, then, without prejudice to any other right or remedy available to the Company and to the extent permitted by law, the Company may, in its sole discretion, elect to do any one or more of the following:

- (a) suspend any further deliveries to the Customer arising from any Agreement;
- (b) cancel any Agreement in respect of any Goods or Services not yet supplied to the Customer in whole or in part by the Company;
- (c) terminate any Agreement in accordance with clause 19.1;
- (d) enter the property of the Customer in order to repossess the Goods and the Customer grants the Company and its agents an irrevocable licence to do so;
- (e) dismantle any other goods into which the Goods have been installed or incorporated and remove the Goods from such goods;
- (f) charge the Customer interest (both before and after any judgement) on the unpaid amount at the Default Rate, which interest will accrue and be chargeable from the first day on which such amounts become overdue until the Company receives payment of all such amounts (including all interest) by way of cleared funds;
- (g) cancel any Trading Limit or account facilities previously granted to the Customer by the Company (including under the Account Application);
- (h) cancel or reverse any trade discounts or rebates provided, or otherwise offered, to the Customer under any Agreement or other arrangement; and
- (i) exercise any rights which the Company may have under law, including the *Personal Property Securities Act 2009* (Cth).

4.9 The Customer may not set off or combine any amount owing by the Company to the Customer, whether or not due for payment, against any money due for payment by the Customer to the Company under an Agreement and the Customer must pay, and not withhold, any amount due to the Company under an Agreement notwithstanding the Customer may be in dispute with the Company regarding the Goods or Services supplied by the Company to the Customer.

## 5 Delivery of Goods and provision of Services

5.1 The Company will deliver the Goods and provide the Services to the Customer in the manner determined by the Company unless otherwise agreed between the Company and the Customer.

5.2 The Customer agrees that, unless otherwise agreed by the Company, delivery of Goods will occur by the Customer collecting the Goods from the Company's premises and such collection must occur within 7 days of any delivery date which the Company notifies to the Customer.

5.3 The Company will endeavour, but is not obliged, to deliver Goods and provide the Services between the hours of 9.00am and 5.00pm Monday to Friday (excluding public holidays in Queensland) (**Trading Hours**) at the place of delivery or service provision. If the Company remains open outside of the Trading Hours in order to allow the Customer

to collect Goods or to provide Services outside of the Trading Hours, the Customer must, immediately upon demand from the Company, pay the Company an amount equal to the greater of \$200 for each hour the Company is open or provides Services outside the Trading Hours and the actual costs incurred by the Company in remaining open or providing Services outside the Trading Hours.

- 5.4 There must be a representative of the Customer present at the delivery location at the time delivery is made of the Goods and, if no such representative is present, a redelivery fee may be charged by the Company.
- 5.5 The Customer must, prior to taking possession of the Goods, inspect the Goods and notify the Company if the Goods are not fit for any purpose for which the Customer intends to use the Goods, are less than the number meant to be delivered under the Agreement, have any defect or otherwise do not meet the Specifications.
- 5.6 In the event of the Customer returning or failing to accept any delivery of the Goods (including failure to collect the Goods in accordance with clause 5.2), the Company shall be entitled to payment for those Goods and to treat the obligation to supply the remainder of the Goods (if any) as cancelled by the Customer.
- 5.7 Without limiting any other rights the Company may have, the Company will be entitled to store at the risk and cost of the Customer any Goods which the Customer refuses or fails to take delivery of.
- 5.8 The Company will use its reasonable endeavours to deliver the Goods and provide the Services on any date specified or estimated by the Company or set out in a Quote or Order however the Customer acknowledges that such dates are estimates only.
- 5.9 Without limiting clause 5.8, the Company may deliver a portion of the Goods or Services and may invoice or otherwise charge the Customer for that portion. The Customer may not refuse to accept delivery of the Goods or to pay for the Goods or Services because only a portion of the quantity ordered was delivered and the Customer agrees that the Company will not be liable for any Loss that the Customer suffers as a result of any delay or cancellation.
- 5.10 The Customer acknowledges and agrees that:
- the Company may, but will not be required to, provide proof of delivery or other similar documentation (whether at the time of delivery or after);
  - it will not request proof of delivery or other similar documentation from the Company; and
  - it will not dispute any Invoice based on (in whole or in part) proof of delivery or other similar documentation not having been provided by the Company.
- 5.11 The Customer acknowledges and agrees that the Customer is responsible for the costs of delivery to the Company of any goods which are to be traded in by the Customer.

## **6 Return of Goods**

- 6.1 The terms of this clause 6 are subject to clause 10 and the Credit Policy and, if a Good is not of acceptable quality, faulty, defective or damaged, the Customer may have rights under the Australian Consumer Law which are not affected by this clause 6.
- 6.2 Subject always to any applicable provisions of the Australian Consumer Law, the Customer may only return the Goods to the Company with the prior written consent of the Company and the Company will be under no obligation to accept Goods returned to it or provide any refund or other remedy in respect of such returned Goods.
- 6.3 Any claims in respect of the Goods made by the Customer to the Company must:
- in respect of claims relating to damaged Goods or Goods not meeting Specifications, be made within 7 days of the date of delivery of the Goods and details of the damage or how the Goods do not meet the Specifications; and
  - in respect of claims for non-delivery of Goods, be made within 14 days of the delivery date.
- 6.4 If the Customer makes a claim in respect of the Goods:

- the Goods returned must be clean, unaltered, undamaged, in saleable condition and with all packaging and seals intact;
- the Goods must be received by the Company within 30 days from the date of Invoice;
- the Goods being returned must be accompanied by the Invoice number and part number for those Goods; and
- the Company may charge the Customer a handling fee of at least 5% of the Purchase Price for the Goods.

- 6.5 The Customer will be responsible for the cost of having the Goods returned to the Company.

## **7 Title and risk of Goods**

- 7.1 Title to, and property in:
- any Goods supplied under an Agreement remain with the Company and will only pass to the Customer once all moneys owing by the Customer to the Company in respect of the Agreement or any other agreement or arrangement between the Customer and the Company have been paid in full; and
  - any goods which are to be traded in by the Customer remain with the Customer and will only pass to the Company upon delivery of those goods to the Company's specified delivery location.
- 7.2 Risk in the Goods passes to the Customer upon the Goods being removed from the Company's premises (or that of the Company's supplier) for delivery to the Customer or collection by the Customer from such premises, and:
- the Customer is responsible for arranging, and taking out in its own name and its own cost, any insurance in respect of the Goods from the time risk passes to the Customer under this clause; and
  - the Customer indemnifies the Company against any Loss or damage to the Goods, however caused, occurring after the Goods have been removed from and left the Company's premises (or the premises of the Company's supplier or agent).
- 7.3 The Customer acknowledges and agrees that risk in:
- the Goods passes in accordance with clause 7.2 notwithstanding that the Company may be engaged to provide installation or other Services in respect of the Goods at the Premises;
  - any goods left by the Customer with the Company (including at the Company's premises) remains with the Customer; and
  - any goods which are to be traded in by the Customer remain with the Customer and only transfers to the Company upon delivery of those goods to the Company's specified delivery location.
- 7.4 In the event that the Customer is required to return any Goods to the Company, risk in the Goods passes to the Company on confirmation of receipt of the Goods by the Company.
- 7.5 Until such time as full title, property and ownership of the Goods passes to the Customer in accordance with clause 7.1, and while the Goods remain in the Customer's full control and possession:
- subject to clause 7.6, the Customer must hold the Goods as the Company's fiduciary agent and bailee and must not sell, lease, dispose of or otherwise deal with the Goods in any way without the Company's prior written consent;
  - the Customer must insure the Goods for their full replacement value (which must not be less than the Purchase Price) and must store the relevant Goods separately from any other goods and in a way that enables the Goods to be clearly identified as the Company's and referable to a particular Invoice;
  - the Company may enter the premises of the Customer or any third party where the Goods are stored during the hours of 9.00am to 5.00pm to inspect the Goods and:

- (i) the Customer expressly authorises and grants the Company and its agents an express, irrevocable licence to enter the premises of the Customer or relevant third party to inspect the Goods; and
  - (ii) the Customer indemnifies the Company against any Loss that may be incurred or sustained by the Company, its employees or agents, as a result of the entry of those premises where the Goods are stored;
- (d) the Company may at any time after payment is overdue require the Customer to deliver up the Goods to the Company and, if the Customer fails to deliver up the Goods immediately, the Company may enter the premises of the Customer or any third party where the Goods are stored and repossess them and:
- (i) the Customer expressly authorises and grants the Company an express, irrevocable licence to enter the premises of the Customer or relevant third party to remove or arrange for the removal of the Goods; and
  - (ii) the Customer indemnifies the Company against any Loss that may be incurred or sustained by the Company, its employees or agents, as a result of the entry of those premises where the Goods are stored;
- (e) The Customer must not pledge or grant a security interest in or in any way charge by way of security for any indebtedness, any of the Goods which remain the property of the Company. If the Customer does pledge or in any way charge by way of security, for any indebtedness, any of the Goods for which property and ownership has not passed to the Customer, the Customer must remove the pledge, charge or security interest immediately and all moneys owing by the Customer to the Company will (without prejudice to any other right or remedy of the Company) immediately become due and payable to the Company; and
- (f) The Customer must not remove, deface, alter, obliterate or cover up and any names, marks, designs, numbers, code or writing on the Goods (including any identifying plate or trade mark).
- 7.6 Notwithstanding that title to the Goods has not passed to the Customer under clause 7.1, the Customer may, subject to obtaining the Company's prior written approval, resell the Goods or any part thereof in the name of the Customer but only as agent for the Company and may deliver any such Goods to the buyer of those Goods but only in the ordinary course of its business and on terms which will not prejudice the Company's ability to obtain the sale proceeds thereof and:
- (a) any amount paid or due to be paid by the buyer of such Goods to the Customer (**Sale Proceeds**) must be held by the Customer on trust for the Company and banked in a separate bank account relating only to the sale proceeds of any Goods and shall be forwarded as soon as possible to the Company in satisfaction of any amount owed by the Customer in respect of the Goods;
  - (b) the Customer must keep and maintain separate records in relation to the Sale Proceeds received and held by the Customer and must provide such records to the Company immediately upon request by the Company; and
  - (c) if and when the full amount due to the Company in respect of the Goods has been received by the Company, any further Sale Proceeds may be retained by the Customer.
- 7.7 The Customer must immediately cease the resale of any Goods under clause 7.6 if:
- (a) the Company revokes any consent it has given to the Customer to resell the Goods under clause 7.6; or
  - (b) the Customer fails to make any payment under an Agreement by the relevant Due Date.

- 7.8 In the event that the Customer processes, incorporates, transforms or installs the Goods (or any portion of them) into any other goods manufactured or produced by the Customer or a third party, then the Customer must:
- (a) keep and maintain records in relation to the Goods which have been processed, incorporated, transformed or installed and the goods in which the Goods have been processed, incorporated, transformed or installed; and
  - (b) hold a proportion of any payment (**Relevant Proportion**) received by the Customer for such goods on trust for the Company and the Customer acknowledges that the Relevant Proportion must be not less than the dollar value of the portion of the Goods processed, incorporated, transformed or installed.
- 7.9 If an Insolvency Event occurs in respect of the Customer then, without the need for notice or demand by the Company, the Customer acknowledges that any sale or purported sale of the Goods will not be in the ordinary course of the Customer's business and the proceeds of any Goods sold in such circumstances will, to the extent of any money owing by the Customer to the Company, be held on trust for the Company by the administrator, controller or similar officer as the case may be, or if there is no such officer, by the Customer.

## 8 PPSA

- 8.1 Words and expressions used in this clause 8 which are not defined in these Terms but are defined in the *Personal Property Securities Act 2009 (Cth)* (**PPSA**) have the meaning given to them in the PPSA.
- 8.2 Unless a Customer has paid for Goods in respect of an Agreement before they are delivered to the Customer, each Customer acknowledges that:
- (a) the Agreement for the supply of Goods created under these Terms is a security agreement for the purposes of the PPSA, under which the Customer grants the Company a security interest in the Goods and over any amount owed to the Customer in respect of the Goods (**Account**) to secure all monies owing by the Customer to the Company from time to time;
  - (b) where the Company has other enforcement rights in addition to the enforcement rights provided for in the PPSA, those other enforcement rights will continue to apply; and
  - (c) the Company is not obliged to act in any way to dispose of or to retain any Goods which have been seized by the Company or any person nominated by the Company under its rights under the PPSA.
- 8.3 Without limiting anything else in these Terms, the Customer consents to the Company effecting a registration on the register in relation to any security interest created by or arising in connection with, or contemplated by, an Agreement or these Terms, including in relation to the Goods and any Account. The Customer agrees to promptly do all things necessary to ensure that any security interest created under these Terms is perfected and remains continuously perfected, the Company's priority position is preserved or secured and any defect in any security interest, including registration, is overcome.
- 8.4 The Customer must promptly take all reasonable steps which are prudent for its business under or in relation to the PPSA (including doing anything reasonably requested by the Company for that purpose in relation to the Goods or the Account). Without limiting the foregoing, the Customer must:
- (a) create and implement appropriate policies and systems to register a security interest in relation to the Goods where the Customer on sells the Goods to a third party or incorporates the Goods into another good or product; and
  - (b) where appropriate, take reasonable steps to identify security interests in relation to the Goods in the Customer's favour and to perfect and protect them, with the highest priority reasonably available.

- 8.5 The Customer must indemnify, and on demand reimburse, the Company for all expenses incurred in registering a financing statement or financing change statement on the register, and for the enforcement of any rights arising out of any of the Company's security interests.
- 8.6 The Customer must not change its name, address or contact details without providing prior written notice to the Company and must not register a financing change statement or a change demand without the Company's prior written consent.
- 8.7 To the extent that the PPSA permits, the Customer waives its rights to receive a copy of any verification statement or financing change statement; to receive any notice required under the PPSA, including notice of a verification statement; to reinstate the security agreement by payment of any amounts owing or by remedy of any default; and under sections 95, 96, 117, 118, 120, 121(4), 123, 125, 126, 127, 128, 129, 130, 132, 134(2), 135, 136(3), (4) and (5), 137, 142 and 143 of the PPSA.
- 8.8 The Customer may only disclose information or documents, including information of a kind referred to in section 275(1) of the PPSA, if the Company has given prior written consent.
- 9 Manufacturer's Warranty**
- 9.1 Other than any warranties that cannot be excluded by law and subject to clause 10, the Company provides no warranties, including any warranty against defect, to the Customer in respect of any Goods supplied by the Company to the Customer under an Agreement.
- 9.2 The parties acknowledge that in respect of certain Goods, the original manufacturer of those Goods may provide a warranty to the Customer (**Manufacturer's Warranty**) and the Customer acknowledges that any Manufacturer's Warranty is provided by the manufacturer of the relevant Goods and not by the Company.
- 9.3 The Customer is responsible for:
- ensuring it understands the terms and conditions of any Manufacturer's Warranty including the basis and requirements for making a claim under the warranty; and
  - making any claim in respect of a Manufacturer's Warranty.
- 10 Warranties and liability**
- 10.1 If the Customer is a Consumer and the Company supplies PDH Goods or Services to the Customer (even where those PDH Goods or Services are second hand), the Company acknowledges that the Customer may have certain rights under the Australian Consumer Law in respect of the Consumer Guarantees as they apply to the PDH Goods or Services supplied by the Company and nothing in these Terms should be interpreted as attempting to exclude, restrict or modify the application of any such rights.
- 10.2 If the Customer is a Consumer and any goods or services supplied by the Company to the Customer are non PDH Goods or Services, the Company's liability to the Customer in connection with any breach of the Consumer Guarantees in respect of those non PDH Goods or Services is limited (at the Company's discretion) to:
- in the case of Goods;
    - the replacement of the Goods or the supply of equivalent goods;
    - the repair of the Goods; or
    - the payment of the cost of replacing the Goods or acquiring equivalent goods again; and
  - in the case of Services;
    - the supplying of the Services again; or
    - the payment of the cost of having the Services supplied again.
- 10.3 If the Customer makes a claim against the Company which includes a cause of action other than for a breach of a Consumer Guarantee then, to the extent the claim, or part of the claim, does not relate to a Consumer Guarantee and to the extent permitted by law, the Company expressly excludes all liability in respect of the Goods or Services supplied by the Company to the Customer.
- 10.4 In relation to the supply of Goods which are non PDH Goods or Services, if the Company is liable to indemnify the Customer under section 274 of the Australian Consumer Law, the Company's liability to the Customer is limited to an amount equal to the lower of:
- the cost of replacing the Goods;
  - the cost of obtaining equivalent Goods; or
  - the cost of having the Goods repaired.
- 10.5 The Customer acknowledges that:
- Goods supplied to the Customer under these Terms may be supplied as second hand Goods; and
  - where second hand Goods are supplied to the Customer under these Terms those Goods may have issues or defects which affect their state and condition and the Goods are unlikely to be in the same state and condition as if they were new Goods.
- 10.6 The Customer acknowledges that the Customer may not have rights under the Australian Consumer Law against the Company for a claim that the Goods (including second hand Goods) are not of acceptable quality, or such rights may be diminished, where:
- the reason or reasons for the Goods not been of acceptable quality are specifically drawn to the Customer's attention before making an Offer; or
  - when the Customer examined the Goods prior to taking possession as required under clause 5.5, the examination revealed, or ought reasonably to have revealed, that the Goods were not of acceptable quality.
- 11 Intellectual Property**
- Unless expressly stated by an Agreement, the parties acknowledge and agree that nothing in these Terms shall be construed as a transfer from the Company to the Customer of the ownership of, or title to, any of the Intellectual Property Rights in the Goods, material created as part of the Services or any other Intellectual Property Rights owned by or licensed to the Company or a third party and the Customer agrees that it must not infringe or use the Intellectual Property Rights of the Company or any other third party which exist in the Goods or materials created as part of the Services without the prior consent of the Company or relevant third party.
- 12 Safety**
- 12.1 From time to time in the course of assisting the Company to deliver the Goods and/or provide the Services, the Personnel may attend the Premises.
- 12.2 The Customer is responsible for conducting health and safety risk assessments of the Premises and for all aspects of health and safety at the Premises and must:
- comply with H&S Laws including ensuring appropriate consultation with other duty holders under H&S Laws in relation to any work occurring at the Premises;
  - do all things necessary to ensure that its agents, officers, employees and contractors comply with all H&S Laws and reasonable directions provided by the Customer about managing risks to health and safety;
  - provide the Company with access to such documentation as may be necessary to establish the Customer's compliance with H&S Laws and the requirements of these Terms; and
  - provide the Company with reasonable access to the Premises to allow the Company to monitor the Customer's compliance with the health and safety requirements of these Terms and H&S Laws.
- 12.3 Without limiting clause 12.2, the Customer must eliminate risks to health and safety at the Premises so far as is reasonably practicable and, if it is not reasonably practicable to eliminate risks to health and safety, reduce those risks as is reasonably practicable.
- 12.4 The Customer will verbally notify the Company immediately in the event of:
- any incident or injury that occurs involving Personnel and provide the Company with copies of any

documentation that is created or produced as a result of or relating to such incident or injury, including but not limited to incident reports; and

- (b) any notices issued by a regulatory authority about the systems of work and/or plant at the Premises relevant to the attendance of the Personnel at the Premises.

12.5 The Customer indemnifies the Company for any claim, including in relation to any injury, illness or death, arising out of or in connection with a breach by the Customer of the H&S Laws or this clause 12.

### 13 Indemnity

The Customer indemnifies the Company and holds the Company harmless from and against all Losses (including all legal costs, and any other associated fees and costs) for which the Company incurs as a direct or indirect result of:

- (a) recovering any amounts the Customer owes to the Company (including any fees paid to a debt collector, mercantile agent or similar);
- (b) any breach of an Agreement by the Customer; and
- (c) any negligent or wilful act or omission by the Customer, the Customer's employees, agents, servants, contractors or others for whom the Customer is legally responsible.

### 14 Notification of claims

14.1 The Customer shall notify the Company immediately if it becomes aware of:

- (a) any claim; or
- (b) any death, serious injury or serious illness, in respect of, or caused by, the Goods or other goods of which the Goods are a component or mixed with and the Customer will take all reasonable steps to mitigate any Loss arising as a consequence of the claim, death, serious injury or serious illness.

14.2 If Goods are sold by the Customer to a third party for commercial use by that third party, the Customer must impose on the third party an obligation to notify the Customer immediately if the third party becomes aware of:

- (a) any claim; or
- (b) any death, serious injury or serious illness, in respect of the Goods or other goods of which the Goods are a component or mixed with and to take all reasonable steps to mitigate Loss arising as a consequence of the claim, death, serious injury or serious illness.

14.3 The Customer must, and must impose on any third party to whom it sells the Goods an obligation to:

- (a) not, without the Company's express written consent, make any representation to any Consumer regarding the purpose, performance or durability of the Goods, which is in breach of the Australian Consumer Law;
- (b) take all steps and do all things necessary to promptly pass on to the Company any claim made by a Consumer arising out of or in connection with the Australian Consumer Law and must, at the Customer's expense, assist the Company to comply with its obligations under the Australian Consumer Law;
- (c) not, other than in respect of any warranties or guarantees which cannot be excluded by law, make on behalf of the Company any undertaking, assertion, statement, warranty, admission or other representation in respect of the Goods which is inconsistent with the Agreement under which the Goods are supplied; and
- (d) not agree to settle any claim made by a Consumer without the prior written consent of the Company.

### 15 Confidentiality

15.1 The Customer:

- (a) may use Confidential Information solely for the purposes of the relevant Agreement;
- (b) must keep confidential all Confidential Information; and
- (c) may disclose Confidential Information only to (i) employees and contractors who (A) are aware and

agree that the Confidential Information must be kept confidential and (B) either have a need to know the Confidential Information (and only to the extent that each has a need to know), or have been specifically approved by the Company; or (ii) as required by law or securities exchange regulation; or (iii) with the prior written consent of the Company.

15.2 The Customer must notify the Company immediately once it becomes aware of any breach of confidentiality in respect of the Confidential Information and must take all reasonable steps necessary to prevent further unauthorised use or disclosure of the Confidential Information.

### 16 Privacy

The Customer acknowledges and agrees that personal information (as that term is defined in the *Privacy Act 1988* (Cth)) regarding the Customer if the Customer is an individual, or the employees, contractors, officers and agents of the Customer if the Customer is an organisation, may be collected, held, used and disclosed by the Company for the purposes set out in the Company's privacy policy (which privacy policy is available on the Company's website or on request from the Company). The Customer consents, and where applicable will make all reasonable endeavours to have its employees, contractors, officers and agents consent, to the Company collecting, holding, using and disclosing any such personal information for all purposes specified in the Company's privacy policy.

### 17 GST

Unless otherwise expressly stated in writing in an Agreement, all amounts payable by the Customer in connection with an Agreement do not include an amount for GST. If GST is payable on any supply made by the Company under these Terms, the Customer must pay to the Company, in addition to and at the same time as the payment for the supply, an amount equal to the amount of GST on the supply. Where the Customer is required by these Terms to reimburse or indemnify the Company for any Loss or other amount incurred, the amount to be reimbursed or paid will be reduced by the amount of any input tax credit that the Company will be entitled to claim for the Loss or amount incurred and increased by the amount of any GST payable by the Company in respect of the reimbursement or payment. This clause does not merge on completion or termination of the relevant Agreement or contract. In this clause, words and expressions which are defined in the GST Act have the same meaning given to them by the GST Act.

### 18 Force Majeure

18.1 The Company will not be liable for any failure to perform or delay in performing its obligations under an Agreement if that failure or delay is due to a Force Majeure Event.

18.2 If a Force Majeure Event under clause 18.1 exceeds 20 Business Days, the Company may immediately terminate the Agreement by written notice to the Customer.

### 19 Termination

19.1 Without limiting the Company's other rights under these Terms, and to the extent permitted by law, the Company may terminate any and all Agreements and any account facility under an Account Application with immediate effect by written notice to the Customer if:

- (a) the Customer is the subject of an Insolvency Event;
- (b) the Customer has breached any term of the relevant Agreement (including these Terms) and, if the breach is capable of remedy, has not remedied the breach within 14 days of receiving notice requiring the breach to be remedied; or
- (c) in accordance with clause 18.2.

19.2 On termination of an Agreement, the Customer must, at its cost and within 10 Business Days of the date of termination, return to the Company all Goods the subject of the Agreement (other than any Goods which have been paid for) and any displays and other promotional materials in relation to the Goods.

19.3 Each party retains any rights, entitlements or remedies it has accrued before termination, including the right to pursue all remedies available to either party at law or in equity.

## 20 Acknowledgements and representations

- 20.1 If an Offer has been accepted by the Company, the Customer acknowledges that the Offer was accepted by the Company on the basis of, and in reliance upon, any information, specifications, data, representations, statements and documents provided by the Customer.
- 20.2 By making an Offer, the Customer warrants and represents to the Company that it has read and understood these Terms prior to making the Offer, and agrees to be bound by them in full.
- 20.3 Any price list, goods lists or other similar documents or catalogues issued by or on behalf of the Company do not constitute an offer by the Company to supply Goods appearing in those lists or catalogues or an offer by the Company to supply Goods at the prices set out in those lists or catalogues. The Company's price lists and catalogues may be changed by the Company at any time without notice.
- 20.4 The Specifications are approximate only and the Company makes no representation or warranty as to the completeness or accuracy of the Specifications and the Customer is responsible for making its own enquiries in relation to the completeness and accuracy of the Specifications provided.
- 20.5 Where any instructions or material in whatever form (including documents, specifications, designs, plans, processes, information and data) are required to be provided by the Customer to the Company before the Company can proceed with or complete the provision of the Goods or Services such instructions or materials must be supplied by the Customer to the Company within a reasonable time (as determined by the Company) so as to enable the Company to deliver the Goods or Services within any agreed time frame.
- 20.6 The Company makes no representation or warranty that any ROPS, FOPS, Guards, Noise and Ultra Violet Radiation Protections are fitted in accordance with the Code of Practice for Safe Design and Operation of Machinery and it is the Customer's responsibility to fit such ROPS, FOPS, Guards, Noise and Ultra Violet Radiation Protections.

## 21 Inconsistency

- 21.1 Unless otherwise specified in these Terms, in the event of an inconsistency between any of the documents listed in clause 3.3, the following order of precedence shall apply to the extent of the inconsistency:
- the prices and quantity of Goods and/or Services set out in a Quote (if any);
  - these Terms;
  - the Account Application;
  - any other terms of the Quote (if applicable);
  - the Credit Policy;
  - the Invoice; and
  - without limiting clause 21.2, any terms in the Order which are accepted by the Company in writing.
- 21.2 These Terms shall prevail over any Customer terms and conditions, except to the extent specifically agreed by the Company in writing and any terms or conditions included in an Order or other document provided or issued by the Customer will only be binding on the Company if expressly agreed by the Company in writing.

## 22 Cancellation

- 22.1 Without limiting clause (b), the Company may cancel or suspend any Agreement effective immediately upon providing the Customer with written notice of cancellation or suspension where the Company believes (for any reason) that it will be unable to supply the relevant Goods or provide the Services to the Customer, provided that if the Company cancels an Agreement under this clause 22.1 it will refund to the Customer any amounts already paid by the Customer for the Goods or Services subject to the cancellation and which are not provided to the Customer. The refund of any such amounts will be the Customer's sole remedy against the

Company in respect of any cancellation pursuant to this clause 22.1.

- 22.2 Neither an Agreement nor any Offer that has been submitted can be cancelled by the Customer except with the prior written consent of the Company and without prejudice to any other rights the Company may have, the Customer indemnifies the Company for any Loss incurred by the Company in connection with such cancellation.

## 23 Miscellaneous

- 23.1 In these Terms:
- the singular includes the plural and vice versa;
  - the word person includes a firm, a body corporate, an unincorporated association, body or organisation established pursuant to international treaty, intergovernmental body, or government authority and other official authority;
  - a reference to a document or legislation includes a reference to that document or legislation as varied, amended, novated or replaced from time to time;
  - a reference to a person includes a reference to the person's executors, administrators, successors, substitutes (including, but not limited to, persons taking by novation) and permitted assigns;
  - headings are inserted for convenience and do not affect the interpretation of these Terms;
  - no provision will be construed to the disadvantage of a party merely because that party was responsible for the preparation of the Terms or the inclusion of the provision in the Terms; and
  - unless otherwise provided, all monetary amounts are in Australian dollars and a reference to payment means payment in Australian dollars.
- 23.2 The Customer agrees to be bound by the terms of the Credit Policy.
- 23.3 The Customer must maintain and keep current and complete records of the Goods which the Company has supplied to the Customer, including the Goods which are sold by the Customer to a third party and must, immediately upon written request from the Company, provide the Company with access to, or copies of, those records.
- 23.4 The Customer must, within 7 days of a request from the Company, provide the Company with all information in respect of, and complete details of, the use of the Goods since the Customer took possession of the Goods including:
- the type of work done by the Goods;
  - any machine in which the Goods have been installed and the method of installation (**Machine**);
  - the use and work performed by the Machine;
  - the maintenance performed on the Machine and the compliance by the Customer with the manufacturer of the Machine's specifications for the use and maintenance of the Machine.
- 23.5 The Company may, to the extent permitted by law, vary these Terms from time to time with the variation becoming effective as soon as the Company provides the Customer notice of the variation (**Variation Date**). Any variation to these Terms will only apply to any Offer made after the Variation Date and the parties acknowledge that nothing in these Terms requires the Customer to make any further Offers after the Variation Date.
- 23.6 A failure to exercise or delay in exercising any right under these Terms does not constitute a waiver and any right may be exercised in the future. Waiver of any rights under these Terms must be in writing and is only effective to the extent set out in that written waiver.
- 23.7 If any provision of these Terms is void, unenforceable or illegal and would not be so if words were omitted, then those words are to be severed and if this cannot be done, the entire provision is to be severed from these Terms without affecting the validity or enforceability of the remaining provisions.

- 23.8 These Terms are governed by the laws in force in Queensland, and the Customer and the Company submit to the non-exclusive jurisdiction of the courts of Queensland.
- 23.9 The termination or expiry of these Terms or any Agreement does not operate to terminate any rights or obligations under an Agreement that by their nature are intended to survive termination or expiration, and those rights or obligations remain in full force and binding on the party concerned including without limitation the rights and obligations under clauses 1, 7, 8, 9, 10, 12.5, 13, 14, 15, 16, 17, 19, 21 and 23.
- 23.10 Each party must:
- (a) do all acts necessary or desirable to give full effect to an Agreement; and
  - (b) refrain from doing anything which might prevent full effect being given to an Agreement.
- 23.11 The relationship between the parties is and will remain that of independent contractors, and nothing in these Terms or an Agreement constitutes the parties as partners or joint venturers or constitutes any party as the agent of another party or gives rise to any other form of fiduciary relationship between the parties.
- 23.12 Notices by a party must be delivered by hand, prepaid post or email and sent to the address of the receiving party specified in the Account Application, or, if none are specified, in any other part of the Agreement. Notices shall be deemed to have been received by hand upon delivery, by post within two (2) Business Days of sending and by email one hour after the email (unless the sender knows that email has failed to send).
- 23.13 The *United Nations Convention on Contracts for the International Sale of Goods (1980)* (**The Vienna Convention**) and any acts or regulations enacting The Vienna Convention will not apply to these Terms or any Agreement and are excluded.