

# TERMS AND CONDITIONS

## Payment terms

1. Credit payments are to be paid for by cash, cheque, bank cheque or EFT without deduction strictly thirty (30) days (or such other period as nominated by the supplier herein) from the date of invoice. Fearman Pty Ltd ABN 56 009 437 316 and its related bodies corporate (as that term is defined in the *Corporations Act 2001*) (**Supplier**) may, at any time, unilaterally vary the terms of trade in its absolute and unfettered discretion.
2. Cash purchases will be paid for with order ("CWO") or at or prior to delivery (COD) as required by the Supplier.
3. Should the Applicant not pay for the goods or services supplied by the Supplier in accordance with the credit terms as provided herein, or as agreed in writing by the Supplier from time to time, the Supplier will be entitled to charge an administration fee of 10 percent of the amount of the invoice payable per year, or part thereof, from the date the goods or services were supplied (and not the day when the Supplier's invoice was payable) until payment by the Applicant.

## Order

4. In the event of any dispute concerning any order (including any question of identity or authority or any telephone, facsimile, email, ecommerce or computer generated order) the internal records of the Supplier will be conclusive evidence of what was ordered.
5. Each order the Applicant places shall be and be deemed to be, a representation by it made at the time that it is, and will remain in the future, solvent and able to pay all of its debts as and when they fall due.
6. Failure to pay the Supplier in accordance with these terms and conditions shall be deemed to be conclusive evidence that the Applicant has no reasonable grounds for making the representation referred to in clause 11 and that the representations were unconscionable, misleading and deceptive.
7. When any order is placed, the Applicant shall inform the Supplier of any material facts which would or might reasonably affect the commercial decision by the Supplier to accept the order and/or grant credit in relation thereto. Any failure to do so by or on behalf of the Applicant shall create and be deemed to create an inequality of bargaining position and be deemed to constitute the taking of an unfair advantage of the Supplier and to be unconscionable, misleading and deceptive.
8. The Applicant agrees to pay for so much of any order as is invoiced by the Supplier.
9. The Applicant agrees that no delay or failure to fulfil any part of any order shall entitle the Applicant to cancel or vary any order or delay or reduce any payment.

## Purchase price

10. All sales are made at the Supplier's ruling price at the time of delivery.
11. Duty, government charges etc. including GST (**Imposts**) will be to the Applicant's account. The Supplier's price lists exclude Imposts unless expressly noted thereon.
12. Any volume rebate or settlement discount will be calculated on base price exclusive of Imposts.

## Delivery

13. The Supplier accepts no responsibility for delivery but may elect to arrange delivery at its discretion and without any liability and at the Applicant's costs and responsibility in all things.
14. The Supplier may charge for any delivery.
15. The Applicant will be deemed to have accepted delivery and liability for products immediately after the Supplier notifies that they are ready for collection or they are delivered to a carrier or the Applicant's business premises or site whether attended or not.
16. A certificate purporting to be signed by an officer of the Supplier confirming delivery shall be conclusive evidence of delivery as shall any signed delivery docket.
17. The Supplier will not be liable for delay failure or inability to deliver any products or perform any services.
18. The Applicant will pay all the Supplier's costs in holding products for the Applicant after the Supplier give notice that they are ready for collection or delivery.

## Variations in quantity

19. The Applicant agrees to accept a permissible variation of quantity provided the variation does not exceed + or -10 percent of the quantity ordered.

## Pallets etc

20. The Applicant will promptly return pallets and reusable packaging provided by the Supplier and indemnifies the Supplier for the hire and/or replacement costs thereof, if not returned within fourteen (14) days of request by the Supplier.

## Jurisdiction

21. The Applicant acknowledges and agrees that this agreement will be governed by the laws of Victoria, and the laws of the Commonwealth of Australia which are in force in Victoria.
22. The Applicant acknowledges and agrees that any contract for the supply of goods or services between the Supplier and the Applicant is formed at the address of the Supplier.
23. The parties to this agreement submit to the non-exclusive jurisdiction of the courts of Victoria and the relevant federal courts and courts competent to hear appeals from those courts.

## Security/charges

24. The Applicant charges in favour of the Supplier all of its estate and interest in any real property that the Applicant owns at present and in the future with the amount of its indebtedness hereunder until discharged.
25. The Applicant charges in favour of the Supplier all of its estate and interest in any personal property that the Applicant owns at present and in the future with the amount of its indebtedness hereunder until discharged.

26. The Applicant appoints as its duly constituted attorney the Supplier's company secretary from time to time to execute in the Applicant's name and as the Applicant's act and deed any real property mortgage, bill of sale or consent to any caveat the Supplier may choose to lodge against real property that the Applicant may own in any Land Titles Office in any state or territory of Australia, even though the Applicant may not have defaulted in carrying out its obligations hereunder.
27. Where the Applicant has previously entered into an agreement with the Supplier by which the Applicant has granted a charge, mortgage or other security over real or personal property, those charges, mortgages or other security interests will continue and co-exist with the obligations and security interests created in this agreement. The Supplier may, at its election, vary the terms of such previous charges, mortgages or other securities to reflect the terms herein.

## Purpose of credit

28. The Applicant acknowledges and agrees that the credit to be provided to the Applicant by the Supplier is to be applied wholly or predominantly for commercial purposes.

## Formation of contract

29. Quotations made by the Supplier will not be construed as an offer or obligation to supply in accordance with the quotation. The Supplier reserves the right to accept or reject, at its discretion, any offer to purchase received by it.
30. Placement of an order, either verbally or in writing, will imply acceptance of the Supplier's offer and of these terms and conditions.

## Retention of title

31. Whilst the Applicant has not paid for the goods supplied in full at any time, the Applicant agrees that property and title in the goods will not pass to the Applicant and the Supplier retains the legal and equitable title in those goods supplied and not yet sold.
32. Until payment in full has been made to the Supplier, the Applicant will hold the goods in a fiduciary capacity for the Supplier and agrees to store the goods in such a manner that they can be identified as the property of the Supplier, and will not mix the goods with other similar goods.
33. The Applicant will be entitled to sell the goods in the ordinary course of its business, but until full payment for the goods has been made to the Supplier, the Applicant will sell as agent and bailee for the Supplier and the proceeds of sale of the goods will be held by the Applicant on trust for the Supplier absolutely.
34. The Applicant's indebtedness to the Supplier, whether in full or in part, will not be discharged by the operation of clause 33 hereof unless and until the funds held on trust are remitted to the Supplier.
35. The Applicant agrees that whilst property and title in the goods remains with the Supplier, the Supplier has the right, with or without prior notice to the Applicant, to enter upon any premises occupied by the Applicant (or any receiver, receiver and manager, administrator, liquidator or trustee in bankruptcy of the Applicant) to inspect the goods of the Supplier and to repossess the goods which may be in the Applicant's possession, custody or control when payment is overdue.
36. The Applicant will be responsible for the Supplier's costs and expenses in exercising its rights under clause 35. Where the Supplier exercises any power to enter the premises, that entry will not give rise to any action of trespass or similar action on the part of the Applicant against the Supplier, its employees, servants or agents.
37. The Applicant agrees that where the goods have been retaken into the possession of the Supplier, the Supplier has the absolute right to sell or deal with the goods, and if necessary, sell the goods with the trademark or name of the Applicant on those goods, and the Applicant hereby grants an irrevocable licence to the Supplier to do all things necessary to sell the goods bearing the name or trademark of the Applicant.
38. The Applicant will be responsible for the Supplier's costs and expenses in exercising its rights under clause 35. Where the Supplier exercises any power to enter the premises, that entry will not give rise to any action of trespass or similar action on the part of the Applicant against the Supplier, its employees, servants or agents.
39. For the avoidance of doubt, the Supplier's interest constitutes a 'purchase money security interest' pursuant to the *Personal Property Securities Act 2009*.
40. Until payment in full the Applicant agrees sale on terms for less than cost shall not be "in the usual course".
41. The Applicant agrees that:
  - (a) products will be deemed at all times to be dealt with by the Applicant on a "first in first out" basis;
  - (b) a certificate purporting to be signed by an officer of the Supplier identifying products as unpaid for shall be conclusive evidence that the goods have not been paid for and of the Suppliers

## Limitation of liability

42. The Applicant agrees to limit any claim it makes to the cost or supply of equivalent goods or the supply of services again.
43. The Supplier shall not be liable for any claim, loss or expense which is made after fourteen (14) days from date of delivery or performance (or at all once the goods have been unpacked, on- sold or otherwise used or applied) after which there shall be deemed to be unqualified acceptance.
44. The Supplier will not be liable for any contingent consequential directly, indirect, special, or punitive damage arising in any way whether due to the Supplier's negligence or otherwise and the Applicant acknowledges this express limit of liability and agrees to limit any claim accordingly.
45. No other term, condition, agreement, warranty, representation or understanding whether express or implied, extending to or relating to or binding upon the Supplier is made or given.

## Exclusions

46. No contract between the Supplier and the Applicant shall be or be deemed to be a sale by sample.

47. If the Supplier publishes material concerning its products, services or prices anything so published which is incompatible with these Terms is expressly excluded.
48. The Applicant will rely on its own knowledge and expertise in selecting any product or services for any purpose and any advice or assistance given for or on behalf of the Supplier shall be accepted at the Applicant's risk and shall not be or be deemed given as expert advice and such advice or assistance be relied upon by the Applicant.
- Cancellation of terms of credit**
49. The Supplier reserves the right to vary the terms of credit or withdraw credit at any time, whether the Applicant is in default under the terms of this agreement or not, at its sole discretion without liability to the Applicant or any other party.
50. Upon cancellation with or without notice all liabilities incurred by the Applicant become immediately due and payable to the Supplier.
- Indemnity**
51. The Applicant agrees to indemnify the Supplier and keep the Supplier indemnified against any claim. This indemnity includes any legal fees and expenses the Supplier incurs in order to enforce its rights, on an indemnity basis.
- Provision of further information**
52. The Applicant undertakes to comply with any request by the Supplier to provide further information for the purpose of assessing the Applicant's creditworthiness, including an updated credit application.
53. If the Applicant is a corporation (with the exception of a public listed company), it must advise the Supplier of any alteration to its corporate structure (for example, by changing directors, shareholders, or its constitution). In the case of a change of directors or shareholders the Supplier may ask for new guarantors to sign a guarantee and indemnity.
- Corporations**
54. If the Applicant is a corporation, the Applicant warrants that all of its directors have signed this agreement and that all of its directors will enter into a guarantee and indemnity with the Supplier in relation to the Applicant's obligations to the Supplier.
- Trustee capacity**
55. If the Applicant is the trustee of a trust (whether disclosed to the Supplier or not), the Applicant warrants to the Supplier that:
- the Applicant enters into this agreement in both its capacity as trustee and in its personal capacity;
  - the Applicant has the right to be indemnified out of trust assets;
  - the Applicant has the power under the trust deed to sign this agreement; and
  - the Applicant will not retire as trustee of the trust or appoint any new or additional trustee without advising the Supplier.
56. The Applicant must give the Supplier a copy of the trust deed upon request.
- Partnership**
57. If the Applicant enters into this agreement as partners, the Applicant warrants that all of the partners have signed this agreement and that all of the partners will enter into a guarantee and indemnity with the Supplier in relation to the Applicant's obligations to the Supplier.
58. If the Applicant is a partnership, it must not alter its partnership (for example, adding or removing partners or altering its partnership agreement) without advising the Supplier. In the case of a change of partners, the Supplier may ask for new guarantors to sign a guarantee and indemnity.
- Insolvency**
59. If the Applicant becomes insolvent, the Applicant remains liable under this agreement for payment of all liabilities incurred hereunder. The Applicant remains liable under this agreement even if the Supplier receives a dividend or payment as a result of the Applicant being insolvent.
- Waiver**
60. A waiver of any provision or breach of this agreement by the Supplier must be made by an authorised officer of the Supplier in writing. A waiver of any provision or breach of this agreement by the Applicant must be made by the Applicant's authorised officer in writing.
61. Until ownership of the goods passes, the Applicant waives its rights it would otherwise have under the PPSA:
- under section 95 to receive notice of intention to remove an accession;
  - under section 118 to receive notice that the Supplier intends to enforce its security interest in accordance with land law;
  - under section 121(4) to receive a notice of enforcement action against liquid assets;
  - under section 129 to receive a notice of disposal of goods by the Supplier purchasing the goods;
  - under section 130 to receive a notice to dispose of goods;
  - under section 132(2) to receive a statement of account following disposal of goods;
  - under section 132(4) to receive a statement of account if no disposal of goods for each 6 month period;
  - under section 135 to receive notice of any proposal of the Supplier to retain goods;
  - under section 137(2) to object to any proposal of the Supplier to retain or dispose of goods;
  - under section 142 to redeem the goods;
  - under section 143 to reinstate the security agreement; and
  - under section 157(1) and 157(3) to receive a notice of any verification statement.
- Costs**
62. The Applicant must pay for its own legal, accounting and business costs and all costs incurred by the Supplier relating to any default by the Applicant.
63. The Applicant must also pay for all stamp duty and other taxes payable on this agreement (if any).
64. The Applicant will pay the Supplier's costs and disbursements incurred in pursuing any recovery action, or any other claim or remedy, against the Applicant, including collection costs, debt recovery fees and legal costs on an indemnity basis. Such costs and disbursements will be due and payable by the Applicant to the Supplier irrespective of whether pursuit of the recovery action, claim or remedy is successful.
65. The Applicant acknowledges and agrees that payments by the Applicant will be applied by the Supplier as follows.
- Firstly, in payment of any and all collection costs and legal costs in accordance with clauses 36 and 64.
  - Secondly, in payment of any interest incurred in accordance with clause 68.
  - Thirdly, in payment of the outstanding invoice(s).
- Taxes and duty**
66. The Applicant must pay GST on any taxable supply made by the Supplier to the Applicant under this agreement. The payment of GST is in addition to any other consideration payable by the Applicant for a taxable supply.
67. If as a result of:
- any legislation becoming applicable to the subject matter of this agreement; or
  - any changes in legislation or its interpretation by a court of competent jurisdiction or by any authority charged with its administration;
- the Supplier becomes liable to pay any tax, duty, excise or levy in respect of the amounts received from the Applicant, then the Applicant must pay the Supplier these additional amounts on demand.
- Interest rates**
68. The interest rate on any outstanding debts is a fixed rate of 15 percent per annum.
- Set-off**
69. All payments required to be made by the Applicant under this agreement will be made free of any set-off, or counterclaim and without deduction or withholding.
70. Any amount due to the Supplier from time to time may be deducted from any monies which may be or may become payable to the Applicant by the Supplier.
- Applicant material**
71. The Applicant agrees that it is the Applicant's sole responsibility to ensure that materials, designs, drawing, specifications, procedures etc. (**Material**) which is provided by or on behalf of the Applicant, to be used by the Supplier in meeting any orders, are correct and appropriate.
72. Material will be relied upon by the Supplier.
73. Any Material or property used by the Supplier in providing any goods or services shall be of merchantable quality, fit for the purpose of becoming the property of the Supplier.
- Miscellaneous**
74. The Supplier is not liable for any loss caused to the Applicant by reason of strikes, lockouts, fires, riots, war, embargoes, civil commotions, acts of God or any other activity beyond the Supplier's control.
75. In relation to the supply of goods, the Supplier's liability is limited to:
- replacing the goods or supplying similar goods;
  - repairing the goods;
  - providing the cost for replacing the goods or for acquiring equivalent goods; and
  - providing the cost for having the goods repaired.
76. In relation to the supply of services, the Supplier's liability is limited to:
- supplying the service again; or
  - providing for the cost of having the services supplied again.
77. The Supplier is not liable, whether claims are made or not, for loss of profit, economic or financial loss, damages, consequential loss, loss of opportunity or benefit, loss of a right or any other indirect loss suffered by the Applicant.
78. The Applicant will, at the request of the Supplier, execute documents and do such further acts as may be required for the Supplier to register the security interest granted by the Applicant under the PPSA.
79. The Applicant agrees to accept service of any document required to be served, including any notice under this agreement or the PPSA or any originating process, by prepaid post at any address nominated in this application or any other address later notified to the Supplier by the Applicant or the Applicant's authorised representative.
80. The Applicant further agrees that where we have rights in addition to those under part 4 of the PPSA, those rights will continue to apply.
81. The Applicant irrevocably grants to the Supplier the right to enter upon the Applicant's property or premises, without notice, and without being in any way liable to the Applicant or to any third party, of the Supplier has cause to exercise any of their rights under sections 123 and/or 128 of the PPSA, and the Applicant shall indemnify the Supplier from any claims made by any third party as a result of such exercise.
82. Nothing in this agreement shall be read or applied so as to purport to exclude, restrict or modify or have the effect of excluding, restricting or modifying the application in relation to the supply of any goods and/or services pursuant to this agreement of all or any of the provisions the Competition and Consumer Act 2010 or any relevant State or Federal Legislation which by law cannot be excluded, restricted or modified.
83. The applicant agrees it is solely responsible for ensuring that all goods and any material used for packaging complies with all laws, regulations, standards and packaging covenants applicable thereto and does not breach any copyright or intellectual property rights.
84. The Applicant agrees that all tooling, materials industrial or intellectual property or the like used in the preparation for or production of any goods or provision of any services will be and remain the property of the Supplier despite any contribution by the Applicant.
85. The Applicant warrants that at all times it will have all necessary industrial and intellectual property rights in anything it requests for the Supplier.
86. The Applicant agrees to pay for any artwork, designs, stereotypes, blocks, engravings etc, or modifications thereto etc. involved in any order, in addition to the agreed prices.
87. The Applicant agrees to experimental or preliminary work or product requested fixed.
88. The Supplier disclaims any responsibility or liability relating to any products or services:
- made or performed to designs, drawings, specifications and/or procedures etc or with any materials which are provided or approved by or on behalf of the Applicant;
  - utilised, stored, handled or maintained incorrectly or inappropriately.

89. The Applicant agrees to check all products and services for compliance with all applicable Standards and regulatory bodies before use, on-sale or application and to use or apply same in accordance therewith and with all manufacture or the Supplier's recommendations and directions and good commercial practice.
90. The Applicant acknowledges the Supplier may update, modify, alter or make substitution (or any of its products or any component in or used informing any party of any products as part of its ongoing business development, and agrees to accept current products in substitution for any products ordered provided they are not materially different.
91. t/o terms and conditions sought to be imposed by the Applicant (including any Terms and Conditions of Purchase or the like) shall apply.
92. To give effect to its obligations arising hereunder, the Applicant irrevocably appoints any solicitor acting for the Supplier from time to time, as its attorney in all things.
93. The Applicant:
- (a) will notify the Supplier in writing of any change in its structure or management including any change in director, shareholder, management or change in partnership or trusteeship or of sale of any material part of its business within 7 days of any such change;
  - (b) will be liable to the Supplier for any purchases from the Supplier by any party acquiring any material part of the Applicant's business until such notice is given.
94. The Applicant agrees that it will be deemed to have notice of any change to these Terms immediately they are adopted by the Supplier. The Applicant agrees to be bound by any terms and conditions of sale adopted by the Supplier immediately they are so adopted and notwithstanding any other purported or pre-existing terms and conditions of the Supplier.
95. The United Nations Convention on Contracts for the International Sales of Goods or any modification or substitution therefore is expressly excluded.

**Default**

96. Upon any breach of these Terms or default in any dealing with the Supplier by the Applicant:
- (a) the Supplier may (inter alia) retain all monies paid and/or cease further delivers and recover from the Applicant all loss of profits arising; and/or
  - (b) the Supplier may, at its discretion, take possession of any products not paid for, without prejudice to any other of its rights and without being liable to any party;

- (c) the Applicant agrees not to commence or continue or permit to be commenced or continued through it any action against the Supplier until any such default or breach is remedied;
- (d) the Supplier will be deemed to have requested the securities from the Applicant referred to in clause 25.

**Severance**

97. If any provision of this agreement is not enforceable in accordance with its terms, other provisions which are self-sustaining are, and continue to be, enforceable in accordance with their terms.
98. If any part of this agreement is invalid or unenforceable, that part is deleted and the remainder of the agreement remains effective.

**Variation**

99. The Applicant agrees that these terms and conditions may be varied, added to, or amended by an authorised officer of the Supplier at any time by written notice to the Applicant.
100. Any proposed variation to these terms and conditions by the Applicant must be requested in writing. The Supplier may refuse any such request without providing reasons either orally or in writing.

**Consent to register**

101. The Applicant hereby consents to the Supplier recording the details of this Agreement on the Personal Property Securities Register and agrees to do all things necessary and reasonably required by the Supplier to effect such registration.
102. The Applicant waives any right or entitlement to receive notice of the registration of any security interest(s) created by this instrument on the Personal Property Securities Register.

**Entire agreement**

103. This agreement constitutes the entire agreement between the parties relating in any way to its subject matter. Subject to clause 27 all previous negotiations, understandings, representations, warranties, memoranda or commitments about the subject matter of this agreement are merged in this agreement and are of no further effect. No oral explanation or information provided by a party to another affects the meaning or interpretation of this agreement or constitutes any collateral agreement, warranty or understanding.

**Privacy Act**

104. The Applicant agrees to the terms of the *Privacy Act 1988* authorisation contained in this document.