

## KM Hudson Wholesale Pty Ltd T/A The Tyre Hub – Terms & Conditions of Trade (Terms)

### 1. Definitions

- 1.1 **"Acknowledgment Document"** means the document signed by the Buyer in conjunction with these Terms and Conditions of Trade and applicable if the Seller elects, whereby the Buyer acknowledges the extent and effect of the provision of security the Buyer provides to the Seller in consideration of the provision of Goods or Services.
- 1.2 **"Buyer"** means the person/s, entities or any person acting on behalf of and with the authority of the Buyer requesting the Seller to provide the Services as specified in any proposal, quotation, order, invoice, or other documentation, and:
- (a) if there is more than one Buyer, is a reference to each Buyer jointly and severally; and
  - (b) if the Buyer is a partnership, it shall bind each partner jointly and severally; and
  - (c) if the Buyer is on behalf of or part of, a Trust, shall be bound in its own capacity as a trustee; and
  - (d) includes the Buyer's executors, administrators, successors, and permitted assigns.
- 1.3 **"Confidential Information"** means information of a confidential nature whether oral, written or in electronic form including, but not limited to, these Terms, either party's intellectual property, operational information, know-how, trade secrets, financial and commercial affairs, Contracts, client information (including but not limited to, **"Personal Information"** such as: name, address, D.O.B, occupation, driver's license details, electronic contact (email, Facebook or Twitter details), medical insurance details or next of kin and other contact information (where applicable), previous credit applications, credit history) and pricing details.
- 1.4 **"Cookies"** means small files which are stored on a user's computer. They are designed to hold a modest amount of data (including Personal Information) specific to a particular client and website and can be accessed either by the web server or the client's computer. **If the Buyer does not wish to allow Cookies to operate in the background when using the Seller's website, then the Buyer shall have the right to enable / disable the Cookies first by selecting the option to enable / disable provided on the website, prior to making enquiries via the website.**
- 1.5 **"Goods"** means all Goods or Services supplied by the Seller to the Buyer at the Buyer's request from time to time (where the context so permits the terms 'Goods' or 'Services' shall be interchangeable for the other).
- 1.6 **"GST"** means Goods and Services Tax as defined within the "A New Tax System (Goods and Services Tax) Act 1999" (Cth).
- 1.7 **"Penalty Interest Rate"** means the interest rate set from time to time by the Penalty Interest Rate Act 1983 (Vic)
- 1.8 **"Price"** means the Price payable (plus any GST where applicable) for the Goods as agreed between the Seller and the Buyer in accordance with clause 6 below.
- 1.9 **"Seller"** means KM Hudson Wholesale Pty Ltd T/A The Tyre Hub, its successors and assigns or any person acting on behalf of and with the authority of KM Hudson Wholesale Pty Ltd T/A The Tyre Hub.

### 2. Acceptance

- 2.1 The parties acknowledge and agree that:
- (a) they have read and understood these Terms; and
  - (b) the parties are taken to have exclusively accepted and are immediately bound, jointly and severally, by these terms and conditions if the Buyer places an order for or accepts delivery of the Goods.
- 2.2 In the event of any inconsistency between the terms and conditions of these Terms and any other prior document or schedule that the parties have entered into, the terms of these Terms shall prevail.
- 2.3 Any amendment to the terms and conditions contained in these Terms may only be amended in writing by the consent of both parties.
- 2.4 The Buyer acknowledges and accepts that:
- (a) the supply of Goods on credit shall not take effect until the Buyer has completed a credit application with the Seller and it has been approved with a credit limit established for the account. In the event that the supply of Goods requested exceeds the Buyer's credit limit and/or the account exceeds the payment terms, the Seller reserves the right to refuse delivery; and
  - (b) Goods for accepted orders may be subject to availability and if, for any reason, the Goods are not or cease to be available, the Seller reserves the right to substitute comparable Goods and vary the Price as per clause 6.2. In all such cases the Seller will notify the Buyer in advance of any such substitution, and also reserves the right to place the Buyer's order on hold until such time as the Seller and the Buyer agree to such changes.
- 2.5 Where the Seller gives any advice, recommendation, information or assistance in relation to the Goods or Services supplied (including, but not limited to, advice regarding the suitability of the Goods, specific instructions regarding the use of the Goods or advice of the consequences relating to the installation of certain Goods (such as wide wheels, stretched tyres with respect to safety or other regulations, etc)) is given in good faith to the Buyer, or the Buyer's agent and is based on the Seller's own knowledge and experience and shall be accepted without liability on the part of the Seller.
- 2.6 Electronic signatures shall be deemed to be accepted by either party providing that the parties have complied with Section 9 of the Electronic Transactions (Victoria) Act 2000 or any other applicable provisions of that Act or any Regulations referred to in that Act.

### 3. Errors and Omissions

- 3.1 The Buyer acknowledges and accepts that the Seller shall, without prejudice, accept no liability in respect of any alleged or actual error(s) and/or omission(s):
- (a) resulting from an inadvertent mistake made by the Seller in the formation and/or administration of these Terms; and/or
  - (b) contained in/omitted from any literature (hard copy and/or electronic) supplied by the Seller in respect of the Services.
- 3.2 In circumstances where the Buyer is required to place an order for Goods, in writing, or otherwise as permitted by these terms and conditions, the Buyer is responsible for supplying correct order information such as, without limitation, measurements and quantity, when placing an order for Goods (whether they are made to order Goods or not) (**Buyer Error**). The Buyer must pay for all Goods it orders from the Seller notwithstanding that such Goods suffer from a Buyer Error and notwithstanding that the Buyer has not taken or refuses to take Delivery of such Goods. The Seller is entitled to, at its absolute discretion to waive its right under this sub-clause in relation to Buyer Errors.

### 4. Change in Control

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- 4.1 The Buyer shall give the Seller not less than fourteen (14) days prior written notice of any proposed change of ownership of the Buyer and/or any other change in the Buyer's details (including but not limited to, changes in the Buyer's name, address, contact phone or fax number/s, change of trustees, or business practice). The Buyer shall be liable for any loss incurred by the Seller as a result of the Buyer's failure to comply with this clause.
- 5. Credit Card Information**
- 5.1 The Seller will:
- (a) keep the Buyer's personal details, including credit card details for only as long as is deemed necessary by the Seller;
  - (b) not disclose the Buyer's credit card details to any third party; and
  - (c) not unnecessarily disclose any of the Buyer's personal information, except in accordance with the Privacy Act (clause 18) or where required by law.
- 5.2 The Buyer expressly agrees that, if pursuant to these Terms, there are any unpaid charges or other amounts due and outstanding by the Buyer, the Seller is entitled to immediately charge the Buyer's nominated credit card for these amounts, and is irrevocably authorised to complete any documentation and take any action to recover from the credit card issuer any and all amounts which may be due by the Buyer pursuant to the terms of these Terms.
- 6. Price and Payment**
- 6.1 At the Seller's sole discretion, the Price shall be either:
- (a) as indicated on any invoice provided by the Seller to the Buyer upon placement of an order for Goods; or
  - (b) the Seller's quoted Price (subject to clause 6.2) which will be valid for the period stated in the quotation or otherwise for a period of thirty (30) days.
- 6.2 The Seller reserves the right to change the Price:
- (a) if a variation to the Seller's quotation is requested; or
  - (a) if a variation to the Goods which are to be supplied is requested; or
  - (b) if during the course of the Services, the Goods cease to be available from the Seller's third-party suppliers, then the Seller reserves the right to provide alternative Goods, subject to prior confirmation and agreement of both parties; or
  - (c) in the event of increases to the Seller in the cost of labour or Goods (including, but not limited to, overseas transactions that may increase as a consequence of variations in foreign currency rates of exchange and/or international freight and insurance charges) which are beyond the Seller's control.
- 6.3 Variations will be charged for on the basis of the Seller's quotation, and will be detailed in writing, and shown as variations on the Seller's invoice. The Buyer shall be required to respond to any variation submitted by the Seller within ten (10) working days. Failure to do so will entitle the Seller to add the cost of the variation to the Price. Payment for all variations must be made in full at the time of their completion.
- 6.4 At the Seller's sole discretion, a reasonable non-refundable deposit of not more than 20% of the Price may be required upon placement of an order for Goods, in accordance with any quotation provided by the Seller or as notified to the Buyer prior to the placement of an order for Goods.
- 6.5 Time for payment for the Goods being of the essence, the Price will be payable by the Buyer on the date/s determined by the Seller, which may be:
- (a) on delivery of the Goods; or
  - (b) before delivery of the Goods; or
  - (c) by way of instalments/progress payments in accordance with the Seller's payment schedule; or
  - (d) thirty (30) days following the end of the month in which a statement is posted to the Buyer's address or address for notices;
  - (e) the date specified on any invoice or other form as being the date for payment; or
  - (f) failing any notice to the contrary, the date which is fourteen (14) days following the date of any invoice given to the Buyer by the Seller.
- 6.6 Any discount, markdown, reduction or special Price, previously offered by the Seller to the Buyer may be withdrawn, or cancelled, and the Price shall become the Seller's standard Price as at the date of the original sale, should the Buyer fail to pay any amount in the time specified on any invoice given by the Seller to the Buyer.
- 6.7 Payment may be made by cash, electronic/on-line banking, credit card (a surcharge may apply per transaction), or by any other method as agreed to between the Buyer and the Seller.
- 6.8 The Seller may in its discretion allocate any payment received from the Buyer towards any invoice that the Seller determines and may do so at the time of receipt or at any time afterwards. On any default by the Buyer the Seller may re-allocate any payments previously received and allocated. In the absence of any payment allocation by the Seller, payment will be deemed to be allocated in such manner as preserves the maximum value of the Seller's Purchase Money Security Interest (as defined in the PPSA) in the Goods.
- 6.9 The Buyer shall not be entitled to set off against, or deduct from the Price, any sums owed or claimed to be owed to the Buyer by the Seller nor to withhold payment of any invoice because part of that invoice is in dispute. Once in receipt of an invoice for payment, if any part of the invoice is in dispute, then the Buyer must notify the Seller in writing within three (3) business days, the invoice shall remain due and payable for the full amount, until such time as the Seller investigates the disputed claim, no credit shall be passed for refund until the review is completed. Failure to make payment may result in the Seller placing the Buyer's account into default and subject to default interest in accordance with clause 16.1.
- 6.10 Unless otherwise stated the Price does not include GST. In addition to the Price, the Buyer must pay to the Seller an amount equal to any GST the Seller must pay for any supply by the Seller under this or any other agreement for the sale of the Goods. The Buyer must pay GST, without deduction or set-off of any other amounts, at the same time and on the same basis as the Buyer pays the Price. In addition, the Buyer must pay any other taxes and duties that may be applicable in addition to the Price except where they are expressly included in the Price.

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**7. Delivery of Goods**

- 7.1 Delivery (**Delivery**) of the Goods is taken to occur at the time that:
- (a) the Buyer or the Buyer's nominated carrier takes possession of the Goods at the Seller's address; or
  - (b) the Seller (or the Seller's nominated carrier) delivers the Goods to the Buyer's nominated address even if the Buyer is not present at the address.
- 7.2 The cost of Delivery will be payable by the Buyer in accordance with the quotation provided by the Seller to the Buyer, or as otherwise notified to the Buyer prior to the placement of an order for Goods.
- 7.3 The Seller may deliver the Goods in separate instalments. Each separate instalment shall be invoiced and paid in accordance with the provisions in these terms and conditions.
- 7.4 The Buyer must take Delivery by receipt or collection of the Goods whenever they are tendered for Delivery.
- 7.5 Any time specified by the Seller for Delivery of the Goods is an estimate only and the Seller will not be liable for any loss or damage incurred by the Buyer because of Delivery being late. However, both parties agree that they shall make every endeavour to enable the Goods to be delivered at the time and place as was arranged between both parties. If the Seller is unable to supply the Goods as agreed solely due to any action or inaction of the Buyer, then the Seller shall be entitled to charge a reasonable fee for redelivery and/or storage.

**8. Risk**

- 8.1 Risk of damage to or loss of the Goods passes to the Buyer on Delivery and the Buyer must insure the Goods on or before Delivery.
- 8.2 If any of the Goods are damaged or destroyed following Delivery but prior to ownership passing to the Buyer, the Seller is entitled to receive all insurance proceeds payable for the Goods. The production of these terms and conditions by the Seller is sufficient evidence of the Seller's rights to receive the insurance proceeds without the need for any person dealing with the Seller to make further enquiries.
- 8.3 If the Buyer requests the Seller to leave Goods outside the Seller's premises for collection or to deliver the Goods to an unattended location, then such Goods shall be left at the Buyer's sole risk.
- 8.4 In the event that the Buyer has purchased Goods (including, but not limited to, tyres for racing purposes etc) then such Goods are supplied on the understanding that they will be used strictly as per the manufacturer's instructions. The Buyer acknowledges and accepts responsibility for the suitability of purpose and the Seller shall not be responsible for any loss, injury and/or any damages whatsoever to the Goods resulting from the malfunction of such Goods where they are:
- (a) fitted by an unqualified trade person(s);
  - (b) in any way adapted to a use to which they are not specifically intended; and
  - (c) added to or repaired by components not recommended or approved by the manufacturer of the Goods.
- 8.5 The Seller shall not be responsible for any loss or damages where the Goods are fitted or used on rims or wheels which are:
- (a) not compliant with any specifications or which are used on contravention of any applicable statutory provision;
  - (b) out of alignment, damaged, rusty or otherwise in improper condition;
  - (c) used in abnormal conditions (including, but not limited to, off road use, trials, rallies and /or record attempts etc);
  - (d) used in conjunction with tubes and/or valves which are not recommended by the Seller;
  - (e) in breach of good practice of any of the Seller's conditions of use or recommendations;
  - (f) fitted with undersized tubes or flaps;
  - (g) damaged in any way after manufacture;
  - (h) improperly inflated at any time or used with substitutes of air which is not recommended by the Seller;
  - (i) used for any purpose which is excess of the ratings marked on the tyre inside walls or specified by the Seller or the manufacturer;
  - (j) used for excessive loads or excessive speeds;
  - (k) altered, reprocessed or repaired in any way whatsoever whether by the Seller, it's authorised agents or otherwise;
  - (l) purchased by the Buyer second hand or blemished; and
  - (m) treated at any time with any sealant for any reason.
- 8.6 The Buyer acknowledges and accepts that the Goods can be damaged by (inter alia) misuse, contact with solvents or other prolonged exposure to infra-red or ultraviolet rays and other light sources, heat, incorrect storage, improper or careless fitting or use. The Seller shall not be held responsible for any loss or damages to the Goods where the Buyer has not followed the Seller's or the manufacturer's recommendations.

**9. Product Specifications**

- 9.1 The Buyer acknowledges and agrees that:
- (a) all descriptive specifications, illustrations, drawings, data, dimensions, ratings and weights stated in the Seller's or the manufacturer's fact sheets, price lists or advertising material, are approximate only and are given by way of identification only. The Buyer shall not be entitled to rely on such information, and any use of such does not constitute a sale by description, and does not form part of the Contract, unless expressly stated as such in writing by the Seller; and
  - (b) while the Seller may have provided information or figures to the Buyer regarding the performance of the Goods, the Buyer acknowledges that the Seller has given these in good faith and are estimates based on industry prescribed estimates.

**10. Compliance with Laws**

- 10.1 The Buyer and the Seller shall comply with the provisions of all statutes, regulations and bylaws of government, local and other public authorities that may be applicable to the Goods/Services.

**11. Title**

- 11.1 The Seller and the Buyer agree that ownership of the Goods shall not pass until:
- (a) the Buyer has paid the Seller all amounts owing to the Seller; and
  - (b) the Buyer has met all of its other obligations to the Seller.
- 11.2 Receipt by the Seller of any form of payment other than cash shall not be deemed to be payment until that form of payment has been honoured, cleared or recognised.
- 11.3 It is further agreed that, until ownership of the Goods passes to the Buyer in accordance with clause 11.1:

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- (a) the Buyer is only a bailee of the Goods and must return the Goods to the Seller on request;
- (b) the Buyer holds the benefit of the Buyer's insurance of the Goods on trust for the Seller and must pay to the Seller the proceeds of any insurance in the event of the Goods being lost, damaged or destroyed;
- (c) the Buyer must not sell, dispose, or otherwise part with possession of the Goods other than in the ordinary course of business and for market value. If the Buyer sells, disposes or parts with possession of the Goods then the Buyer must hold the proceeds of any such act on trust for the Seller and must pay or deliver the proceeds to the Seller on demand;
- (d) the Buyer should not convert or process the Goods or intermix them with other goods but if the Buyer does so then the Buyer holds the resulting product on trust for the benefit of the Seller and must sell, dispose of or return the resulting product to the Seller as it so directs;
- (e) the Buyer irrevocably authorises the Seller to enter any premises where the Seller reasonably believes the Goods are kept and recover possession of the Goods;
- (f) the Seller may recover possession of any Goods in transit whether or not Delivery has occurred;
- (g) the Buyer shall not charge or grant an encumbrance over the Goods nor grant nor otherwise give away any interest in the Goods while they remain the property of the Seller; and
- (h) the Seller may commence proceedings to recover the Price of the Goods sold notwithstanding that ownership of the Goods has not passed to the Buyer.

**12. Personal Property Securities Act 2009 ("PPSA")**

- 12.1 In this clause financing statement, financing change statement, security agreement, and security interest has the meaning given to it by the PPSA.
- 12.2 Upon assenting to these terms and conditions in writing the Buyer acknowledges and agrees that these terms and conditions constitute a security agreement for the purposes of the PPSA and creates a security interest in all Goods that have previously been supplied and that will be supplied in the future by the Seller to the Buyer, and the proceeds from such Goods.
- 12.3 The Buyer undertakes to:
- (a) promptly sign any further documents and/or provide any further information (such information to be complete, accurate and up-to-date in all respects) which the Seller may reasonably require to;
    - (i) register a financing statement or financing change statement in relation to a security interest on the Personal Property Securities Register;
    - (ii) register any other document required to be registered by the PPSA; or
    - (iii) correct a defect in a statement referred to in clause 12.3(a)(i) or 12.3(a)(ii);
  - (b) indemnify, and upon demand reimburse, the Seller for all expenses incurred in registering a financing statement or financing change statement on the Personal Property Securities Register established by the PPSA or releasing any Goods charged thereby;
  - (c) not register a financing change statement in respect of a security interest without the prior written consent of the Seller;
  - (d) not register, or permit to be registered, a financing statement or a financing change statement in relation to the Goods or the proceeds of such Goods in favour of a third party without the prior written consent of the Seller;
  - (e) immediately advise the Seller of any material change in its business practices of selling the Goods which would result in a change in proceeds derived from such sales.
- 12.4 The Seller and the Buyer agree that sections 96, 115 and 125 of the PPSA do not apply to the security agreement created by these terms and conditions.
- 12.5 The Buyer waives their rights to receive notices under sections 95, 118, 121(4), 130, 132(3)(d) and 132(4) of the PPSA.
- 12.6 The Buyer waives their rights as a grantor and/or a debtor under sections 142 and 143 of the PPSA.
- 12.7 Unless otherwise agreed to in writing by the Seller, the Buyer waives their right to receive a verification statement in accordance with section 157 of the PPSA.
- 12.8 The Buyer must unconditionally ratify any actions taken by the Seller under clauses 12.3 to 12.5.
- 12.9 Subject to any express provisions to the contrary (including those contained in this clause 12), nothing in these terms and conditions is intended to have the effect of contracting out of any of the provisions of the PPSA.

**13. Security and Charge**

- 13.1 In consideration of the Seller agreeing to supply the Goods and/or provide its Services and as acknowledged by the Seller in accordance with any Acknowledgment Document the Buyer grants the Seller a security interest in its personal property as a "circulating asset" as the term is defined in PPSA (registerable by the Seller pursuant to the PPSA) over all of its present and after acquired rights, title and interest (whether joint or several) in all other assets that is now owned by the Buyer or owned by the Buyer in the future, including but not limited to those set out in any Acknowledgment Document, to the extent necessary to secure the repayment of monies owed under these Terms for provision of the Goods and/or Services under these Terms and/or permit the Seller to appoint a receiver to the Buyer in accordance with the *Corporations Act 2001* (Cth).
- 13.2 The Buyer indemnifies the Seller from and against all the Seller's costs and disbursements including legal costs on a solicitor and own client basis incurred in exercising the Seller's rights under this clause.
- 13.3 In the event that the Buyer defaults or breaches any term of these Terms and as a result, the security provided in clauses 11.1, 12.2 and 13.1 as applicable, is deemed insufficient by the Seller to secure the repayment of monies owed by the Buyer to the Seller, the Buyer hereby grants the Seller a security interest as at the date of the default, by way of a charge, that enables the right and entitlement to lodge a caveat over any real property and or land owned by the Buyer now, or owned by the Buyer in the future, to secure the performance of the Buyer of its obligations under these terms and conditions (including, but not limited to, the payment of any money), in accordance with the Acknowledgment Document.

**14. Defects, Warranties and Returns, Competition and Consumer Act 2010 (CCA)**

- 14.1 The Buyer must inspect the Goods on Delivery and must within seven (7) days of Delivery notify the Seller in writing of any evident defect/damage, shortage in quantity, or failure to comply with the description or quote. The Buyer must notify any other alleged defect in the

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- Goods as soon as reasonably possible after any such defect becomes evident. Upon such notification the Buyer must allow the Seller to inspect the Goods.
- 14.2 Under applicable State, Territory and Commonwealth Law (including, without limitation the CCA), certain statutory implied guarantees and warranties (including, without limitation the statutory guarantees under the CCA) may be implied into these Terms (**Non-Excluded Guarantees**).
- 14.3 The Seller acknowledges that nothing in these Terms purports to modify or exclude the Non-Excluded Guarantees.
- 14.4 Except as expressly set out in these Terms or in respect of the Non-Excluded Guarantees, the Seller makes no warranties or other representations under these terms and conditions including but not limited to the quality or suitability of the Goods. The Seller's liability in respect of these warranties is limited to the fullest extent permitted by law.
- 14.5 If the Buyer is a consumer within the meaning of the CCA, the Seller's liability is limited to the extent permitted by section 64A of Schedule 2.
- 14.6 If the Seller is required to replace the Goods under this clause or the CCA, but is unable to do so, the Seller may refund any money the Buyer has paid for the Goods.
- 14.7 If the Buyer is not a consumer within the meaning of the CCA, the Seller's liability for any defect or damage in the Goods is:
- (a) limited to the value of any express warranty or warranty card provided to the Buyer by the Seller at the Seller's sole discretion;
  - (b) limited to any warranty to which the Seller is entitled, if the Seller did not manufacture the Goods;
  - (c) otherwise negated absolutely.
- 14.8 Subject to this clause 14, returns will only be accepted provided that:
- (a) the Buyer has complied with the provisions of clause 14.1; and
  - (b) the Seller has agreed that the Goods are defective; and
  - (c) the Goods are returned within a reasonable time at the Buyer's cost (if that cost is not significant); and
  - (d) the Goods are returned in as close a condition to that in which they were delivered as is possible.
- 14.9 Notwithstanding clauses 14.1 to 14.8 but subject to the CCA, the Seller shall not be liable for any defect or damage which may be caused or partly caused by or arise as a result of:
- (a) the Buyer failing to properly maintain or store any Goods;
  - (b) the Buyer using the Goods for any purpose other than that for which they were designed;
  - (c) the Buyer continuing the use of any Goods after any defect became apparent or should have become apparent to a reasonably prudent operator or user;
  - (d) the Buyer failing to follow any instructions or guidelines provided by the Seller;
  - (e) fair wear and tear, any accident, or act of God.
- 14.10 In the case of second-hand Goods, unless the Buyer is a consumer under the CCA, the Buyer acknowledges that it has had full opportunity to inspect the second-hand Goods prior to Delivery and accepts them with all faults and that to the extent permitted by law no warranty is given by the Seller as to the quality or suitability for any purpose and any implied warranty, statutory or otherwise, is expressly excluded. The Buyer acknowledges and agrees that the Seller has agreed to provide the Buyer with the second-hand Goods and calculated the Price of the second-hand Goods in reliance of this clause 14.10.
- 14.11 The Seller may in its absolute discretion accept non-defective Goods for return in which case the Seller may require the Buyer to pay handling fees of up to twenty percent (20%) of the value of the returned Goods plus any freight costs.
- 14.12 Notwithstanding anything contained in this clause if the Seller is required by a law to accept a return, then the Seller will only accept a return on the conditions imposed by that law.
- 15. Intellectual Property**
- 15.1 Where the Seller has designed, drawn or developed Goods for the Buyer, then the copyright in any designs and drawings and documents shall remain the property of the Seller. Under no circumstances may such designs, drawings and documents be used without the express written approval of the Seller.
- 15.2 The Buyer warrants that all designs, specifications, or instructions given to the Seller will not cause the Seller to infringe any patent, registered design or trademark in the execution of the Buyer's order and the Buyer agrees to indemnify the Seller against any action taken by a third party against the Seller in respect of any such infringement.
- 15.3 The Buyer agrees that the Seller may (at no cost) use for the purposes of marketing or entry into any competition, any documents, designs, drawings or Goods which the Seller has created for the Buyer.
- 16. Default and Consequences of Default**
- 16.1 Interest on overdue invoices shall accrue daily from the date when payment becomes due, until the date of payment, at a rate of two and a half percent (2.5%) above the Penalty Interest Rate per calendar month (and at the Seller's sole discretion such interest shall compound monthly at such a rate) after as well as before any judgment.
- 16.2 If the Buyer owes the Seller any money, the Buyer shall indemnify the Seller from and against all costs and disbursements:
- (a) incurred; and/or
  - (b) which would be incurred and/or
  - (c) for which by the Buyer would be liable;
- in regard to legal costs on a solicitor and own client basis incurred in exercising the Seller's rights under these terms and conditions, internal administration fees, the Seller's Contract fees owing for breach of these terms and conditions', including, but not limited to, contract default fees and/or recovery costs (if applicable), as well as bank dishonour fees.
- 16.3 Further to any other rights or remedies the Seller may have under these Terms, if a Buyer has made payment to the Seller, and the transaction is subsequently reversed, the Buyer shall be liable for the amount of the reversed transaction, in addition to any further costs incurred by the Seller under this clause 16 where it can be proven that such reversal is found to be illegal, fraudulent or in contravention to the Buyer's obligations under these Terms.
- 16.4 Without prejudice to the Seller's other remedies at law the Seller shall be entitled to cancel all or any part of any order of the Buyer which remains unfulfilled and all amounts owing to the Seller shall, whether or not due for payment, become immediately payable if:
- (a) any money payable to the Seller becomes overdue, or in the Seller's opinion the Buyer will be unable to make a payment when it falls due;

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- (b) the Buyer has exceeded any applicable credit limit provided by the Seller;
- (c) the Buyer becomes insolvent, convenes a meeting with its creditors or proposes or enters into an arrangement with creditors, or makes an assignment for the benefit of its creditors; or
- (d) a receiver, manager, liquidator (provisional or otherwise) or similar person is appointed in respect of the Buyer or any asset of the Buyer.

**17. Cancellation**

- 17.1 Without prejudice to any other remedies the parties may have, if at any time either party is in breach of any obligation (including those relating to payment) under these terms and conditions **(the Breaching Party)** the other party may suspend or terminate the supply or purchase of Goods and/or Services to the other party, with immediate effect, by providing the Breaching Party with written notice. Neither party will be liable for any loss or damage the other party suffers because one of the parties has exercised its rights under this clause.
- 17.2 If the Seller, due to reasons beyond the Seller's reasonable control, is unable to deliver any Goods and/or Services to the Buyer, the Seller may cancel any Contract to which these terms and conditions apply or cancel Delivery of Goods and/or Services at any time before the Goods and/or Services are delivered by giving written notice to the Buyer. On giving such notice the Seller shall repay to the Buyer any money paid by the Buyer for the Goods and/or Services. The Seller shall not be liable for any loss or damage whatsoever arising from such cancellation.
- 17.3 The Buyer may cancel Delivery of the Goods and/or Services by written notice served within forty-eight (48) hours of placement of the order. If the Buyer cancels Delivery in accordance with this clause 17.3, the Buyer will not be liable for the payment of any costs of the Seller, except where a deposit is payable in accordance with clause 6.4. Failure by the Buyer to otherwise accept Delivery of the Goods and/or Services shall place the Buyer in breach of these Terms.
- 17.4 Cancellation of orders for non-stocklist items, will not be accepted once an order has been placed.

**18. Privacy Policy**

- 18.1 All emails, documents, images, or other recorded information held or used by the Seller is Personal Information, as defined and referred to in clause 18.4, and therefore considered Confidential Information. The Seller acknowledges its obligation in relation to the handling, use, disclosure and processing of Personal Information pursuant to the Privacy Act 1988 ("the Act") including the Part IIIC of the Act being Privacy Amendment (Notifiable Data Breaches) Act 2017 (NDB) and any statutory requirements, where relevant in a European Economic Area ("EEA"), under the EU Data Privacy Laws (including the General Data Protection Regulation "GDPR") (collectively, "EU Data Privacy Laws"). The Seller acknowledges that in the event it becomes aware of any data breaches and/or disclosure of the Buyer's Personal Information, held by the Seller that may result in serious harm to the Buyer, the Seller will notify the Buyer in accordance with the Act and/or the GDPR. Any release of such Personal Information must be in accordance with the Act and the GDPR (where relevant) and must be approved by the Buyer by written consent, unless subject to an operation of law.
- 18.2 Notwithstanding clause 18.1, privacy limitations will extend to the Seller in respect of Cookies where the Buyer utilises the Seller's website to make enquiries. The Seller agrees to display reference to such Cookies and/or similar tracking technologies, such as pixels and web beacons (if applicable), such technology allows the collection of Personal Information such as the Buyer's:
  - (a) IP address, browser, email client type and other similar details;
  - (b) tracking website usage and traffic; and
  - (c) reports are available to the Seller when the Seller sends an email to the Buyer, so the Seller may collect and review that information ("collectively Personal Information")

**If the Buyer consents to the Seller's use of Cookies on the Seller's website and later wishes to withdraw that consent, the Buyer may manage and control the Seller's privacy controls via the Buyer's web browser, including removing Cookies by deleting them from the browser history when exiting the site.**

- 18.3 The Buyer agrees for the Seller to obtain from a credit reporting body (CRB) a credit report containing personal credit information (e.g. name, address, D.O.B, occupation, driver's license details, electronic contact (email, Facebook or Twitter details), medical insurance details or next of kin and other contact information (where applicable), previous credit applications, credit history) about the Buyer in relation to credit provided by the Seller.
- 18.4 The Buyer agrees that the Seller may exchange information about the Buyer with those credit providers and with related body corporates for the following purposes:
  - (a) to assess an application by the Buyer; and/or
  - (b) to notify other credit providers of a default by the Buyer; and/or
  - (c) to exchange information with other credit providers as to the status of this credit account, where the Buyer is in default with other credit providers; and/or
  - (d) to assess the creditworthiness of the Buyer including the Buyer's repayment history in the preceding two (2) years.
- 18.5 The Buyer consents to the Seller being given a consumer credit report to collect personal credit information relating to any overdue payment on commercial credit.
- 18.6 The Buyer agrees that personal credit information provided may be used and retained by the Seller for the following purposes (and for other agreed purposes or required by):
  - (a) the provision of Goods; and/or
  - (b) analysing, verifying and/or checking the Buyer's credit, payment and/or status in relation to the provision of Goods; and/or
  - (c) processing of any payment instructions, direct debit facilities and/or credit facilities requested by the Buyer; and/or
  - (d) enabling the collection of amounts outstanding in relation to the Goods.
- 18.7 The Seller may give information about the Buyer to a CRB for the following purposes:
  - (a) to obtain a consumer credit report;
  - (b) allow the CRB to create or maintain a credit information file about the Buyer including credit history.
- 18.8 The information given to the CRB may include:
  - (a) Personal Information as outlined in 18.4 above;
  - (b) name of the credit provider and that the Seller is a current credit provider to the Buyer;
  - (c) whether the credit provider is a licensee;
  - (d) type of consumer credit;

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- (e) details concerning the Buyer's application for credit or commercial credit (e.g. date of commencement/termination of the credit account and the amount requested);
  - (f) advice of consumer credit defaults (provided the Seller is a member of an approved OAIC External Disputes Resolution Scheme), overdue accounts, loan repayments or outstanding monies which are overdue by more than sixty (60) days and for which written notice for request of payment has been made and debt recovery action commenced or alternatively that the Buyer no longer has any overdue accounts and the Seller has been paid or otherwise discharged and all details surrounding that discharge (e.g. dates of payments);
  - (g) information that, in the opinion of the Seller, the Buyer has committed a serious credit infringement;
  - (h) advice that the amount of the Buyer's overdue payment is equal to or more than one hundred and fifty dollars (\$150).
- 18.9 The Buyer shall have the right to request (by e-mail) from the Seller:
- (a) a copy of the Personal Information about the Buyer retained by the Seller and the right to request that the Seller correct any incorrect Personal Information; and
  - (b) that the Seller does not disclose any Personal Information about the Buyer for the purpose of direct marketing.
- 18.10 The Seller will destroy Personal Information upon the Buyer's request (by e-mail) or if it is no longer required unless it is required to fulfil the obligations of these Terms or is required to be maintained and/or stored in accordance with the law.
- 18.11 The Buyer can make a privacy complaint by contacting the Seller via e-mail. The Seller will respond to that complaint within seven (7) days of receipt and will take all reasonable steps to reach a decision on the complaint within thirty (30) days of receipt of the complaint. If the Buyer is not satisfied with the resolution provided, the Buyer can make a complaint to the Information Commissioner at [www.oaic.gov.au](http://www.oaic.gov.au).
- 19. Unpaid Seller's Rights**
- 19.1 Where the Buyer has left any item with the Seller for repair, modification, exchange or for the Seller to perform any other service in relation to the item and the Seller has not received or been tendered the whole of any monies owing to it by the Buyer, the Seller shall have, until all monies owing to the Seller are paid:
- (a) a lien on the item; and
  - (b) the right to retain or sell the item, such sale to be undertaken in accordance with any legislation applicable to the sale or disposal of uncollected goods.
- 19.2 The lien of the Seller shall continue despite the commencement of proceedings, or judgment for any monies owing to the Seller having been obtained against the Buyer.
- 20. Service of Notices**
- 20.1 Any written notice given under these Terms shall be deemed to have been given and received:
- (a) by handing the notice to the other party, in person;
  - (b) by leaving it at the address of the other party as stated in these Terms;
  - (c) by sending it by registered post to the address of the other party as stated in these Terms;
  - (d) if sent by facsimile transmission to the fax number of the other party as stated in these Terms (if any), on receipt of confirmation of the transmission;
  - (e) if sent by email to the other party's last known email address.
- 20.2 Any notice that is posted shall be deemed to have been served, unless the contrary is shown, at the time when by the ordinary course of post, the notice would have been delivered.
- 21. Trusts**
- 21.1 If the Buyer at any time upon or subsequent to entering in to the Contract is acting in the capacity of trustee of any trust or as an agent for a trust (**Trust**) then whether or not the Seller may have notice of the Trust, the Buyer covenants with the Seller as follows:
- (a) the Contract extends to all rights of indemnity which the Buyer now or subsequently may have against the Trust, the trustees and the trust fund;
  - (b) the Buyer has full and complete power and authority under the Trust or from the Trustees of the Trust as the case may be to enter into the Contract and the provisions of the Trust do not purport to exclude or take away the right of indemnity of the Buyer against the Trust, the trustees and the trust fund. The Buyer will not release the right of indemnity or commit any breach of trust or be a party to any other action which might prejudice that right of indemnity;
  - (c) the Buyer will not during the term of the Contract without consent in writing of the Seller (the Seller will not unreasonably withhold consent), cause, permit, or suffer to happen any of the following events:
    - (i) the removal, replacement or retirement of the Buyer as trustee of the Trust;
    - (ii) any alteration to or variation of the terms of the Trust;
    - (iii) any advancement or distribution of capital of the Trust; or
    - (iv) any resettlement of the trust fund or trust property.
- 22. General**
- 22.1 Any dispute or difference arising as to the interpretation of these terms and conditions or as to any matter arising herein, shall be submitted to, and settled by, mediation before resorting to any external dispute resolution mechanisms (including arbitration or court proceedings) by notifying the other party in writing setting out the reason for the dispute. The parties shall share equally the mediator's fees. Should mediation fail to resolve the dispute, the parties shall be free to pursue other dispute resolution avenues.
- 22.2 The failure by either party to enforce any provision of these terms and conditions shall not be treated as a waiver of that provision, nor shall it affect that party's right to subsequently enforce that provision. If any provision of these terms and conditions shall be invalid, void, illegal or unenforceable, that provision shall be severed from these Terms, and the validity, existence, legality and enforceability of the remaining provisions shall not be affected, prejudiced or impaired.
- 22.3 These terms and conditions and any Contract to which they apply shall be governed by the laws of Victoria and are subject to the jurisdiction of the Melbourne Courts in that state. These terms prevail over all terms and conditions of the Buyer (even if they form part of the Buyer's purchase order).

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- 22.4 The Seller may licence and/or assign all or any part of its rights and/or obligations under these Terms without the Buyer's consent provided the assignment does not cause detriment to the Buyer.
- 22.5 The Buyer cannot licence or assign without the written approval of the Seller.
- 22.6 The Seller may elect to subcontract out any part of the Services but shall not be relieved from any liability or obligation under these Terms by so doing. Furthermore, the Buyer agrees and understands that they have no authority to give any instruction to any of the Seller's sub-contractors without the authority of the Seller.
- 22.7 The Buyer agrees that the Seller may amend their general terms and conditions for subsequent future Contracts with the Buyer by disclosing such to the Buyer in writing. These changes shall be deemed to take effect from the date on which the Buyer accepts such changes, or otherwise at such time as the Buyer makes a further request for the Seller to provide Goods to the Buyer.
- 22.8 Neither party shall be liable for any default due to any act of God, war, terrorism, strike, lock-out, industrial action, fire, flood, storm, national or global pandemics and/or the implementation of regulation, directions, rules or measures being enforced by Governments or embargo, including but not limited to, any Government imposed border lockdowns (including, worldwide destination ports), etc, ("Force Majeure") or other event beyond the reasonable control of either party. This clause does not apply to a failure by the Buyer to make a payment to the Seller, once the parties agree that the Force Majeure event has ceased.
- 22.9 Both parties warrant that they have the power to enter these Terms and have obtained all necessary authorisations to allow them to do so, they are not insolvent and that these Terms creates binding and valid legal obligations on them.
- 22.10 The rights and obligations of the parties will not merge on completion of any transaction under these Terms, and they will survive the execution and Delivery of any assignment or other document entered, for the purpose of, implementing any transaction under these Terms.
- 22.11 If part or all of any term of these Terms is or becomes invalid, illegal or unenforceable, it shall be severed from these Terms and shall not affect the validity and enforceability of the remaining terms of these Terms.