

Terms and conditions - Play Collective

1 Dictionary

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

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

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

Business Day means any day except a Saturday, Sunday or public holiday in the state or territory of Australia in which the Company is registered or the location otherwise specified in these Terms.

Company means the company supplying goods and/or services under these Terms, being any of:

- (a) 4PARK Pty Ltd (ABN 56 657 333 296) trading as Forpark Australia of 36 Adams Drive, Welshpool WA 6106;
- (b) Playmakers Pty. Ltd. (ABN 19 010 572 764) trading as The Play Works of 92 Jijaws Street, Sumner QLD 4074; or
- (c) Rhino Play Pty Ltd (ABN 28 101 472 619) trading as Rhino Play, of Unit A1/35-39 Bourke Road, Alexandria NSW 2015.

Confidential Information means all information and other content disclosed by the Disclosing Party to the Receiving Party and includes these Terms and the prices of the Goods or Services but excludes information that:

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

Consequential Loss means:

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

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

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

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

Customer means the entity or person who has agreed to be bound by these Terms who requested that Goods and/or Services be supplied to it by the Company.

Customer Background Materials means all material (including designs, names, logos and information) provided by or on behalf of the Customer to the Company for the purposes of an Agreement.

Customer Specifications has the meaning given to it in clause 15.1.

Default Rate means 8% per annum, reconciled on a daily basis.

Delivery Fee means:

- (a) the delivery fee set out in a Quote or agreed in writing between the parties; or
- (b) if no delivery fee is set out in a Quote or agreed in writing between the parties, the costs of the Company incurred in delivering the Goods to the Customer, including any costs incurred for Hiab, crane truck, tail-gate or hand unload services.

Deposit means the amount set out in the Quote, or if no amount is set out in the Quote:

- (a) if the Customer is located in Australia and the Purchase Price is more than \$5,000, an amount equal to 50% of the Purchase Price; or
- (b) for any Order where (a) does not apply, the full price of the Goods and Services set out in the Quote.

Disclosing Party means a party who discloses its Confidential Information to a party to these Terms or an Agreement.

Due Date is defined in clause 5.4.

Force Majeure Event means any event arising from, or attributable to, acts, events, omissions or accidents which are beyond the reasonable control of a party.

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

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

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

Invoice has the meaning provided to it in clause 5.3.

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

Offer has the meaning provided to it in clause 3.1.

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

Out of Hours means outside of the hours 7:00am to 7:00pm on Business Days at the Site.

Personnel means the employees, officers, agents, contractors and subcontractors.

Purchase Price has the meaning provided to it in clause 5.1.

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

Receiving Party means a party who receives Confidential Information from or on behalf of the Disclosing Party.

Services means the services to be supplied by the Company to the Customer under an Agreement, which may include installation of the Goods.

Site means the location or locations for the delivery of the Goods or performance of the Services by the Company for the Customer, other than the premises of the Company.

Specifications means any physical, qualitative, technical or descriptive specifications, dimensions, weights or other particulars of the Goods or Services or photographs or illustrations of the Goods which are supplied by the Company or which may be available on the internet, including as provided in any Quote, Order, price list, catalogue, brochure or other document which describes the Goods or Services.

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

Terms means these Terms and Conditions.

2 Application

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

3 Formation of Agreement

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

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

(Offer).

- 3.2 A contract will be formed between the Company and the Customer in respect of each Offer upon the earlier of:
- (a) the Company notifying the Customer in writing that it accepts the Customer's Offer;
 - (b) the Company issuing a receipt for payment by the Customer of an invoice issued by the Company for any Goods or Services the subject of the Offer; or
 - (c) the Customer accepting delivery of the Goods or performance of the Services the subject of the Offer to the Customer; or
 - (d) the Company otherwise confirming its acceptance of the Offer.
- 3.3 An Agreement formed under clause 3.2 will comprise these Terms and the Order (only to the extent that any additional terms in the Order are accepted by the Company in writing) and the Quote (if any).
- 3.4 The Company is not bound to accept any Offer and may decide not to accept any Offer for any reason and in the sole discretion of the Company.
- 4 Deposit**
- 4.1 The Company may require that the Customer pay a Deposit to the Company at the time of making the Offer.
- 4.2 Subject to clause 4.3, the Company will be entitled to keep the Deposit at the time it accepts the Offer and the Deposit will be deducted from the balance of the Purchase Price.
- 4.3 The Deposit will only be refundable if the Company does not accept the Offer or the Agreement is otherwise terminated prior to the Company supplying the Goods or Services.
- 5 Price and payment**
- 5.1 Unless otherwise agreed by the parties, the price the Customer must pay for the Goods and/or Services under each Agreement will be:
- (a) the price for the Goods and/or Services specified in the Quote or, if there is no Quote, in the Order; plus
 - (b) the Delivery Fee; plus
 - (c) where not included in (a) above, the costs incurred by the Company in processing rock or buried debris, encountered as a part of performing Services that includes installation of the Goods; plus
 - (d) any additional costs incurred by the Company in delivering the Goods or performing the Services that are incurred due to circumstances outside of the reasonable control of the Company, including:
 - (i) where there is a delay in the Customer approving the performance of the Services or providing the Company access to the Site; or
 - (ii) as a result of complexities that could not be reasonable foreseen or anticipated by the Company, such as environmental factors, hard digging, or the discovery of asbestos at the Site,
- (Purchase Price).**
- 5.2 Subject to clause 17, unless otherwise expressly specified by the Company or in these Terms, all prices stated are stated exclusive of Taxes and the Customer is solely responsible for the payment of all Taxes levied or payable in respect of the Goods and/or Services and must immediately upon request by the Company provide the Company with evidence of payment of any Taxes.
- 5.3 The Company may invoice the Customer for the Purchase Price at any time following formation of the relevant Agreement (**Invoice**).
- 5.4 Subject to clause 5.5, unless otherwise agreed in writing between the Customer and the Company the due date for payment by the Customer to the Company of the Purchase Price for the Goods and/or Services supplied pursuant to an Agreement (**Due Date**) is:
- (a) the due date calculated in accordance with the Order; or
 - (b) where clause 5.4(a) does not apply, 7 days from date of invoice.
- 5.5 If:
- (a) the Customer has previously failed to make any payment to the Company by the due date for that payment (whether under these Terms or otherwise); or
 - (b) the creditworthiness of the Customer is, in the Company's sole opinion, unsatisfactory,
- the Company may require payment of the Purchase Price in full prior to the Company delivering the relevant Goods or providing the Services.
- 5.6 If the Customer fails to make any payment by the Due Date, and the Customer has not remedied the failure to make payment within 30 days of receiving notice of the failure to make payment or is the subject of an Insolvency Event, then, without prejudice to any other right or remedy available to the Company (including any termination rights under clause 19.1) and to the extent permitted by law, the Company may elect to do any one or more of the following:
- (a) suspend any further deliveries to the Customer arising from any Agreement;
 - (b) enter the property of the Customer in order to repossess the Goods and the Customer grants the Company and its agents an irrevocable licence to do so;
 - (c) dismantle any other goods into which the Goods have been installed or incorporated and remove the Goods from those goods;
 - (d) charge the Customer interest (both before and after any judgement) on the unpaid amount at the Default Rate, which interest will accrue and be chargeable from the first day on which an amount becomes overdue until the Company receives payment of all amounts (including all interest) by way of cleared funds; and
 - (e) exercise any rights which the Company may have under law, including the *Personal Property Securities Act 2009* (Cth).
- 5.7 If the Customer fails to make any payment by the Due Date the Customer must pay to the Company on demand all amounts incurred by the Company in recovering or seeking to recover the payment the Customer owes to the Company (including any fees or commission paid to a debt collector, mercantile agent or similar).
- 5.8 Nothing in these Terms modifies or excludes the application of any security of payment legislation and the Company expressly reserves its rights to seek to enforce its rights to payment under an Agreement pursuant to that legislation.
- 6 Delivery of Goods and provision of Services**
- 6.1 The Company will deliver the Goods to the Customer in the manner:
- (a) determined by the Company; or
 - (b) as otherwise agreed between the Company and the Customer (including collection by the Customer).
- 6.2 The Goods and Services will be of merchantable quality and meet all mandatory industry or product standards.
- 6.3 In the event that particular components of the Goods (that are not a material or fundamental part of the Goods) are not reasonably available to the Company, the Company may substitute equivalent goods for those Goods provided that the Company gives the Customer prior notice.
- 6.4 If the parties have agreed that the Customer will collect the Goods, then the Customer must collect those Goods within five Business Days of being notified by the Company that the Goods are ready to be collected. The Customer agrees that it will be solely responsible for any damage caused (to the Goods or any other property) by the Customer or its Personnel while loading the Goods.
- 6.5 Except where the Services include installation of the Goods or as otherwise set out in the Quote, the Customer will be responsible, at its own costs, for the unloading of any Goods at the Site and there must be a representative of the Customer present at the Site at the time the Goods are delivered and, if no representative is present, a redelivery fee equal to the Delivery Fee may be charged by the Company.
- 6.6 The Customer acknowledges that, after the time the Customer makes the Offer, a Good which is subject to an Offer may be modified by the Company as a result of an improvement in technology or because of a requirement imposed by law.
- 6.7 Without limiting any other obligation of the Customer under an Agreement, the Customer must take all necessary steps and fulfill all requirements to accept delivery of the Goods from the Company.
- 6.8 The Customer must do all acts reasonably necessary in order for the Company to be able to fully perform the Agreement, and all acts as specified in the Quote. If the Customer fails to do all such acts, the Company:
- (a) is excused from supplying the Services, to the extent it is prevented by the Customer's failure;

- (b) subject to clause 12.1, is not liable to the Customer for any loss or damage that may result from the Customer's failure or the Company exercising its rights under and taking the benefits of this clause 6.8; and
 - (c) may, at the Customer's cost, do the act itself or engage a third party to do the act.
- 6.9 The Customer must co-operate fully with the Company in relation to all aspects of the Services and the Company's performance of the Agreement.
- 6.10 The Company will use its reasonable endeavours to deliver the Goods and provide the Services on any date specified or estimated by the Company or set out in a Quote or Order, however the Customer acknowledges that:
- (a) these dates are estimates only;
 - (b) the Company will not perform the Services Out of Hours unless otherwise agreed in writing; and
 - (c) if the Company does not currently stock a Good, then there may be a delay in the supply of that Good until the Company has restocked that Good.
- 6.11 Without limiting clause 6.10, the Company may deliver or provide a portion of the Goods or Services and may invoice or otherwise charge the Customer for that portion. The Customer may not refuse to accept delivery of the Goods or to pay for the Goods or Services because only a portion of the quantity ordered was delivered or provided and the Customer agrees that the Company will not be liable for any Loss that the Customer suffers as a result of any delay or cancellation.
- 6.12 If there are multiple Agreements in place at any one time, then the Company may, in its absolute discretion, determine in which order it satisfies the delivery of the Goods and provision of Services under the Agreements.
- 6.13 The Customer acknowledges and agrees that:
- (a) the Company may, but will not be required to, provide proof of delivery or other similar documentation (whether at the time of delivery or after);
 - (b) it will not request proof of delivery or other similar documentation from the Company; and
 - (c) it will not dispute any Invoice based on (in whole or in part) proof of delivery or other similar documentation not having been provided by the Company.

7 Quality of Goods and Services

- 7.1 Subject to clauses 7.3 and 12.1, and without limiting any rights which the Customer may have under the Australian Consumer Law:
- (a) the Customer must, on taking possession of the Goods, inspect the Goods to confirm:
 - (i) whether they are fit for any purpose for which the Customer intends to use the Goods;
 - (ii) are of the number meant to be supplied under the Agreement; or
 - (iii) if they have any defect or otherwise do not meet any Specifications; and
 - (b) any claims in respect of the Goods, in respect of the matters set out in clause 7.1(a), must be made by the Customer by written notice to the Company within 30 days of the later of the date on which the Customer took possession of the Goods and the date of completion of the Services.
- 7.2 If the Customer gives the Company a written notice under clause 7.1, the Customer must:
- (a) preserve the Goods in the state in which they were received, or handed over, for 30 days after it gives the Company the notice (fair wear and tear excepted); and
 - (b) at the Company's option, allow the Company or its authorised representative to inspect the Goods or return some or all of the Goods to the Company in the same condition as when received by, or handed over to, the Customer (fair wear and tear excepted).
- 7.3 Nothing in clause 7.1 affects any separate express warranty given by the Company to the Customer, which will apply in accordance with its terms.

8 Subcontracting

- 8.1 The Company may, to the extent permitted by law, assign, subcontract or deal with any of its rights or obligations under these

Terms (including any right to be paid or chose in action) at any time in circumstances where the assignment will not adversely affect the rights of the Customer.

8.2 The Customer acknowledges that:

- (a) some services in connection with the Services may not be subcontracted by the Company but are contracted directly between Customer and third parties, eg. some electrical, fencing installation, surfacing and concrete cutting services;
- (b) unless specified to the contrary in the Agreement, the Fees do not include fees or expenses charged by such third parties and their invoices will be payable directly by Customer to the third-party service provider; and
- (c) the Company gives no warranty and bears no liability in relation to goods and services provided by such third parties directly to the Customer.

8.3 Clause 8.2 applies even if, among other things, the Company:

- (a) recommends the third-party service provider to the Customer;
- (b) obtains a quote from or engages the service provider on the Customer's behalf as its agent; or
- (c) supervises or project-manages the work performed by the third-party service provider.

8.4 The Company must not, directly or indirectly, solicit, entice away from the Company, employ or attempt to employ, or induce into the employment of a third party, any Personnel of the Company. for a period of 12 months from entry into an Agreement.

9 Sites & Safety

- 9.1 The Customer expressly authorises and grants the Company and its agents an express, irrevocable licence to enter the Site in order for the Company to deliver the Goods or provide the Services.
- 9.2 The Customer must provide sufficient, safe and suitable possession and access to the Site for the Company, its Personnel, vehicles, materials and equipment to complete the Services in a clear and unimpeded manner without risk to health and safety.
- 9.3 The Customer must not (and procure that its Personnel must not), prior to delivery of the Goods or completion of the Services under an Agreement:
- (a) enter any part of, or leave any object or substance at any part of, the Site over which the Company has control, or where the Company's tools or equipment are located or kept, such as to interfere with those items;
 - (b) touch, move, modify, hide, remove or otherwise interfere with any of the Goods, or the Company's tools or equipment;
 - (c) perform any work on the Goods; or
 - (d) direct or permit any person (other than the Company or its Personnel and third parties agreed in writing in advance) to do any of the above, without Company's prior written consent,
- unless the act is necessary to prevent imminent injury or death to any person.
- 9.4 The Customer must:
- (a) ensure that the Sites and the condition of the Sites are suitable for the provision of any Services by the Company, including by ensuring the site is prepared to suit the requirements of the Goods; and
 - (b) notify the Company in writing of anything in respect of the Sites which may be relevant to the provision of the Services, including all underground pipes, services or other relevant materials or obstructions (including rock) that may be under the Site, and where possible, identify the precise location; and
 - (c) advise the Company if any noise restrictions apply at the Site; and
 - (d) advise the Company whether, if strong odours emanate from the Site (including rubber surface installation) it will be unacceptable and as such if it will be necessary to perform work Out of Hours.
- 9.5 The Customer is responsible for conducting health and safety risk assessments of the Sites and for all aspects of health and safety at the Sites, except where the Company has control over the Site while it is performing the Services. The Customer must eliminate risks to health and safety at the Sites so far as is reasonably

- practicable and, if it is not reasonably practicable to eliminate risks to health and safety, reduce those risks as is reasonably practicable.
- 9.6 If the Customer fails to advise the Company in writing prior to the commencement of any Services of the location and type of underground services and such services are damaged by the Company, then the Customer shall release and indemnify the Company against any loss, damage or expense of whatsoever nature incurred in connection with making good any loss or damage to the underground services.
- 9.7 Each party must maintain public liability insurance sufficient to cover its obligations and responsibilities under these Terms and each Agreement.
- 10 Title and risk of Goods**
- 10.1 Title to, and property in any Goods supplied under an Agreement remain with the Company and will only pass to the Customer once all moneys owing by the Customer to the Company in respect of the Agreement or any other agreement or arrangement between the Customer and the Company have been paid in full.
- 10.2 Risk in the Goods passes to the Customer upon the earlier of:
- the Goods being delivered into the possession of the Customer or its Personnel, whether at the address for delivery or when collected by the Customer at the Company's facility; and
 - if the Goods are to be collected by the Customer, on the date which is three Business Days after the date on which the Company notified the Customer that the Goods are ready to be collected.
- 10.3 The Customer is responsible for all Loss and damage to the Goods after risk in the Goods passes to the Customer in accordance with clause 10.2. The Customer should ensure it follows all maintenance and storage instructions issued by the Company in relation to the Goods.
- 10.4 The Customer is responsible for arranging, and taking out in its own name and its own cost, any insurance in respect of the Goods from the time risk passes to the Customer under this clause and the Company is not obliged to give the Customer a notice referred to in section 35(3) of the *Sale of Goods Act 1S*
- 10.5 923 (NSW) (or any equivalent legislation).
- 10.6 In the event that the Customer is required to return any Goods to the Company, risk in the Goods passes to the Company on confirmation of receipt of the Goods by the Company.
- 10.7 Until full title, property and ownership of the Goods passes to the Customer in accordance with clause 10.1, and while the Goods remain in the Customer's full control and possession:
- subject to clause 10.9, the Customer must hold the Goods as the Company's fiduciary agent and bailee and must not sell, lease, dispose of or otherwise deal with the Goods in any way without the Company's prior written consent;
 - the Customer must keep and maintain the Goods in good and substantial repair;
 - the Customer must insure the Goods for their full replacement value (which must not be less than the Purchase Price) and must store the relevant Goods separately from any other goods and in a way that enables the Goods to be clearly identified as the Company's and referable to a particular Invoice;
 - the Company may enter the premises of the Customer or any third party where the Goods are stored during the hours of 9.00 am to 5.00 pm to inspect the Goods;
 - the Company may at any time after payment is overdue require the Customer to deliver up the Goods to the Company and, if the Customer fails to deliver up the Goods immediately, the Company may enter the premises of the Customer or any third party where the Goods are stored and repossess them;
 - the Customer must not pledge or grant a security interest in or in any way charge by way of security for any indebtedness, any of the Goods and if the Customer does pledge or in any way charge by way of security, for any indebtedness, any of the Goods for which property and ownership has not passed to the Customer, the Customer must remove the pledge, charge or security interest immediately and all moneys owing by the Customer to the Company will (without prejudice to any other right or remedy of the Company) immediately become due and payable to the Company; and
- (g) the Customer must not remove, deface, alter, obliterate or cover up any names, marks, designs, numbers, code or writing on the Goods.
- 10.8 For the purposes of the Company exercising its rights under clauses 10.7(d) and 10.7(e), the Customer expressly authorises and grants the Company and its agents an express, irrevocable licence to enter the premises of the Customer or relevant third party to inspect the Goods or to remove or arrange for the removal of the Goods.
- 10.9 Notwithstanding that title to the Goods has not passed to the Customer under clause 10.1, the Customer may, subject to obtaining the Company's prior written approval, resell the Goods or any part of them in the name of the Customer but only as agent for the Company and may deliver any Goods so sold to the buyer of those Goods but only in the ordinary course of its business and on terms which will not prejudice the Company's ability to obtain any amount paid or due to be paid by the buyer of Goods (Sale Proceeds) and:
- any Sale Proceeds must be held by the Customer on trust for the Company and any amounts received by the Customer must be banked in a separate bank account relating only to the sale proceeds of any Goods and must be forwarded as soon as possible to the Company in satisfaction of any amount owed by the Customer in respect of the Goods;
 - the Customer must keep and maintain separate records in relation to the Sale Proceeds received and held by the Customer and must provide those records to the Company immediately upon request by the Company; and
 - if and when the full amount due to the Company in respect of the Goods has been received by the Company, any further Sale Proceeds may be retained by the Customer.
- 10.10 The Customer must immediately cease the resale of any Goods under clause 10.9 if:
- the Company revokes any consent it has given to the Customer to resell the Goods under clause 10.9; or
 - the Customer fails to make any payment under an Agreement by the relevant Due Date.
- 10.11 In the event that the Customer itself incorporates or installs the Goods (or any portion of them) into any other goods, buildings or land then the Customer must:
- keep and maintain records in relation to the Goods which have been incorporated or installed and the goods, buildings or land in which the Goods have been processed, incorporated, transformed or installed; and
 - hold a proportion of any payment (**Relevant Proportion**) received by the Customer for those goods, buildings or land on trust for the Company and the Customer acknowledges that the Relevant Proportion must be not less than the dollar value of the portion of the Goods incorporated or installed.
- 10.12 If an Insolvency Event occurs in respect of the Customer then, without the need for notice or demand by the Company, the Customer acknowledges that any sale or purported sale of the Goods will not be in the ordinary course of the Customer's business and the proceeds of any Goods sold in those circumstances will, to the extent of any money owing by the Customer to the Company, be held on trust for the Company by the administrator, controller or similar officer as the case may be, or if there is no such officer, by the Customer.
- 11 PPSA**
- 11.1 Words and expressions used in this clause 11 which are not defined in these Terms but are defined in the *Personal Property Securities Act 2009* (Cth) (**PPSA**) have the meaning given to them in the PPSA.
- 11.2 Unless a Customer has paid for Goods in respect of an Agreement before they are delivered to the Customer, each Customer acknowledges that:
- the Agreement for the supply of Goods created under these Terms is a security agreement for the purposes of the PPSA, under which the Customer grants the Company a security interest in the Goods and over any amount owed to the Customer in respect of the Goods (**Account**) to secure

- all monies owing by the Customer to the Company from time to time;
- (b) where the Company has other enforcement rights in addition to the enforcement rights provided for in the PPSA, those other enforcement rights will continue to apply; and
- (c) the Company is not obliged to act in any way to dispose of or to retain any Goods which have been seized by the Company or any person nominated by the Company under its rights under the PPSA.
- 11.3 Without limiting anything else in these Terms, the Customer consents to the Company effecting a registration on the register in relation to any security interest created by or arising in connection with, or contemplated by an Agreement or these Terms, including in relation to the Goods and any Account. The Customer agrees to promptly do all things necessary to ensure that any security interest created under these Terms is perfected and remains continuously perfected, the Company's priority position is preserved or secured and any defect in any security interest, including registration, is overcome.
- 11.4 The Customer must promptly take all reasonable steps which are prudent for its business under or in relation to the PPSA (including doing anything reasonably requested by the Company for that purpose in relation to the Goods or the Account). Without limiting the foregoing, the Customer must:
- (a) register a security interest in relation to the Goods where the Customer on sells the Goods to a third party or incorporates the Goods into another good or product;
- (b) where appropriate, take reasonable steps to identify security interests in relation to the Goods in the Customer's favour and to perfect and protect them, with the highest priority reasonably available; and
- (c) not register a financing change statement in relation to any registration made under paragraphs (a) or (b) without the Company's prior written consent.
- 11.5 The Customer must indemnify, and on demand reimburse, the Company for the enforcement of any rights arising out of any of the Company's security interests.
- 11.6 The Customer must not change its name, address or contact details without providing prior written notice to the Company.
- 11.7 To the extent that the PPSA permits, the Customer waives its rights to receive a copy of any verification statement or financing change statement; to receive any notice required under the PPSA, including notice of a verification statement; to reinstate the security agreement by payment of any amounts owing or by remedy of any default; and under sections 95, 96, 117, 118, 120, 121(4), 123, 125, 126, 127, 128, 129, 130, 132, 134(2), 135, 136(3), (4) and (5), 137, 142 and 143 of the PPSA.
- 11.8 The Customer may only disclose information or documents, including information of a kind referred to in section 275(1) of the PPSA, if the Company has given prior written consent.
- 12 Liability**
- 12.1 If the Customer is a Consumer and the Company supplies Consumer Goods or Services to the Customer, the Company acknowledges that the Customer may have certain rights under the Australian Consumer Law in respect of the Consumer Guarantees as they apply to the Consumer Goods or Services supplied by the Company and nothing in these Terms should be interpreted as attempting to exclude, restrict or modify the application of those rights.
- 12.2 If the Customer is a Consumer and any goods or services supplied by the Company to the Customer are non Consumer Goods or Services, the Company's liability to the Customer in connection with any breach of the Consumer Guarantees (other than a guarantee under section 51, 52 or 53 of the ACL) in respect of those non Consumer Goods or Services is limited (at the Company's discretion) to:
- (a) in the case of Goods:
- (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; and
- (b) in the case of Services:
- (i) the supplying the Services again; or
- (ii) the payment of the cost of having the Services supplied again.
- 12.3 Subject to clause 12.7, if the Customer makes a claim against the Company in connection with or arising out of these Terms which includes a cause of action other than for a breach of a Consumer Guarantee then, to the extent the claim, or part of the claim, does not relate to a Consumer Guarantee and to the extent permitted by law, the Company's total aggregate liability arising in connection with all such claims shall be limited to 100% of the Purchase Price.
- 12.4 Subject to clauses 12.5 and 12.7, the Customer's total aggregate liability arising in connection with all claims the Company makes against the Customer in connection with or arising out of these Terms shall be limited to 100% of the Purchase Price.
- 12.5 Clause 12.4 does not apply in relation to any claim which the Company may make against the Customer for:
- (a) breach of clause 9 (Sites & Safety) by the Customer;
- (b) breach of clause 14.7 (IP in Customer Background Materials) by the Customer
- (c) any Loss for which the Company is entitled to be indemnified by the Customer under these Terms; or
- (d) payment to the Company of any amount under these Terms or an Agreement (including payment of the Purchase Price).
- 12.6 In relation to the supply of Goods which are non Consumer Goods or Services, if the Company is liable to indemnify the Customer under section 274 of the Australian Consumer Law, the Company's liability to the Customer is limited to an amount equal to the lower of:
- (a) the cost of replacing the Goods;
- (b) the cost of obtaining equivalent Goods; or
- (c) the cost of having the Goods repaired.
- 12.7 Without limiting and subject to clauses 12.1 and 12.2, neither party shall be liable to the other party for any Consequential Loss.
- 13 Claims**
- 13.1 The Customer must notify the Company immediately if it becomes aware of:
- (a) any claim; or
- (b) any death, serious injury or serious illness, in respect of, or caused by, the Goods or other goods of which the Goods are a component or mixed with and the Customer will take all reasonable steps to mitigate any Loss arising as a consequence of the claim, death, serious injury or serious illness.
- 13.2 The Customer must indemnify, and on demand reimburse, the Company for any Loss incurred by the Company arising from any claim made by a third party in respect of death, serious injury or serious illness resulting from the use or misuse of the Goods, except to the extent contributed to by:
- (a) breach of these Terms by the Company;
- (b) a negligent act or negligent omission of the Company; or
- (c) a failure of the Goods or the Company to comply with a Consumer Guarantee.
- 14 Intellectual Property**
- 14.1 The parties acknowledge and agree that, unless otherwise agreed in writing, as between the Company and the Customer all Intellectual Property Rights in the Goods and any material created as part of the Services vests in and exclusively belongs to and are irrevocably assigned to the Company and the Customer agrees that it must not infringe or use the Intellectual Property Rights of the Company which exist in the Goods or materials created as part of the Services without the prior written consent of the Company.
- 14.2 The Customer grants to the Company a non-exclusive, royalty free licence to use, reproduce, modify, adapt and further develop all Intellectual Property Rights in those portions of the Customer Background Materials which are required to enable the Company to supply the Goods or perform the Services.
- 14.3 The Customer must not modify, adapt, vary, reverse engineer, disassemble or copy all or any part of any Good without the prior written consent of the Company.
- 14.4 The Customer must not remove, deface, change, distort, delete or cover up:
- (a) any name plate or mark on the Goods which indicates that the Company is the owner of the Goods; or

- (b) any patent, copyright or other proprietary notices which appear in writing on or in any part of the Goods.
- 14.5 The Customer must only sell or promote the Goods using any trade mark, name or brand which is approved in writing by the Company.
- 14.6 The Customer must not make available for purchase, sell or promote any:
- (a) good which is a copy or imitation, in whole or in part, of any Good; or
- (b) Good which has been modified or varied (other than the affixation of any labels or other packaging on the Goods).
- 14.7 The Customer Background Material must not infringe the Intellectual Property Rights owned by a third party.
- 15 Specifications**
- 15.1 If an Offer has been accepted by the Company, the Customer acknowledges that the Offer was accepted by the Company on the basis of, and in reliance upon, any information, drawings, specifications, data, representations, statements and documents provided by the Customer, set out in an Order or otherwise approved by the Customer (**Customer Specifications**).
- 15.2 The Specifications are approximate only and the Company makes no representation or warranty as to the completeness or accuracy of the Specifications and the Customer is responsible for making its own enquiries in relation to the completeness and accuracy of the Specifications provided.
- 15.3 Where any instructions, materials or information in whatever form (including any Customer Specifications) are required to be provided by the Customer to the Company before the Company can proceed with or complete the provision of the Goods or Services, those instructions, materials or information must be supplied by the Customer to the Company within a reasonable time (as determined by the Company) so as to enable the Company to deliver the Goods or Services within any agreed time frame.
- 15.4 The Company may make changes to the Specifications or other particulars of the Goods as may be required from time to time by law or any safety or manufacturing requirements.
- 16 Confidentiality**
- 16.1 The Receiving Party:
- (a) may use Confidential Information solely for the purposes of the relevant Agreement;
- (b) must keep confidential all Confidential Information; and
- (c) may disclose Confidential Information only to (i) employees and contractors who (A) are aware and agree that the Confidential Information must be kept confidential and (B) either have a need to know the Confidential Information (and only to the extent that each has a need to know), or have been specifically approved by the Disclosing Party; (ii) as required by law or securities exchange regulation; or (iii) with the prior written consent of the Disclosing Party.
- 16.2 The Receiving Party must notify the Disclosing Party immediately once it becomes aware of any breach of confidentiality in respect of the Confidential Information and must take all reasonable steps necessary to prevent further unauthorised use or disclosure of the Confidential Information.
- 17 GST**
- 17.1 In this clause, words and expressions which are defined in the *New Tax System (Goods and Services Tax) Act 1999* (Cth) (as amended, varied or replaced from time to time) have the same meaning given to them by that Act.
- 17.2 Unless otherwise expressly stated in writing in an Agreement, all amounts payable by the Customer in connection with an Agreement do not include an amount for GST. If GST is payable on any supply made by the Company under these Terms, the Customer must pay to the Company, in addition to and at the same time as the payment for the supply, an amount equal to the amount of GST on the supply. Where the Customer is required by these Terms to reimburse or indemnify the Company for any Loss or other amount incurred, the amount to be reimbursed or paid will be reduced by the amount of any input tax credit that the Company will be entitled to claim for the Loss or amount incurred and increased by the amount of any GST payable by the Company in respect of the reimbursement or payment.
- 18 Force Majeure**
- 18.1 The Company will not be liable for any failure to perform or delay in performing its obligations under an Agreement if that failure or delay is due to a Force Majeure Event. The Company must give the Customer notice of a Force Majeure Event.
- 18.2 If a Force Majeure Event under clause 18.1 exceeds 45 days, either party may immediately terminate the Agreement by written notice to the other party.
- 19 Termination**
- 19.1 Without limiting the Company's other rights under these Terms, and to the extent permitted by law, the Company may terminate any and all Agreements with immediate effect by written notice to the Customer if:
- (a) the Customer fails to make any payment under the Agreement to the Company by the due date for that payment and the Customer has not remedied the failure to make payment within 30 days of receiving notice of the failure to make payment;
- (b) the Customer is the subject of an Insolvency Event;
- (c) the Customer has breached any material term of the relevant Agreement (including these Terms) which is not capable of remedy;
- (d) the Customer has breached any term of the relevant Agreement (including these Terms) which is capable of remedy and has not remedied the breach within 30 days of receiving notice requiring the breach to be remedied; or
- (e) in accordance with clause 18.2.
- 19.2 The Company may terminate an Agreement with immediate effect by written notice to the Customer if:
- (a) without prejudice to clause 19.1, the Customer fails to make payment of the Deposit by the due date, as required under clause 4.1; or
- (b) the Company's access to the Site is delayed, or the Services are suspended by the Customer, for a period of more than 90 days after the date on which the Company notifies the Customer it is able to provide the Services.
- 19.3 Without limiting the Customer's other rights under these Terms, and to the extent permitted by law, the Customer may terminate any and all Agreements and any account facility under an Account Application with immediate effect by written notice to the Company if:
- (a) the Company is the subject of an Insolvency Event;
- (b) the Company has breached any material term of the relevant Agreement (including these Terms) which is not capable of remedy;
- (c) the Company has breached a term of the relevant Agreement (including these Terms) which is capable of remedy and has not remedied the breach within 30 days of receiving notice requiring the breach to be remedied.
- 19.4 On termination of an Agreement:
- (a) the Customer must not sell or part with possession (other than as required under clause 19.4(b)) of any Goods the subject of the Agreement (other than any Goods which have been paid for);
- (b) the Customer must, at its cost, immediately return to the Company all Goods the subject of the Agreement (other than any Goods which have been paid for);
- (c) the Company may enter the premises of the Customer or any third party to repossess any Goods not returned under clause 19.4(b) and the Customer expressly authorises and grants the Company and its agents an express, irrevocable licence to enter the premises of the Customer or relevant third party to remove or arrange for the removal of those Goods; and
- (d) all money owed by the Customer to the Company will become immediately due and payable, which shall include the following (which will be payable within 7 days of termination of the Agreement):
- (i) the portion of the Fees attributable to the Goods supplied and the Services performed up to the date of termination by the Company;
- (ii) unless terminated by the Customer under clause 19.3, all irrevocable liabilities of the Company to pay fees to its contractors and subcontractors for works not performed by those contractors by reason only of the early termination of the Agreement; and

- (iii) unless terminated by the Customer under clause 19.3, the difference between:
- (A) the costs incurred by the Company in producing any Goods for the Customer that were not delivered at the date of termination; and
- (B) the residual value of those Goods on resale or as materials for the Company.
- 19.5 Each party retains any rights, entitlements or remedies it has accrued before termination, including the right to pursue all remedies available to either party at law or in equity.
- 20 Acknowledgements and representations**
- 20.1 By making an Offer, the Customer warrants and represents to the Company that it has read and understood these Terms prior to making the Offer, and agrees to be bound by them in full.
- 20.2 Any price list, goods lists or other similar documents or catalogues (**Documents**) issued by or on behalf of the Company do not constitute an offer by the Company to supply Goods appearing in those Documents or an offer by the Company to supply Goods at the prices set out in those Documents and for the avoidance of doubt those Documents do not form part of an Agreement except to the extent that they are expressly referred to in any Offer. The Company's price lists and catalogues may be changed by the Company at any time without notice.
- 21 Inconsistency**
- 21.1 Unless otherwise specified in these Terms, in the event of an inconsistency between any of the documents listed in clause 3.3, the following order of precedence will apply to the extent of the inconsistency:
- (a) without limiting clause 21.2, any terms in the Order which are accepted by the Company in writing;
- (b) the prices and quantity of Goods and/or Services set out in a Quote (if any);
- (c) these Terms;
- (d) any other terms of the Quote (if applicable).
- 21.2 These Terms will prevail over any Customer terms and conditions, except to the extent specifically agreed by the Company in writing and any terms or conditions included in an Order or other document provided or issued by the Customer will only be binding on the Company if expressly noted by the Company and agreed to by the Company in writing.
- 22 Miscellaneous**
- 22.1 In these Terms:
- (a) the singular includes the plural and vice versa;
- (b) the word person includes a firm, a body corporate, an unincorporated association, body or organisation established pursuant to international treaty, intergovernmental body, or government authority and other official authority;
- (c) a reference to a document or legislation includes a reference to that document or legislation as varied, amended, novated or replaced from time to time;
- (d) the meaning of general words is not limited by specific examples introduced by 'includes', 'including', 'for example' or 'such as' or similar expressions;
- (e) a reference to a person includes a reference to the person's executors, administrators, successors, substitutes (including, but not limited to, persons taking by novation) and permitted assignees;
- (f) headings are inserted for convenience and do not affect the interpretation of these Terms;
- (g) no provision will be construed to the disadvantage of a party merely because that party was responsible for the preparation of the Terms or the inclusion of the provision in the Terms; and
- (h) unless otherwise provided, all monetary amounts are in Australian dollars and a reference to payment means payment in Australian dollars.
- 22.2 The Customer must maintain and keep current and complete records of the Goods which the Company has supplied to the Customer (in sufficient detail so as to be readily identified as goods supplied by the Company), including any Goods which are sold by the Customer to a third party and must, immediately upon written request from the Company, provide the Company with access to, or copies of, those records.
- 22.3 The Customer must not assign or otherwise deal with any of its rights or obligations under these Terms without the Company's prior written consent.
- 22.4 For the purposes of clause 22.3, a Change in Control of the Customer will be considered an assignment of the Customer's rights or obligations under these Terms.
- 22.5 The Company may, to the extent permitted by law, vary these Terms from time to time on written notice of the variation to the Customer (**Variation Date**). Any variation to these Terms will only apply to, and in respect of, any Offer or Agreement made after the Variation Date and the parties acknowledge that nothing in these Terms requires the Customer to make any further Offers after the Variation Date. The Customer may, by written notice to the Company, terminate these Terms at any time within 30 days of the Variation Date but any such termination by the Customer will not have the effect of terminating any Agreement existing prior to the notice of termination.
- 22.6 A failure to exercise, or a delay in exercising, any right under these Terms does not constitute a waiver and any right may be exercised in the future. Waiver of any rights under these Terms must be in writing and is only effective to the extent set out in that written waiver.
- 22.7 If any provision of these Terms is void, unenforceable or illegal and would not be so if words were omitted, then those words are to be severed and if this cannot be done, the entire provision is to be severed from these Terms without affecting the validity or enforceability of the remaining provisions.
- 22.8 The termination or expiry of these Terms or any Agreement does not operate to terminate any rights or obligations under an Agreement that by their nature are intended to survive termination or expiration, and those rights or obligations remain in full force and binding on the party concerned including without limitation the rights and obligations under clauses 1, 7, 10, 11, 12, 13, 14, 17, 19, 21 and 22.
- 22.9 Each party must:
- (a) do all acts necessary or desirable to give full effect to an Agreement; and
- (b) refrain from doing anything which might prevent full effect being given to an Agreement.
- 22.10 The relationship between the parties is and will remain that of independent contractors, and nothing in these Terms or an Agreement constitutes the parties as partners or joint venturers or constitutes any party as the agent of another party or (except as expressly provided for) gives rise to any other form of fiduciary relationship between the parties.
- 22.11 Notices by a party must be delivered by hand, prepaid post or email and sent to the address of the receiving party specified in the Account Application or, if none are specified, in any other part of the Agreement. Notices will be deemed to have been received: by hand upon delivery; by post within six Business Days of sending; and by email one hour after the email is sent (unless the sender knows that email has failed to send).
- 22.12 These Terms each Agreement are governed by the laws in force in New South Wales, and the Customer and the Company submit to the non-exclusive jurisdiction of the courts of New South Wales.
- 22.13 The *United Nations Convention on Contracts for the International Sale of Goods (1980) (The Vienna Convention)* and any acts or regulations enacting The Vienna Convention will not apply to these Terms or any Agreement and are excluded.
- BY SIGNING BELOW OR SUBMITTING AN ORDER THE CUSTOMER (OR PERSON AUTHORISED TO BIND THE CUSTOMER) CONFIRMS THAT IT HAS READ AND UNDERSTOOD THESE TERMS AND AGREES TO ACCEPT AND COMPLY WITH THEM.**
- SIGNED** by
for and on behalf of **THE CUSTOMER**
-
Signature of Customer or authorised representative