

## 1) DEFINITIONS

- 1.1 "**Customer**" means a person or entity whose order for the purchase of Goods is accepted by the Supplier.
- 1.2 "**Director**" means where the customer is a corporation, all directors of that corporation and where the Customer is a trust that has a corporate trustee all directors of the trustee.
- 1.3 "**Goods**" shall mean Goods supplied by the Supplier to the Customer (and where the context so permits shall include any supply of Services as hereinafter defined).
- 1.4 "**Guarantor**" means that person (or persons), or entity who agrees herein to be liable for the debts of the Customer and includes all directors of the Customer where the Customer is a corporation and where the Customer is a trust all trustees of the trust and all directors of the trustee if there is a corporate trustee of the trust (if applicable).
- 1.5 "**Price**" shall mean the cost of the Goods and/or the Services as agreed between the Supplier and the Customer subject to clause 5 of these Terms.
- 1.6 "**Promotional Material**" means sample or other material supplied to the Customer by the Supplier at the cost of the Supplier and includes but is not limited to display boards, samples, folders and advertising brochures.
- 1.7 "**Services**" shall mean all services supplied by the Supplier to the Customer and includes any advice or recommendations (and where the context so permits shall include any supply of Services as defined supra).
- 1.8 "**Supplier**" means Cleary Bros (Bombo) Pty Ltd and includes its successors and assigns.
- 1.9 "**Terms**" means these terms and conditions and where the context so permits shall include the agreement formed between the Supplier and the Customer and/or Directors and Guarantor.

## 2) INTERPRETATION

- 2.1 The headings used in this agreement do not form part of these Terms and are for convenience only.
- 2.2 Words importing the singular shall include the plural and vice versa, words importing a gender shall include other genders and references to a person shall be construed as references to an individual, firm, body corporate, association (whether incorporated or not), government and governmental, semi-governmental and local authority or agency.

## 3) GENERAL

- 3.1 These Terms replace any previous agreements or terms and conditions of sale.
- 3.2 Unless otherwise agreed in writing by the Supplier, any terms and conditions of the Customer's order deviating from or inconsistent with these Terms are expressly rejected by the Supplier. Any variations to these Terms not expressly agreed to in writing by the Supplier are expressly rejected by the Supplier.
- 3.3 A quotation shall not constitute an offer to sell Goods and/or Services to the Customer. No contract for the supply of Goods and/or Services shall exist between the Supplier and the Customer unless the Customer's order for Goods and/or Services has been accepted by the Supplier. The Supplier may accept or refuse any order for Goods and/or Services in its absolute discretion and may make its acceptance of an order conditional upon it receiving a satisfactory credit assessment of the Customer. Supply to the Customer is not exclusive.
- 3.4 Once an order from a Customer has been accepted by the Supplier:
  - a) the order cannot be cancelled by the Customer without the written consent of the Supplier; and
  - b) the order cannot be varied by the Customer after 4 hours of the Customer submitting the order to the Supplier.
- 3.5 The Supplier may vary these Terms by notice in writing to the Customer. The Customer agrees that the purchase of any Goods and/or Services after the date of a notice of variation will be deemed to be an acceptance of such varied Terms.
- 3.6 Should there be any variation to any of the information supplied by the Customer to the Supplier concerning the structure or nature of the Customer's business (such as a conversion to or from a Company or Trust) the Customer shall forthwith notify the Supplier in writing.
- 3.7 Any order received by the Supplier from the Customer for the supply of Goods and/or the Customer's acceptance of Services and/or Goods supplied by the Supplier shall constitute acceptance of these Terms.
- 3.8 Upon acceptance of these Terms by the Customer the Terms are irrevocable and can only be varied in accordance with these Terms.

- 3.9 The Supplier's agents or representatives are not authorised to make any representations, or statements on behalf of the Supplier and the Supplier shall not be liable for any unauthorised representations or statements made by the Supplier's agents or representatives.
- 3.10 The Supplier's agents or representatives are not authorised to enter into any agreement on behalf of the Supplier or vary these Terms.
- 3.11 In the event that the whole or any part or parts of any provisions in these Terms should be held to be void or unenforceable in whole or in part such provision or part thereof shall to that extent be severed from these Terms but the validity and enforceability of the remainder of these Terms shall not be effected.
- 3.12 The Supplier reserves the right at its sole discretion to sub-contract the manufacture and/or supply of the Goods and/or Services or any part thereof to a third party.
- 3.13 The Customer agrees that a statement in writing signed by the Supplier's credit manager certifying that monies are payable by the Customer to the Supplier shall be prima facie evidence of the amounts so payable.

## 4) GOODS

- 4.1 The Goods and/or Services are as described on the invoices, quotation, work authorisation or any other work commencement forms provided by the Supplier to the Customer in writing.

## 5) PRICING AGREEMENT

- 5.1 The price of Goods and/or Services shall be indicated on invoices provided by the Supplier to the Customer in respect of Goods and/or Services supplied.
- 5.2 Where the price of the Goods and/or Services has been quoted by the Supplier that price shall be binding upon the Supplier provided that the Goods and/or Services are delivered to and accepted by the Customer within thirty (30) days of the quotation.
- 5.3 The price shall be increased by the amount of any GST and other taxes and duties which may be applicable, except to the extent that the taxes and duties are expressly included in any quotation given by the Supplier.
- 5.4 Notwithstanding any prior acknowledgment by the Supplier of the price of Goods and/or Services, the prices specified for Goods and/or Services may at the Supplier's option be subject to the Supplier's prices and charges in effect at the time of delivery.
- 5.5 The Supplier shall be entitled to alter the price of Goods and/or Services in the invoice or contract price as a consequence of currency fluctuations, taxes, customs duty or other government imposts.

## 6) ACCOUNT TERMS

- 6.1 Unless otherwise agreed in writing by the Supplier, the Customer shall pay for all Goods and/or Services delivered at the time of delivery.
- 6.2 Where the Supplier has agreed to extend credit to the Customer for the purchase of Goods and/or Services the Customer must pay for the Goods and/or Services within 30 days after the end of the calendar month that the Goods and/or Services were delivered.
- 6.3 Credit extended to the Customer for all Goods and/or Services sold will be provided in the absolute discretion of the Supplier. Any credit limit approved by the Supplier shall be notified in writing to the Customer.
- 6.4 The Supplier will be entitled to set off against any money owing to the Customer amounts owed to the Supplier by the Customer on any account whatsoever.
- 6.5 Payment for Goods and/or Services must be made by direct credit or by credit card, or by any method expressly agreed to between the Customer and the Supplier. Payments will be applied to outstanding invoices of the Customer at the sole discretion of the Supplier. The Supplier reserves the right to charge a credit card handling fee at its discretion and at rates advised by the Supplier from time to time.
- 6.6 If the Customer does not pay the Supplier by the due date, the Customer shall pay interest on monies due, charged on a daily basis at 10% per annum from the date of the invoice until the actual date of payment. If the Customer has a credit account with the Supplier, the Supplier may debit the Customer for any interest that accrues at such other times that it chooses.
- 6.7 If the Customer does not pay the Supplier by the due date, the Customer shall pay to the Seller an administration fee which shall be the greater of \$50.00 or 10.00% of the amount overdue on an unpaid invoice. The Customer and the Supplier agree that the administration fee is a reasonable liquidated cost of administering an abnormal payment and the Supplier may debit the Customer at such other times that it chooses for such administration fees.

- 6.8 The Customer shall pay any legal costs, stamp duties and other expenses payable on these terms and conditions or any credit application, guarantee or other security documents signed by the Customer together with all collection costs including legal fees (on a solicitor/client indemnity basis) and dishonoured cheque fees incurred by the Supplier in connection with the purchase of Goods and/or Services by the Supplier.
- 6.9 The Supplier may withdraw the Customer's credit facilities (if applicable) at any time or vary the Customer's credit limit, without notice to the Customer or any guarantor of the Customer.
- 6.10 The Customer shall not set off against the Price amounts due from the Supplier.
- 6.11 In the event that:
- the Supplier retains possession or control of the Goods; and
  - payment of the Price is due to the Supplier; and
  - the Supplier has made a demand in writing to the Customer for payment of the Price and the Supplier has not received the Price for the Goods,
- then whether property in or title to the Goods has passed to the Customer or has remained with the Supplier, the Supplier may dispose of the Goods and may claim from the Customer the loss to the Supplier on such disposal.
- 7) INTELLECTUAL PROPERTY**
- 7.1 Where the Supplier has designed or drawn Goods for the Customer, then the copyright in those designs and drawings shall remain vested in the Supplier, and shall only be used by the Customer at the Supplier's discretion.
- 7.2 Where the Customer has supplied drawings, designs or concepts for Goods to be supplied by the Supplier, the Customer warrants that all designs or instructions provided to the Supplier will not cause the Supplier to infringe any patent, registered design or trademark in the execution of the Customer's order.
- 8) DELIVERY**
- 8.1 Goods will be delivered or deemed to be delivered when they are delivered to the delivery place nominated by the Customer. If no such address is nominated then delivery will be deemed to occur at the time when the Goods are ready for collection at the Supplier's premises.
- 8.2 The Customer shall pay to the Supplier packing, crating and delivery charges in accordance with the Supplier's current rates, as at the date of dispatch. If there is no current rate, then a reasonable delivery charge shall be paid by the Customer.
- 8.3 The Supplier reserves the right to make a reasonable charge for storage if delivery instructions are not provided by the Customer within 14 days of a request by the Supplier for such information.
- 8.4 The Customer authorises the Supplier to deliver products to the place nominated by the Customer and to leave the Goods at such place whether or not any person is present to accept delivery. The Supplier shall not be liable on any basis whatsoever for loss suffered by the Customer after delivery to the nominated delivery place.
- 8.5 The Supplier shall not be obliged to obtain a signed receipt or other acknowledgement from any person at the nominated place for delivery but if a signed receipt or other acknowledgement is obtained from someone believed by the Supplier to be authorised by the Customer to sign or otherwise take delivery, then such signed receipt or other acknowledgement shall be conclusive evidence of the Customer's acceptance of the Goods delivered.
- 8.6 Any notified times for delivery are estimates only and the Supplier shall not be liable to the Customer for any failure to deliver or for delay in delivery of Goods occasioned by strike, lockout or other industrial dispute, shortage of stock, shortage of labour, lack of skilled labour, delays in transit, fire, flood, hostility, civil commotion or any other cause whatsoever whether or not beyond the control of the Supplier.
- 8.7 The Customer shall not be relieved of any obligation to accept or pay for Goods by reason of any delay in delivery.
- 8.8 The Supplier reserves the right to deliver Goods by instalments and each instalment shall be deemed to be sold under a separate contract. Failure to deliver any instalment or deliver any instalment on time shall not be a repudiation of the contract and will not entitle the Customer to determine the contract in whole or in part.
- 8.9 The Supplier shall not be liable to the Customer for any loss or damage attributable to failure by the Supplier to deliver the Goods.
- 9) PROPERTY AND RISK**
- 9.1 The Goods shall be at the sole risk of the Customer as soon as they are dispatched from the Supplier's premises.
- 9.2 The Supplier may mark or label the Goods to identify the Goods in any manner which the Supplier considers appropriate.
- 9.3 Property in and title to the Goods will not pass to the Customer until the Price and all other amounts owed to the Supplier by the Customer have been paid for in full and until then:
- the Customer will hold the Goods as trustee and agent for the Supplier;
  - the Goods must be stored separately and in a manner enabling them to be identified as Goods of the Supplier and cross-referenced to particular invoices and the Customer acknowledges that if it should process or mix the Goods with other products or items such that the Goods are no longer separately identifiable then the Customer and the Supplier will be owners in common of the new product;
  - the Customer may sell the Goods in the ordinary course of its business as trustee and agent of the Supplier and will hold the proceeds of sale in a separate account on trust for the Supplier and account to the Supplier for those proceeds; and
  - the Supplier may require the Customer to return the Goods to the Supplier or its authorised representative on demand and the Supplier may enter upon the premises of the Customer or any other premises occupied or controlled by the Customer to inspect or repossess the Goods.
- 9.4 The Customer shall insure the Goods against theft or any damage until such Goods have been paid for, or until they are sold by the Customer, whichever occurs first and the Supplier will be entitled to call for details of the insurance policy. If the Customer does not insure the Goods or fails to supply details of its insurance policy the Customer will reimburse the Supplier for the cost of any insurance which the Supplier may reasonably arrange in respect of the Goods supplied to the Customer.
- 9.5 If any of the Goods are damaged or destroyed prior to property in and title to the Goods passing to the Customer, the Customer hereby assigns to the Supplier all insurance proceeds payable to the Customer for the loss or damage of the Goods. The Customer shall at the time that it makes any claim on an insurer in connection with the loss or damage to the Goods notify that insurer of the assignment of rights pursuant to this clause.
- 10) RETURN OF GOODS**
- 10.1 The Customer acknowledges and agrees that any Promotional Material provided to the Customer by the Supplier remains the property of the Supplier at all times and the Customer must return the Promotional Material to the Supplier immediately on demand.
- 10.2 Subject to clause 9, unless agreed in writing by the Supplier, the Supplier will not accept any return of Goods.
- 10.3 Goods accepted for return by the Supplier will attract a charge to the Customer to cover restocking and repackaging charges. The amount of this charge will be determined by the Supplier but will be not less than 15% of the price of the Goods. Such charge shall be deducted from the amount or credit allowed. The original invoice number and a copy of the original invoice must accompany all Goods returned to the Supplier.
- 11) CLAIMS FROM CUSTOMER**
- 11.1 Subject to clause 8.4, all claims by the Customer relating to failure by the Supplier to comply with an order of the Customer whether due to shortfall, defect, incorrect delivery or otherwise must be made by written notice to the Supplier within seven (7) days of the date of delivery. If the Customer fails to provide such notice within seven (7) days then the Customer shall be deemed to have accepted the Goods and shall not be entitled to make any claim against the Supplier.
- 11.2 These Terms shall not exclude or limit the application of any provisions of any statute including any implied condition or warranty the exclusion of which would contravene any statute (including the Australian Consumer Law) or cause any part of this clause 11 to be void or unenforceable. To the extent permitted by law all conditions, warranties and undertakings are expressly excluded.
- 11.3 Unless the Goods supplied by the Supplier are of a kind ordinarily acquired for domestic household or personal use or consumption, the Supplier's liability under clause 11.2 for breach of a non-excludable condition or warranty is limited at the Supplier's option, to any one of the following:
- In the case of Goods:
    - the replacement of the Goods or the supply of equivalent Goods;
    - the repair of the Goods; or

- (3) the payment of the cost of providing replacement Goods or of acquiring equivalent Goods;
  - (4) the payment of the cost of having the Goods repaired.
- b) In the case of Services:
- (1) The supplying of the Services again; or
  - (2) The payment of the cost of having the Services supplied again.

11.4 Subject to clause 11.2 the Supplier shall not be liable for any direct or indirect loss whatsoever including consequential loss, loss of profits, loss of opportunity or loss of use.

11.5 The Supplier shall not be liable for any claim in connection with Goods which have not been stored or used in a proper manner by the Customer.

## 12) FIT FOR PURPOSE

12.1 The Customer agrees that it does not rely on the skill or judgment of the Supplier in relation to the suitability of any Goods and/or Services for a particular purpose. Any advice, recommendation, information or assistance provided by the Supplier is provided without any liability by the Supplier whatsoever and the Customer must make its own investigations and enquiries in relation to the Goods and/or Services and its proposed use.

## 13) GST

13.1 In this clause the expressions "GST", "Input tax credit", "tax invoice", "recipient" and "taxable supply" have the meanings given to those expressions in the A New Tax System (Goods and Services Tax) Act 1999.

13.2 With the exception of any amount payable under this clause 5, unless otherwise expressly stated all amounts stated to be payable by Customer under these Terms are exclusive of GST.

13.3 If GST is imposed on any supply made under or in accordance with these Terms, the recipient of the taxable supply must pay the Supplier an additional amount equal to the GST payable on or for taxable supply. Payment of the additional amount will be made at the same time as payment for the taxable supply subject to the provision of a tax invoice.

## 14) DEFAULT BY CUSTOMER

14.1 In the event of:

- a) any default or failure by the Customer in making due and punctual payment to the Supplier of any moneys owing by the Customer;
- b) an administrator, liquidator or provisional liquidator is appointed in respect of the Customer;
- c) a receiver and manager, administrator or controller is appointed in respect of any assets or groups of assets of the Customer;
- d) the Customer goes into bankruptcy or is wound up;
- e) the Customer becomes, admits in writing that it is, or is declared by a court to be unable to pay its debts as and when they fall due, or
- f) there is a breach by the Customer of any of these Terms,
- g) the Customer offers the Goods for sale through the internet on eBay or any like website.
- h) the Customer without the written approval of the Supplier sells Promotional Material;

then all monies payable by the Customer to the Supplier shall become immediately due and payable notwithstanding the due date of payment shall not have expired, and the Supplier may without prejudice to any other rights it may have do any or all of the following:

- (1) withdraw any credit facilities which may have been extended to the Customer;
- (2) withhold any further deliveries of Goods;
- (3) in respect of Goods already delivered onto the Customer's premises enter onto those premises and recover and resell the Goods;
- (4) recover from the Customer the cost of materials or Goods acquired for the purposes of future deliveries; and/or
- (5) cease to supply Goods to the Customer.

## 15) COVENANTS BY THE CUSTOMER

15.1 Fixed and Floating Charge

- a) In consideration of the Supplier selling to the Customer Goods on credit, the Customer as beneficial owner does hereby charge all and every undertaking and all of its assets of whatsoever nature and wheresoever situate both present and future with the payment to the Supplier of all moneys

now or hereafter to become owing or payable to the Supplier by the Customer.

b) The charge hereby created ("**the Charge**") shall operate as:

- (1) a fixed charge as regards to freehold and leasehold property, uncalled capital, engines, machinery, plant, stock, books of account, debts, vouchers and other documents relating in any way to the business transactions of the Customer and all securities negotiable or otherwise, shares and documents evidencing title to or right to possession of any property and whether or not deposited with the Supplier by the Customer and the property mentioned in any such documents;
- (2) as a floating charge in respect of all other assets hereby charged.

c) The Customer shall immediately upon demand made on it by the Supplier execute in favour of the Supplier a deed of fixed and floating charge containing such covenants as the Supplier may reasonably require including without limitation the provisions of the Supplier's standard form of deed of fixed and floating charge.

15.2 Mortgage

- a) The Customer shall immediately upon demand being made upon it by the Supplier execute in favour of the Supplier as mortgagee, a mortgage payable on demand in registrable form over all or any part of the freehold or leasehold land of the Customer referred to in Clause 16.2 hereof ("**the Mortgage**") containing such covenants as the Supplier may require including without limitation the covenants contained in Memorandum 2447323 presently filed in the New South Wales Land Titles Office in respect of real property situate in New South Wales or in the case of real property in other jurisdictions, the provisions of the Supplier's standard form of mortgage.
- b) The Supplier shall be entitled to lodge a caveat in respect of the agreement to grant a mortgage contained in Clause 16 or the Mortgage or in respect of all or any of the real property of the Customer charged to the Supplier under Clause 16.1. The Customer shall not object to the lodgement of the said caveat or take any steps to have any such caveat removed from the Land Titles Office register.

15.3 Future Assurances

At the cost of the Customer, the Customer shall from time to time at the written request of the Supplier execute any deed, dealing, assurance or other document which the Supplier shall in its absolute discretion require the Customer to execute and do all such other acts, matters and things as the Supplier shall consider reasonable for the purpose of preserving, perfecting or protecting the Charge and the Mortgage or more effectively securing the powers, remedies, rights, declarations and authorities of the Supplier under the Charge and/or the Mortgage.

15.4 Power of Attorney

The Customer hereby irrevocably appoints the Supplier and every authorised officer of the Supplier jointly and each of them severally the attorney of the Customer for the purpose of doing either in the Customer's name or in the name of the attorney and in either cases as the Customer's act and deed all such acts, matters and things as the attorney from time to time considers necessary or expedient for the purpose of carrying into effect all the powers and authorities herein contained and without limiting the power and authority:

- a) do any act including the execution of the Charge and/or the Mortgage and the execution of such documents as may be necessary to register the Charge and/or the Mortgage in the Customer's name as mortgagor pursuant to this application;
- b) to execute and deliver on behalf of the Customer a lease of the said freehold or leasehold land of the Customer or any part thereof for such period as the Supplier may think fit;
- c) to bring, proceed with, defend or compromise any legal proceedings on behalf of the Customer in connection with the said land or property the subject of the Mortgage and to execute and appeal from any judgment or judgments in connection therewith.

## 16) CONCRETE CUSTOMERS

16.1 The Customer acknowledges and agrees that:

- a) concrete is made from naturally occurring coarse aggregates mixed with sand, cement, and admixtures as required by the mix design and that the finish can be affected by a range of factors including (without limitation) the method of placement, method of curing, standard of workmanship and climatic conditions and

- b) concrete with coloured oxides can be affected by factors which are outside the Supplier's control. The Supplier will not be held responsible for variations or inconsistencies in the finish of concrete mixed with coloured oxides; and
- c) additional water that is added to a load of concrete at the Customer's request is at the Customer's sole risk.

## 17) **ACKNOWLEDGMENT**

17.1 Each of the Customer and the Directors hereby acknowledge, affirm and agree that:

- a) this application has been provided to the Supplier to enable each of the Customer and the Directors to take it away and read it so that they may fully understand and comprehend the terms conditions and provisions contained herein;
- b) they have read, fully understand and comprehend the terms, conditions and provisions contained in this application;
- c) they have been advised by the Supplier prior to the execution of this application that a copy of this application form containing the forms of this application has been provided to the Customer and each Director to enable them to obtain independent legal advice and they have take such advice as to us has seemed appropriate;
- d) they have full power and authority to enter into this Agreement;
- e) this Agreement is signed and delivered as a Deed;
- f) the Supplier will rely on all information given to the Supplier by the Customer and the Directors and this information is true and correct.

## 18) **ASSIGNMENT AND NOVATION**

The Supplier may at any time assign, novate or otherwise dispose of or deal with its rights and obligations under these Terms by notice in writing to the Customer. The Customer agrees that any order for the purchase of Goods submitted by the Customer to the Supplier after the date of a notice of assignment will be deemed to be an acceptance of such assignment, novation or other disposal of rights and obligations.

## 19) **GENERAL**

19.1 Nothing in this Agreement creates a joint venture, partnership or the relationship of principal and agent, or employee and employer between the parties.

19.2 The Agreement constitutes the entire agreement between the parties regarding the matters set out in it and supersedes any prior representations, understandings or arrangements made between the parties, whether orally or in writing.

19.3 A right created by this Agreement cannot be waived except in writing by the party entitled to that right.

19.4 Each party will promptly do everything necessary or desirable to give full effect to the arrangements contained in this Agreement.

19.5 If a clause or part of any clause is in any way unenforceable, invalid or illegal, it will be read down so as to be enforceable, valid and legal. If this is not possible, the clause (or where possible, the offending part) is to be severed from this Agreement without affecting the enforceability, validity or legality of the remaining clauses (or parts of those clauses) which will continue in full force and effect.

19.6 Each party will pay its own legal costs and disbursements in connection with the negotiation, preparation, execution and carrying into effect of this Agreement.

## 20) **LAWS TO GOVERN PROVISIONS OF AGREEMENT**

These Terms and the supply of the Goods by the Supplier to the Customer shall be governed by and construed in accordance with the laws of New South Wales.

## 21) **PPSA**

For the purposes of this clause, any terms have the same meaning as they do under the Personal Property Securities Act 2009 (Cth), and associated regulations, as amended from time to time.

The parties agree that the Supplier may register a Security Interest over all materials, goods and equipment supplied to the Customer pursuant to this Contract until such a time that the materials, goods and equipment have been paid for in full.

The Customer agrees that it will do all things reasonably necessary to ensure the Supplier can perfect, register and enable its rights in relation to any Security Interest created pursuant to this Contract.

If Chapter 4 of the PPSA applies to the enforcement of the Security Interest, the Customer agrees that sections 95, 96, 121(4), 125, 130, 132(3)(D), 132(4), 135, 142 and 143 of the PPSA will not apply to the enforcement of the Security Interest.

The parties agree that this instrument will not be disclosed pursuant to clause 275 of the PPSA.

