

# TERMS AND CONDITIONS OF SALE

Approved By:

## BMS/Sales/Policy

» Rev 3.1 – KH/PDA/SMJ  
09/04/2020  
Conversion to Gen 3 using  
Word Template

» Rev 3.0 - KH/PDA/SMJ  
14/05/2019

## 1. INTERPRETATION

The following Terms and Conditions apply to all contracts, dealings, arrangements and communications between the Purchaser and the Company (together the “parties”)

- 1.1** In these Terms and Conditions, unless the context otherwise requires:
- (a) “Agreement” means these Terms and Conditions, the Purchase
  - (b) “Associate” has the meaning given in sections 12 and 15 of the Corporations Act 2001 (Cth).
  - (c) “Business Day” means any day except a Saturday, Sunday or public holiday in Queensland.
  - (d) “Commencement Date” has the meaning given in clause 2.5.
  - (e) “Company” means voestalpine Railway Systems Australia Pty Ltd (ABN 71 011 073 108) and, as relevant, its officers, agents, contractors, partners and employees.
  - (f) “Control” has the meaning given in section 50AA of the Corporations Act 2001 (Cth).
  - (g) “Court” has the meaning given to it in clause 18.
  - (h) “Developed IP” means the Intellectual Property Rights in the Goods, Items and all other materials produced by the Company, either alone or in conjunction with the Purchaser or others, in connection with this Agreement.
  - (i) “Goods” means any product and, where relevant, any service specified in the Purchase Order, provided at any time by the Company to the Purchaser under the Agreement.
  - (j) “GST” has the meaning given in the A New Tax System (Goods and Services Tax) Act 1999 (Cth).
  - (k) “Intellectual Property Rights” means any and all intellectual and industrial property rights throughout the world, including:
    - (i) copyright, patents, know-how, confidential information, database rights, moral rights and rights in trademarks and designs (whether registered or unregistered);
    - (ii) applications for registration and the right to apply for registration, for any of the above; and
    - (iii) all other intellectual property rights and equivalent or similar forms of protection existing anywhere in the world, whether created before or after the Commencement Date and whether existing in Australia or otherwise.
  - (l) “Invoice” has the meaning given to it in clause 3.5.
  - (m) “Items” means, in whatever form, all drawings, computer-assisted-design files, manuals, patterns, dies, moulds or other tooling or documentation created, developed, manufactured or obtained by the Company for the purposes of, or in support of, fulfilling or delivering the Sales Order.
  - (n) “person” includes any individual, firm, company, corporation, government or state, or any association, trust, partnership or other entity.
  - (o) “Pre-Existing IP” in respect of a party means all materials owned or licensed by the relevant party as at the Commencement Date and any Intellectual Property Rights attaching to those materials.
  - (p) “PPSA” means the Personal Property Securities Act 2009 (Cth) and any regulations made under or in connection with that Act.
  - (q) “PPS Register” means the register established under section 147 of the PPSA.
  - (r) “Purchase Price” has the meaning given to it in clause 3.1.

- (s) "Purchaser" means the entity or individual named in a Request and/or Sales Order for Goods submitted to the Company.
- (t) "Purchaser Items" means, in whatever form, all drawing computer-assisted-design files, manuals, patterns, dies, moulds or other tooling or documentation supplied by the Purchaser for the purpose of, or in support of, fulfilling or delivering the Sales Order.
- (u) "Purchase Order" means the response from the Purchaser accepting the Quotation.
- (v) "Quotation" means the written quotation given to the Purchaser by the Company which sets out the scope of the Goods to be provided.
- (w) "Relevant Monies" has the meaning given to it in clause 11.2.
- (x) "Request" means an initial enquiry made by the Purchaser to the Company which sets out the scope of the Goods requested.
- (y) "Sales Order" means the order acknowledgement sent to the Purchaser in response to acceptance by the Company of the Purchase Order and includes reference to the Quotation number and Purchaser Order number.
- (z) "Security Interest" has the meaning given to it in clause 13.3.
- (aa) "Secured Property" means:
  - (i) The Goods and any "proceeds" (as defined in the PPSA) derived from any dealing with the Goods (whether or not that dealing is permitted under the Agreement);
  - (ii) any Purchaser Items in the Company's possession.
- (bb) "Taxable Supply" has the meaning given in the A New Tax System (Goods and Services Tax) Act 1999(Cth).
- (cc) "Tax Invoice" has the meaning given in the A New Tax System (Goods and Services Tax) Act 1999 (Cth).
- (dd) Words importing the singular number shall be deemed to include the plural and vice versa. Words importing the male gender are be deemed to include the female and neuter genders and vice versa.
- (ee) Nothing in the Agreement shall constitute the Company as a subcontractor of the Purchaser. The Company's obligations are limited to those of a Goods supplier.

## 2. OFFER AND ACCEPTANCE

- 2.1** Any Quotation given by the Company to the Purchaser in response to a Request will constitute an invitation to treat.
- 2.2** Prices given in any Quotation by the Company are applicable to that Quotation only and will not apply to any other Sales Order.
- 2.3** Quotations are valid for a period of thirty (30) days from the date of issue by the Company, or as otherwise specified in the Quotation.
- 2.4** When ordering Goods, the Purchaser must submit an official Purchase Order to the Company accepting the Quotation, providing a full description of the Goods, delivery instructions (as required), and reference to the Company's Quotation number.
- 2.5** A contract will only be or be deemed to have been entered into between the Company and the Purchaser for the supply of the Goods when the Purchase Order has been accepted by the Company ("Commencement Date") and a Sales Order sent to the Purchaser.
- 2.6** Unless otherwise agreed in writing, the Company will have thirty (30) days from receipt by the Company of the Purchase Order to accept or reject a Purchase Order and notify the Purchaser of its decision.

- 2.7** The Agreement represents the entire agreement between the parties in relation to the Goods, and any prior arrangements, agreements, representations or undertakings are superseded and excluded, unless otherwise agreed to in writing by the parties. Any variation or modification of the Agreement must be agreed by the Company and the Purchaser, acting reasonably and in good faith, in writing. The parties hereby expressly acknowledge and agree that the terms of this Agreement prevail over any terms and conditions of trade of the Purchaser whether or not any inconsistency arises.

## 3. PRICE AND PAYMENT

- 3.1** Unless otherwise expressly agreed in writing, the price of Goods will be the price stated in the Sales Order ("Purchase Price").
- 3.2** Any quoted Purchase Price provided to the Purchaser and all other amounts payable by the Purchaser are exclusive of GST.
- 3.3** If GST is payable on a supply made by the Company to the Purchaser, the Purchaser must pay an additional amount equal to the GST payable on that supply ("GST Amount"). The GST Amount is to be paid by the Purchaser on the due date for payment of the Purchase Price. The Company will deliver a Tax Invoice to the Purchaser in respect of the relevant Taxable Supply. In the Agreement, 'GST', 'Taxable Supply' and 'Tax Invoice' have the meanings given in the A New Tax System (Goods and Services Tax) Act 1999 (Cth).
- 3.4** The parties acknowledge that the Purchase Price excludes transport and packaging by the Company, unless otherwise confirmed in writing by the Company. Unless otherwise agreed by the Company, the Purchaser must pay any transport and packaging charges in addition to the Purchase Price.
- 3.5** The Purchaser will accept and pay for Goods if and when tendered notwithstanding any failure by the Company to deliver the Goods (or, if relevant, to provide the services) by the quoted date. Written advice, in the form of the invoice for Goods will constitute tendering of the Goods ("Invoice").
- 3.6** Unless otherwise agreed in writing the Purchaser must pay the full Purchase Price of the Goods plus any GST Amount, and any loading, transport and packaging charges no later than thirty (30) days from the date of the Invoice.
- 3.7** The Purchaser must pay (and must indemnify the Company for) any stamp duty imposed by any authority on or in connection with the Agreement or arising out of the Company's supply of the Goods to the Purchaser.
- 3.8** Should any other tax, fee, levy or duty imposed by any competent authority be payable on any of the Goods supplied by the Company, such tax, fee, levy or duty will be to the Purchaser's account and will be calculated using the rates and methods of assessment in force at the time of delivery. The Purchaser is liable for any other such applicable tax, fee, levy or duty. The Purchaser must make all payments due to the Company in full without set-off, counterclaim, condition, deduction or withholding or, if the Purchaser is required to make such set-off, counter-claim, condition, deduction or withholding at law, the Purchaser must pay such additional amount to the Company necessary to ensure that the Company receives when due a net amount that is equal to the full amount it would otherwise have received.

## 4. WARRANTIES AND INDEMNITIES

- 4.1** All representations, statements, terms, conditions and warranties (whether implied by statute or otherwise) not embodied herein are expressly excluded from the contract to the fullest extent permitted by law.
- 4.2** To the extent permitted by law, the Company excludes all liability whatsoever and howsoever arising for any loss or damage, whether direct or indirect, including consequential losses or damages, arising out of:
- (a) any breach by the Company or any negligence of the Company, its employees or agents; or
  - (b) any deficiency or other fault or harm in the Goods manufactured, work executed or services provided by or on behalf of or in any arrangement with the Company or occasioned to the Purchaser or any third party or to his or their property or interest and whether or not due to the negligence of the Company, its servants or agents.
- 4.3** The Company warrants that it will provide services in compliance with all applicable laws.
- 4.4** Where the Purchaser is a consumer for the purposes of Schedule 2 of the Competition and Consumer Act 2010 (Cth) ("Australian Consumer Law"), the Goods come with guarantees that cannot be excluded. If the Purchaser is a consumer within the meaning of that term in the Competition and Consumer Act 2010 (Cth) and the Australian Consumer Law, the Company makes each guarantee required of a supplier to a consumer under Part 3-2 of the Australian Consumer Law but only to the extent required by the nature of the Goods and the nature of the Purchaser.
- 4.5** To the extent permitted by law, and subject to clause 4.3 and 4.4, the Company's liability to the Purchaser, whether for a breach of the Agreement or otherwise, will at the discretion of the Company, be limited to any one of the following:
- (a) in the case of Goods (excluding services):
    - (i) the replacement of the Goods or the supply of equivalent Goods;
    - (ii) the repair of the Goods;
    - (iii) the payment of the cost of replacing the Goods or of acquiring equivalent Goods; or
    - (iv) the payment of the cost of having the Goods repaired elsewhere,provided that any such Goods are returned to the Company by the Purchaser at the Purchaser's expense; and
  - (b) in the case of services:
    - (i) the supplying of the services again; or
    - (ii) the payment of the cost of having the services supplied again.
- Notwithstanding any other provision of this Agreement, to the extent permitted by law, the Purchaser agrees that the Company's maximum aggregate liability is the Purchase Price of the Goods invoiced to the Purchaser.
- 4.6** To the extent permitted by law, the Company will not be liable for the costs of recovery of the Goods, loss of revenue or profits, loss of use of the Goods, loss of time, opportunity cost, inconvenience, incidental or consequential loss or damage, nor for any other loss or damage caused either directly or indirectly by the supply of the Goods or use of the Goods.

- 4.7** To the extent permitted by law or as otherwise set out in the Agreement, the Company will not be liable in any circumstances for:
- (a) defects or damage caused in whole or in part by misuse, abuse, neglect, electrical or other overload, unsuitable lubricant, improper installation, repair or alteration (other than by the Company) or accident of the Company, the Purchaser or any third party;
  - (b) any delay, transport, loading, unloading, delivery, failure to deliver, installation, failure to install the Goods, removal of Goods (including Defective Goods), use of any tool or equipment loaned or hired by the Company, labour, insurance, packing, storage, handling, demurrage or other charges relating to the supply of the Goods to the Purchaser;
  - (c) Goods not manufactured by it, but the Company will endeavour to pass on to the Purchaser the benefit of any claim made by the Company and accepted by the manufacturer provided that nothing contained in this sub-paragraph will limit the rights of the Purchaser to proceed against the Company pursuant to the Competition and Consumer Act 2010 (Cth) or any other law; or
  - (d) technical advice or assistance given or rendered by it to the Purchaser whether or not in connection with the manufacture, construction or supply of Goods for or to the Purchaser provided always that the Company has rendered such technical advice or assistance with due care and skill and that any materials supplied in connection with such technical advice or assistance are reasonably fit for the purpose for which they are supplied.
- 4.8** The warranty in clause 4.9 is applicable to the scope of supply as described in the Quotation, for Goods designed and manufactured by the Company.
- 4.9** Within two (2) years after the date of delivery of the Goods, the Company warrants that it will, repair or supply free on site, replacement components, where the materials and/or workmanship is shown not to meet the prescribed standards or requirements for the Goods under the Agreement. If however, the axle loads and speeds exceed those specified under the Agreement, or the works are not installed according to the standards set out in the Agreement, or the operation of the works are not maintained in accordance with the Company's prescribed maintenance requirements or the Goods are otherwise not maintained and/or operated in a manner prescribed by the Company, this warranty shall not apply.
- 4.10** With respect to any Goods that are plated with a badge identifying them as Company products, that badge shall remain intact in order to verify validity.
- 4.11** The warranty in clause 4.9 does not apply to natural wear, goods and services provided by third parties which are specified in the scope of supply as described in the Quotation, the costs for removal of defective material, consequential damages and whatever costs resulting from interruptions or breakdowns.
- 4.12** To the maximum extent permitted by law, the Purchaser indemnifies and agrees to hold the Company, its officers and employees ("Those Indemnified") harmless against and from all Claims which may arise as a result of or in connection with Company's supply of the Goods, the Purchaser's use of the Goods, or the Agreement in general, including the assembly or mixing of Goods by the Purchaser or the delayed delivery of the Goods. The Company holds the benefit of this indemnity on trust for Those Indemnified and Those Indemnified will be entitled to rely on the indemnity and have the Purchaser pay for all costs (including but not limited to legal costs on a solicitor and own client or indemnity basis) prior to Those Indemnified having incurred and paid such costs.
- 4.13** For the purpose of the Agreement, "Claims" means in relation to a person, any claim, demand, remedy, suit, injury, damage, loss, cost, liability, action, proceeding or other legal action, right of action, claim for compensation or reimbursement or liability incurred by or to be made or recovered by or against the person, however arising and whether ascertained or unascertained, or immediate, future or contingent.

- 4.14** As soon as any of the facts or matters which form any part of any Claim or complaint whatsoever become known to the Purchaser, the Purchaser must within fourteen (14) days notify the Company in writing of the same.
- 4.15** To the extent permitted by law, the Company is entitled to make any subsequent performance owed by it contingent on the Purchaser's payment of the total Purchase Price due.

## 5. DELIVERY

- 5.1** For the purposes of the Agreement, the term "delivery" has the following meaning (as applicable to the Sales Order):
- (a) Subject to clause 5.13, in respect of Goods requested by the Purchaser to be delivered by the Company to the Purchaser, the Goods will be deemed delivered when the Goods have been delivered to the Purchaser or their authorised agent at the Purchaser's nominated address for delivery;
  - (b) In respect of Goods where the Purchaser has arranged for their own transport of the Goods, the Goods will be deemed delivered when the Goods are available at the Purchaser's disposal at the Company's premises or some other location nominated by the Company;
  - (c) Subject to clause 5.14, in respect of services, the services will be deemed delivered when the services have been provided to the Purchaser or their authorised agent at the Purchaser's nominated address; or
  - (d) In respect of services where the Company has not received instructions sufficient to enable it to dispatch the services within 14 days of notification to the Purchaser that they are ready to be provided, the services will be deemed delivered when they are available to be provided to the Purchaser.
- 5.2** Any date quoted for delivery is an estimate only and unless a guarantee has been given in writing by the Company providing for liquidated damages for failure to deliver by the quoted date, the Company will not be liable to the Purchaser for any loss or damage howsoever arising even if arising out of the negligence of the Company for failure to deliver on or before the quoted date.
- 5.3** To the extent permitted by law and the terms of any agreement between the parties as described by clause 5.2, the Company excludes liability to the Purchaser or any other party for any direct, indirect or consequential injury, loss or damage whatsoever by reason of any delay in delivery whether the same is due to the negligence of the Company or any other party, strike or any other industrial action be it of the Company or other party, or any other cause whatsoever.
- 5.4** If the delivery of the Goods is delayed due to a request by the Purchaser, the Company will be entitled without prejudice to its other rights, to supply the Goods ordered by the Purchaser at a later date so determined by the Company, and regarding products, to dispose of the Goods in another manner to a third party.
- 5.5** The Purchaser indemnifies the Company for any loss suffered as a result of the Purchaser's request to delay delivery of the Goods.
- 5.6** The Company reserves the right to deliver by instalments. If delivery is made by instalments the Purchaser will not be entitled:
- (a) to terminate or cancel the Agreement unless the Company is in material breach of its obligations under the Agreement; or
  - (b) to claim any loss or damage howsoever arising for failure by the Company to deliver any instalments on or before the quoted date for delivery.

- 5.7** Complaints concerning partial instalments do not release the Purchaser from its obligation to accept the residual quantity of the Goods ordered or the residual services procured, in accordance with the Sales Order and other terms of the Agreement.
- 5.8** It is agreed that the Company will not be responsible for delay in manufacture or delivery caused by, or in any way incidental to an act of God, war, fires, breakages of machinery or strikes or arising out of any other unexpected or exceptional cause, or any cause beyond the Company's reasonable control.
- 5.9** Any Quotation containing a provision to supply Goods "ex- stock" is subject to fulfilment of prior orders at the date the Sales Order is sent.
- 5.10** The Purchaser shall inspect the Goods immediately upon delivery and if the Goods are damaged or not otherwise in conformity with the Sales Order and other terms of the Agreement, will give written notice to the Company of the details of the damaged or non-conforming Goods within seven (7) days of the date of delivery ("Defect Notice").
- 5.11** Unless otherwise agreed in writing by the Company, if the Purchaser provides the Company with a Defect Notice, it must leave the Goods in the state and condition in which they were delivered until such time as the Company or its duly authorised employee or agent has inspected the Goods.
- 5.12** Subject to clause 5.13 and 5.14, acceptance of the Goods will be deemed for all purposes to have taken place when delivery has occurred.
- 5.13** If the Company does not receive forwarding instructions sufficient to enable it to dispatch the Goods within 14 days of notification to the Purchaser that they are ready (whether such notification is made by Invoice or through some other means) or if the Goods are not taken at the Purchaser's nominated address, the Purchaser will be deemed to have taken delivery of the Goods under clause 5.1(b) and accepted the Goods.
- 5.14** If the Company does not receive instructions sufficient to enable it to dispatch the services within 14 days of notification to the Purchaser that they are ready to be provided (whether such notification is made by Invoice or through some other means) or if the services are not taken at the Purchaser's nominated address, the Purchaser will be deemed to have taken delivery of the services under clause 5.1(d) and accepted the services.
- 5.15** Without limiting any other provision of the Agreement, if delivery occurs in accordance with clause 5.13 or 5.14, the Purchaser will be liable for all costs and charges incurred by the Company (at its sole discretion) in respect of the Goods or services (including storage and insurance costs), to be payable monthly on demand by the Purchaser.

## 6. CANCELLATION

- 6.1** Subject to the provisions of the Competition and Consumer Act 2010, any Sales Order may only be cancelled, varied or suspended with the written consent of the Company and in the event of such cancellation, variation or suspension, the Purchaser undertakes to reimburse and indemnify the Company for any costs, material, work expenses or charges as may have been purchased from, manufactured, carried out or incurred by the Company or by the Company's suppliers or sub-contractors in preparation for and in the execution of a Sales Order which, without limiting the generality thereof, will include an amount equal to fifty percent of the net profits to the Company of the Sales Order had the Sales Order not been cancelled, varied or suspended.
- 6.2** If the Sales Order is cancelled or varied by the Company, the Company may apply any prepayments which have been made by the Purchaser in respect of the Goods towards satisfaction of such amount as may become due to the Company, and any excess prepayment will be refunded.

## 7. DESCRIPTION AND SPECIFICATIONS

- 7.1** Whilst every effort is made to ensure their accuracy, the description, illustrations and material contained in any catalogue, price list, brochures, leaflets or other descriptive matter provided by or on behalf of the Company represents the general nature only of the items described therein and, except where the Sales Order is so described or illustrated, does not form any part of any Sales Order or the Agreement or amount to any representation or warranty and, except where the Company has issued a Sales Order specified as so described, the use of such description or illustration will not constitute a contract of sale by description.
- 7.2** The Company reserves the right to modify the design of Goods without notice.
- 7.3** The Purchaser warrants that any Goods manufactured, constructed or supplied by the Company which are based in whole or in part upon designs, drawings or specifications supplied to the Company by or on behalf of the Purchaser will not infringe any letters patent, copyright, trademarks, registered designs or any other Intellectual Property Rights of any third party.
- 7.4** The Purchaser agrees to indemnify and keep indemnified and hold harmless the Company against any action, loss, cost, claim or damage that may be brought against or suffered by the Company for any breach of the warranty in clause 7.3 by the Purchaser.
- 7.5** The Company does not warrant or guarantee, and it will not be a term of any agreement between the Company and the Purchaser, that any Goods manufactured, constructed or supplied by the Company which are based upon any designs, drawings or specifications supplied to the Company, by or on behalf of the Purchaser, will achieve any standard of performance or capacity whatsoever, and the Purchaser acknowledges that it does not rely on the skill and judgement of the Company for the fitness for any purpose of any Goods so manufactured, constructed or supplied.

## 8. ACCESS

In respect of any work done on the Purchaser's premises or elsewhere other than at the Company's premises the Purchaser acknowledges that it will be liable, subject to any written agreement to the contrary, to ensure that the conditions under which the work 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 will be suitable and safe for use by the Company, its employees and agents, failing which, the Company will be entitled to charge a reasonable increase in the Purchase Price, or perform the work at a suitable location of its election having regard to the prevailing circumstances.

## 9. WAIVER

Failure of the Company to insist upon strict performance of any term or condition hereof will not be deemed a waiver thereof or of any rights which the Company may have, and shall not, and nor will any express waiver, be deemed to be a waiver of any subsequent breach of any term or condition.

# 10. CONTAINERS

- 10.1** Containers (which expression includes but is not be limited to stillages, formers and pallets) in or on which Goods are delivered and for which a deposit is paid by the Purchaser to the Company, remain the property of the Company.
- 10.2** On the containers' return in good order and condition (fair wear and tear excepted), and subject to clause 10.3, the deposit will be returned to the Purchaser.
- 10.3** The Company may, at its sole and unfettered discretion, retain part or the whole of the deposit if the containers are returned other than in good order and condition (fair wear and tear excepted).
- 10.4** Containers will be deemed not to be returned by the Purchaser until received into the Company's stores at the address nominated by the Company.
- 10.5** Any container not returned to the Company within 3 Business Days of having being delivered to the Purchaser will be deemed to have been intentionally retained by the Purchaser and the Company may forfeit and retain the deposit for that Container.

# 11. RISK AND TITLE

- 11.1** Risk in the Goods passes to the Purchaser:
  - (a) upon delivery occurring, or being deemed to occur in accordance with clauses 5.1(b) or 5.13; or
  - (b) if the Company delivers the Goods in accordance with clause 5.1(a), upon the Goods leaving the Company's premises.
- 11.2** The Purchaser agrees that title to and ownership in any Goods will not pass from the Company to the Purchaser until the later of when:
  - (a) the Purchaser has paid;
    - (i) for those Goods in full; and
    - (ii) all other sums that are due and payable by the Purchaser to the Company at any time (the "Relevant Monies"); and
  - (b) the Goods have been "delivered" to the Purchaser in accordance with clause 5.1, 5.13 or 5.14.
- 11.3** Before title in the Goods passes to the Purchaser under clause 11.2, the Purchaser agrees:
  - (a) to hold the Goods as bailee and store them separately and mark them so as to render them identifiable as being (or being made from or with) the property of the Company;
  - (b) that it has no right to sell or otherwise deal with any Goods (or any new products which the Goods may have been converted into or incorporated into) unless:
    - (i) those Goods or the new products are sold in the ordinary course of the Purchaser's ordinary business; and
    - (ii) that part of the proceeds of sales of those Goods and the new products as represents the Purchase Price of those Goods is paid forthwith to the Company and until such part of the proceeds are so paid, they will be held by the Purchaser on trust for the Company.
- 11.4** The power of sale hereby conferred on the Purchaser under clause 11.3(b) will automatically cease if a receiver or receiver and manager or an administrator is appointed over any of the Purchaser's assets or if a winding up order is made against or a resolution is passed for the winding up of the Purchaser or if the Company at any time revokes the power of sale by notice to the Purchaser.

- 11.5** Upon cessation of the Purchaser's power of sale under clause 11.4 the Company will become entitled to the immediate possession of the Goods in which it still has title and the Purchaser will:
- (a) upon the Company's request, immediately deliver those Goods to the Company; and
  - (b) ensure that the Company, its agents and servants will have an unrestricted right to enter upon any premises of the Purchaser and remove those Goods.
- 11.6** The Purchaser grants to the Company, upon the Company giving notice to the Purchaser, the right to bring proceedings in the name of the Purchaser to recover monies owing to the Purchaser as a result of sales of the Goods or the new products. Any amounts recovered as a result of such proceedings will be retained by the Company in payment of amounts owing for Goods supplied by the Company to the Purchaser.

## 12. TOOLING AND DIES

- 12.1** Items obtained or manufactured on behalf of the Purchaser to fulfil the Purchaser's Sales Order will be deemed owned by the Company.
- 12.2** The Purchaser will insure Purchaser Items against all risks whilst in the Company's custody.
- 12.3** The Company may dispose of Purchaser Items as it sees fit after the expiration of three months written notice to the Purchaser of its intention to dispose if, during such period, the Purchaser fails to claim possession of them.
- 12.4** The Company will not be responsible for any loss, damage or injury occurring to the Purchaser Items unless such loss, damage or injury has been occasioned by the negligence of the Company. Any claim for any such loss, damage or injury shall not exceed the cost of restoring them to good order or condition or replacing them, whichever may be the less expensive.
- 12.5** Provided that there is no unpaid portion of the Relevant Monies, the Company will return Purchaser Items to the Purchaser on completion of the Sales Order or as otherwise directed by the Purchaser.
- 12.6** The Purchaser grants in favour of the Company a general lien over all Purchaser Items in the Company's possession to secure payment of the Relevant Monies.

## 13. PPSA

- 13.1** In this clause 13, "proceeds", "security interest", "security agreement", "ABN", "ACN", "ARBN" or "ARSN" and "verification statement" have the meaning given to them in the PPSA.
- 13.2** The Agreement constitutes a security agreement.
- 13.3** The Purchaser agrees and acknowledges that:
- (a) the Agreement gives rise to a security interest in favour of the Company over the Secured Property (the "Security Interest"); and
  - (b) the Security Interest:
    - (i) secures the Relevant Monies; and
    - (ii) attaches to the Secured Property.

- 13.4** Without limiting clause 11.6, the Purchaser irrevocably grants to the Company, its agents and servants, an unrestricted right and licence, without notice, to (at the Company's option) enter the premises occupied by the Purchaser to identify and remove any of the Goods which are the property of the Company. Neither the Company nor its employees or agents will be liable for any damages incurred by the Purchaser or any other person as a (direct or indirect) result of that access and/or repossession. The Company has the right to sell or dispose of any Goods so removed. The Purchaser is liable for the payment of all costs and expenses of repossession and sale including legal costs on a full indemnity basis. The Company will only apply the proceeds actually received by the Company from the sale of the Goods towards the payment of money owing by the Purchaser to the Company. The Purchaser will indemnify the Company (and its employees and agents) for any loss, cost or damages which the Company suffers or incurs as a result of the Company exercising its rights under this clause 13.4.
- 13.5** The Purchaser agrees to promptly do anything (such as obtaining consents and signing documents) which the Company requires (acting reasonably) for the purposes of:
- (a) ensuring that the Company's Security Interest is enforceable, perfected and otherwise effective under the PPSA;
  - (b) enabling the Company to:
    - (i) ensure that the Security Interest has the priority required by the Company; and
    - (ii) exercise its rights under and in connection with the Agreement or the Security Interest.
- 13.6** The Company's rights under the Agreement are in addition to and not in substitution for the rights under other law (including the PPSA) and the Company may choose whether to exercise rights under the Agreement, or under such other law, as it chooses.
- 13.7** To the extent permitted by law, for the purposes of:
- (a) sections 115(1) and 115(7) of the PPSA:
    - (i) the Company need not comply with sections 95, 118, 121(4), 125, 130, 132(3)(d) or 132(4) of the PPSA; and
    - (ii) sections 142 and 143 of the PPSA are excluded; and
  - (b) sections 115(1) of the PPSA, the Company need not comply with sections 132 and 137(2) of the PPSA.
- 13.8** The Company and the Purchaser agree that neither party may disclose information of the kind that can be requested under section 275(1) of the PPSA. The Purchaser agrees that it will only authorize the disclosure of information under section 275(7)(c) or request information under section 275(7)(d) if the Company approves nothing in this clause will prevent any disclosure by the Company that it believes is necessary to comply with its other obligations under the PPSA.
- 13.9** To the extent that it is not inconsistent with clause 13.8 constituting a "confidentiality agreement" for the purposes of section 275(6)(a) of the PPSA, the Purchaser agrees that the Company may disclose information of the kind mentioned in section 275(1) of the PPSA to the extent that it is not doing so in response to a request made by an "interested person" (as defined in section 275(9) of the PPSA) pursuant to section 275(1) of the PPSA.
- 13.10** The Purchaser will:
- (a) Reimburse the Company on demand for, and indemnify the Company against, fees, costs and expenses (on a full indemnity basis) incurred by the Company in connection with it exercising, enforcing or preserving any of its rights under the Agreement or at law; and
  - (b) on demand by the Company (and at the entire cost and expense of the Purchaser) perform all acts and execute and deliver all further documents as the Company, acting reasonably, requires:
    - (i) for more satisfactorily securing to the Company the Relevant Monies;
    - (ii) to perfect the Security Interest; or
    - (iii) for facilitating the exercise of any of its rights under the Agreement or at law.
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**13.11** The Company is entitled to take out insurance cover against theft, breakage, fire, water and other damage for the Goods at the expense of the Purchaser, unless the Purchaser furnishes evidence satisfactory to the Company, within 7 days of any request by the Company, that it has taken out such insurance cover itself and that such insurance cover remains current.

**13.12** To the extent permitted by law, the Purchaser waives:

- (a) its rights to receive any notice that is required by:
  - (i) any provision of the PPSA (including a notice of a verification statement); or
  - (ii) any other law before a secured party exercises a right, power or remedy;
- (b) any time period that must otherwise lapse under any law before a secured party exercises a right, power or remedy.

If the law which requires a period of notice or a lapse of time cannot be excluded, but the law provides that the period of notice or lapse of time may be agreed, that period or lapse is one day or the minimum period the law allows to be agreed (whichever is longer).

**13.13** The Purchaser will immediately notify the Company (in writing) if it:

- (a) changes its name, ABN, ACN, ARBN or ARSN; or
- (b) purchases the Goods as trustee for any trust and will provide the Company with the correct details of that trust (including that trust's ABN).

## 14. INTELLECTUAL PROPERTY

**14.1** Each party retains ownership of its Pre-Existing IP and nothing in this Agreement transfers ownership or assigns any Pre-Existing IP of a party to the other party.

**14.2** Unless otherwise agreed by the Company in writing, the Company will be the sole and exclusive owner of all Developed IP. The Company grants the Purchaser a non-exclusive, non-transferable limited licence to use the Developed IP and its Pre-Existing IP incorporated in the Developed IP solely to the extent necessary for the Purchaser to enjoy the benefit of having title to the Goods in accordance with the terms of this Agreement.

**14.3** Subject to clause 14.1, if the Purchaser creates, produces or otherwise develops a portion of the Developed IP, the Purchaser assigns to the Company any and all right, title and interest (including all Intellectual Property Rights) in that portion of the Developed IP (including as a present assignment of future copyright). The Purchaser must do all things necessary to vest title or procure the vesting of title, in any and all of the Intellectual Property Rights that are created by the Purchaser in the Developed IP, in the Company without the need for further consideration.

**14.4** To the extent that any Pre-Existing IP of the Purchaser is incorporated in the Developed IP, the Purchaser grants to the Company a perpetual, irrevocable, transferable, sublicensable, worldwide and royalty-free licence to use, copy, modify, adapt and exploit such Pre-Existing IP in order to use, enjoy the benefit of and exploit the Developed IP.

**14.5** The Purchaser undertakes to procure the irrevocable consent of any of its personnel not to enforce any and all moral rights that those individuals may have, presently or in the future, in relation to the Developed IP, including by executing any moral rights consent required by the Company.

**14.6** The Purchaser must not copy, reproduce or reverse engineer the Goods, Items or any component of the Goods or Items, or directly or indirectly work with any third party to copy, reproduce or reverse engineer the Goods, Items or any component of the Goods or Items.

# 15. TERMINATION

## 15.1 Each of the following is an “Event of Default”, namely if:

- (a) the Purchaser fails to pay any monies payable under the Agreement or otherwise on the due date for payment;
- (b) the Purchaser comes under the Control of a person (acting alone or together with its Associates) who did not control the Purchaser on the Commencement Date;
- (c) the Purchaser breaches any term of the Agreement which is not capable of remedy;
- (d) the Purchaser breaches any term of the Agreement which is capable of remedy, but fails to remedy the breach within 10 Business Days after receiving notice from the Company to do so;
- (e) an application for the winding up or bankruptcy of the Purchaser is made;
- (f) a receiver, receiver and manager, liquidator, provisional liquidator, administrator or trustee is appointed in respect of Purchaser or any of its assets or anyone else is appointed who (whether or not as agent for the Purchaser) is in possession, or has control, of any of Purchaser’s assets for the purpose of enforcing a security interest;
- (g) an event occurs that gives any person the right to seek an appointment referred to in paragraph 15.1(f);
- (h) an application is made to court or a resolution is passed or an order is made for the winding up or dissolution of the Purchaser or an event occurs that would give any person the right to make an application of this type;
- (i) the Purchaser becomes insolvent, bankrupt, fails to comply with a statutory demand, enters into a scheme or arrangement with its creditors, has a writ of execution, mareva injunction or similar order made against it or any of its assets or has an application made to Court (or passes a resolution) for its winding up or is subject to anything analogous.

## 15.2 If an Event of Default occurs, the Company may:

- (a) enforce performance by proceeding by appropriate Court action, enforce performance by the Purchaser of the Agreement or recover damages for the breach concerned;
- (b) terminate the Agreement and demand payment of any monies outstanding under the Agreement by notice in writing to the Purchaser and demand that the Purchaser pay to the Company any outstanding monies under the Agreement.

## 15.3 Upon termination of the Agreement, the Company will have the right to retake possession of any Goods to which title has not yet passed to the Purchaser under and in accordance with clause 11.2, and the Company will not be liable for any loss or damages caused by taking such action.

## 15.4 The Purchaser will pay to the Company such additional amounts as may be necessary to compensate the Company for any costs (including legal costs and expenses) or losses resulting from termination of the Agreement.

# 16. SEVERABILITY

If any one or more provisions of the Agreement should be deemed invalid or unenforceable such provision(s) shall be severed and shall be deemed to have formed no part hereof but the remaining provisions here of shall subsist and remain enforceable unless the basic purpose of the Agreement would hereby be defeated.

## 17. ASSIGNMENT

The Purchaser acknowledges that it is prohibited from assigning or discharging the Agreement or any of its rights or obligations under the Agreement without the prior written consent of the Company. Any change in control of the Purchaser or the sale of substantially all of the Purchaser's assets is deemed an assignment for the purpose of this Agreement. The Company may assign the benefit of the Agreement by providing written notice to the Purchaser.

## 18. PLACE OF JURISDICTION AND APPLICABLE LAW

The Agreement will be governed by the law that applies in the State of Queensland and the Purchaser irrevocably submits to the non-exclusive jurisdiction of the courts of that State and any courts which have jurisdiction to hear appeals from any of those courts ("Courts") and waives any right to object to any proceedings being brought in those Courts.

## 19. NOTICES

- 19.1** Each communication (including each notice, consent, approval, request and demand) under or in connection with this Agreement shall be given in writing.
- 19.2** Each communication (including each notice, consent, approval, request and demand) may be given by personal service, post, facsimile or email in accordance with the contact details of the Company and the Purchaser specified in the Purchase Order.