

ACTIVE OUTTHERE TERMS AND CONDITIONS

1. DEFINITIONS AND INTERPRETATION

1.1 In these Terms and Conditions, except to the extent otherwise indicated by the context:

Business Day – means a day that is not a public holiday, Saturday or Sunday in Victoria;

Claim – means any claim, demand, action, proceeding, notice, litigation, investigation or judgment whether based in contract, tort, and statute or otherwise;

Confidential Information – means existing and future information in the possession of the party who owns it which is provided to the other party for the stated purpose, and includes:

- (a) Information contained in any document which has been provided by one party to the other; and
- (b) any information acquired by one party from the other in confidential circumstances relating to the Products.

The Confidential Information may be oral or written, may be in the form of words, numbers and/or images and may, amongst other things, include statements, contracts, agreements, specifications, drawings, reports, documents, knowledge, know-how, or other information in any form of media. The Confidential Information includes both existing data and knowledge and concepts, ideas and developments.

The Confidential Information does not include information:

- (a) which is or becomes generally available to the public (other than through a breach of these Terms and Conditions)
- (b) which can be proved to have been known by either party or its advisers prior to disclosure by the other party for the stated purpose; or
- (c) which is required by law to be disclosed.

Customer – means the person or entity to whom a quotation or invoice is issued by the Supplier including that person or entities' successors and assigns. In the event that no quotation or invoice has been issued, "Customer" means the person or entity (including that person's or entity's successors and assigns) to whom Products are supplied or are to be supplied by the Supplier;

Delivery Date – means the date stipulated in an Order for delivery of Product/s;

Delivery Point – means the point of delivery for the Product/s, specified in the Order by the Customer;

Force Majeure – means anything outside the reasonable control of a person pursuant to which that person is unable in whole or in part to perform its obligations under these Terms and Conditions (other than the payment of money), including but not in any way limited to:

- (a) acts of god or the public enemy, national emergencies, use of atomic weapons or nuclear fusion or fission, radioactive contamination, insurrection, riot, hostile or warlike action in peace or war or, stoppage;

- (b) strikes, lockouts, labour disputes, work stoppages, embargoes or any other labour difficulties; and
- (c) any action or reaction of or made by, or any civil or military authority;

Information – means methods, skills and know-how supplied by either party and necessary for the manufacture, supply and packaging of the Products;

Intellectual Property – means all patents and patent applications, registered and registrable designs, copyrights, formulations, trademarks and similar industrial or intellectual property rights;

Losses – means all losses, damages (including damage to persons or property), fines, Claims, liabilities (whether in contract or tort, pursuant to statute or otherwise) and all expenses and costs, legal or otherwise (including fees and disbursements reasonably incurred) of any kind and nature;

Order – means a written order given by the Customer to the Supplier or an approved agent of the Supplier specifying:

- (a) the Products and the quantity of Products required;
- (b) the agreed Unit Price of the Products;
- (c) the Delivery Date;
- (d) the Delivery Point; and
- (e) using the product code, if any, supplied by the Supplier;

Products – means the products the Customer requests the Supplier to provide under these Terms and Conditions, as listed in an Order;

Supplier – means Active Outthere Pty Ltd ACN 137 261 922 of 14/94-102 Keys Road, Moorabbin;

Unit Prices – means the Unit Prices payable by the Customer under these Terms and Conditions in consideration for the provision of the Products and as confirmed in each Order.

1.2 Unless otherwise provided in these Terms and Conditions:

- (a) headings in these Terms and Conditions are included for convenience only and do not form part of the content of these Terms and Conditions and do not effect the meaning of these Terms and Conditions;
- (b) the singular includes the plural and vice versa;
- (c) a gender includes the other gender;
- (d) a reference to a thing includes a reference to a part of that thing;
- (e) words importing a natural person include any body or entity, whether incorporated or not;
- (f) references to a party to any document includes that party's administrators,

successors and permitted assigns; and

- (g) references in these Terms and Conditions to any clause, Annexure or Schedule is a reference to a clause, Annexure or Schedule to these Terms and Conditions and reference to these Terms and Conditions includes any clause, Annexure or Schedule to these Terms and Conditions

2. APPOINTMENT OF THE SUPPLIER TO PROVIDE THE PRODUCTS

- 2.1 The Supplier is an independent third party to the Customer and is not (nor is intended to be) an agent, partner or joint venturer of the Customer.
- 2.2 These Terms and Conditions will apply to all Products sold by the Supplier to the Customer and will continue until terminated in accordance with **clause 10** of these Terms and Conditions.

3. ORDERS

- 3.1 Once an Order is received from the Customer, then unless it is rejected by the Supplier it is binding on both the Supplier and the Customer. The Supplier is not bound by any Order if it has been rejected by the Supplier.
- 3.2 The Customer may not cancel an Order without the Supplier's consent in writing. Any cancellation request may be refused or given at the Supplier's sole discretion and, when given, will be on condition that the Customer will compensate the Supplier for all loss that it may suffer as a result of the cancellation as determined by the Supplier in its discretion with supporting evidence of the loss. Without limiting the generality of the foregoing, the Supplier will be entitled to charge a cancellation fee equal to 30% of the value of the cancelled order. Any proposed cancellation or adjustment of an indent order must be made a minimum of 3 months ahead of the scheduled delivery date.
- 3.3 The Supplier may, at its discretion, reject any Order.
- 3.4 There is no obligation on the Supplier to enquire as to the authority of any person placing an Order on behalf of the Customer.
- 3.5 In addition to its other rights under these Terms and Conditions, the Supplier has the right to cancel or delay any Order at any time before the supply of the Products by giving written notice to the Customer. The Supplier will not be liable for any loss arising from such cancellation or delay. Without limiting the generality of the foregoing, if the Supplier does not have the stock of a Product ordered by the Customer, the Supplier may:-
- (a) deliver that part of the stock which it has in stock and deliver the balance at a later date when the Supplier has the rest of the stock.
 - (b) cancel part or all of the order.
 - (c) deliver the entire order when the Supplier has received the stock.
- The Supplier may, but shall not be obliged, to advise the Customer when the relevant stock will be available.
- 3.6 All Products are offered for sale by the Supplier subject to availability to the Supplier of such Products.

4. DELIVERY

- 4.1 The Supplier will deliver such Products that constitute an Order or part of an Order (as the case requires) to the Delivery Point on the Delivery Date or such other date as the parties may agree in writing. Any costs incurred for freight arranged by the Supplier will be charged to the Customer. Unless otherwise agreed, the Supplier will use its own freight carrier and charge the Customers a delivery fee in line with the cost of freight charged to the Supplier.
- 4.2 Risk in the Products will pass to the Customer upon delivery of the Products to the Customer.
- 4.3 The Supplier will invoice the Customer at the time of despatch of the Products by the Supplier.
- 4.4 Times quoted for delivery by the Supplier are given in good faith and are estimates only.
- 4.5 The Supplier will not be liable for failure to deliver any of the Products arising from any cause beyond the Supplier's control. The Customer will not be relieved of any obligation to accept or pay for the Products by reason of any delay in delivery.
- 4.6 If the Customer fails to accept delivery of the Products or give proper instructions to the Supplier for their delivery within seven (7) days after notification in writing that the Products are ready for delivery, the Customer may be liable to pay to the Supplier all reasonable costs for storage, protection and insurance of the Products after expiration of such seven day period. The Supplier reserves the right to store such Products at a location of its choosing.
- 4.7 No defect or claim in respect of Products delivered will entitle the Customer to reject delivery of other Products, which are not subject to any defect or claim, delivered as part of the Order.
- 4.8 Unless otherwise stated, all prices are quoted on an ex Warehouse (Melbourne) basis.
- 4.9 All freight will be charged for separately based on volume, timing, delivery location, ease of access, number of persons required to deliver the Products and whether or not an assembly service is required.
- 4.10 All delivery costs are based on a ground floor/front door basis unless stated otherwise.
- 4.11 The Customer is responsible for ensuring there is adequate access and entry to its premises to allow the delivery of Products. The Supplier must be notified of any vehicle height restrictions in underground car-parks which may preclude access by the Supplier's usual delivery trucks.
- 4.13 The Customer is responsible for ensuring that the items ordered are capable of being delivered and can fit through doors and in goods lifts (where applicable) and are to advise upfront if access is only available via the stairwells etc as this may require delivery surcharges and/or alternative product selections.
- 4.14 The Customer is liable for payment of all delivery charges, including any additional charges incurred as a result of difficulties with access.
- 4.15 The Customer must ensure correct delivery address details are provided to the Supplier and notify the Supplier in advance in writing/via email if there will be difficulties accessing the delivery address (e.g. staircases or narrow passages) that will require

additional time and effort to affect such delivery.

- 4.16 If a delivery is booked and needs to be re-scheduled a re-delivery fee may apply.
- 4.17 The Supplier's delivery teams will not make any deliveries they believe are unsafe.
- 4.18 Products will only be delivered if a person(s) aged over 18 years is able to accept delivery at the delivery address. Should an appropriate person not be available to accept delivery on the pre-arranged delivery date, the Customer will be charged for transport and re-delivery costs.
- 4.19 The Supplier may at its option deliver the Products to the Customer in any number of instalments unless otherwise agreed in writing.
- 4.20 Where the Customer, with the agreement of the Supplier, uses its own freight carrier, the Supplier will not be responsible for the Products damaged in transit by the Customer's nominated carrier and the Customer shall be responsible for insuring the Products against loss or damage during transit.
- 4.21 The Customer must ensure that it does not automatically sign for Products being received in good condition and is to check the state of the cartons and the Products before signing for them as that will be held against the Customer by the courier company in the event of a dispute. In the event of damage/fault, the damage must be pointed out to the carrier on arrival and the Customer is to note the damages on the delivery sheet/consignment notice that the Customer will be requested to sign. The Customer must retain all packaging materials and report the problem to the Supplier immediately and provide photographic evidence via email of any damages/imperfections. The Supplier will endeavour to facilitate a resolution of the issue with the carrier on the Customer's behalf but accepts no responsibility for transit damage.

5. PRICING & PAYMENT

- 5.1 The Customer must pay each Supplier invoice issued in accordance with **clause 4** at the Unit Prices. Unless otherwise states all prices quoted by the Supplier are exclusive of GST and freight. The Customer must pay to the Supplier the Unit Price plus GST at the same time.
- 5.2 The cost of any special packing and packing materials used in relation to the Products are at the Customer's expense notwithstanding that such cost may have been omitted from any quotation.
- 5.3 The Supplier may from time to time, with or without notice to the Customer, revise the Unit Prices of some or all of its Products.
- 5.4 If any invoice is not paid by the due date for payment, the Supplier may notify the Customer and the Customer will have five Business Days from the date of that notification to pay the relevant invoice. If this period of five Business Days elapses without payment being received by the Supplier, the Supplier may, in addition to its other rights under the Terms and Conditions and at law, suspend all further deliveries of Products to the Customer until payment is made in full of the outstanding invoice or agreement is made and agreed by both parties.
- 5.5 The Customer must pay the Supplier as follows:-
- (a) if the Customer is an approved account customer then the Customer must pay all the Supplier invoices within 30 days of the end of the month in which the

Products are invoiced.

- (b) if the Customer is not an approved account customer, then the Customer must pay the Supplier as follows:-
- (i) where an order for Products is placed for immediate delivery and the Supplier has the Products in stock, then payment in full is required upon confirmation of the total value of the invoice prior to the goods being dispatched.
 - (ii) in the case of a new Customer placing an indent order, the Supplier will contact the Customer and require payment prior to the Products being dispatched. The Supplier will not be held responsible for any orders where this is not adhered to. The Supplier reserves the right to cancel the order without notice.

5.6 Time for payment is of the essence.

5.7 In addition to the Supplier's rights under these Terms and Conditions and at law, the amounts of invoices not paid in accordance with this **clause 5** may incur interest at the rate of 15% per annum.

5.8 Payments made by credit card (Visa or Mastercard only) and will not be subject to a surcharge if payment is made within terms. Any payment made on a credit card outside of terms may attract a surcharge of 1.5%.

5.9 The Customer will be liable for all costs incurred with the recovery of any unpaid invoiced amounts, including without limitation legal and collection agents fees, court costs, interest and the Supplier's fees for time incurred with the recovery process.

5.10 The Customer is not entitled to set off against, or deduct from the Unit Price, any sums owed or claimed to be owed to the Customer by the Supplier, nor is the Customer entitled to withhold payment of any invoice because part of that invoice is in dispute.

5.11 Any pricelists issued by the Supplier are subject to change without notice. The Supplier reserves the right without notice to alter the price of Products whether or not a deposit or part payment has been received by the Supplier for such Products and to invoice the Customer for any such extra amount where the cost of the Products to the Supplier have altered due to circumstances beyond the Supplier's control including but without limiting the generality of the foregoing any variation in exchange rates, taxes, levies, imposts, duties, premiums fees or charges however designed, cost of raw material required to complete the order, and to correct errors and omissions. The Customer may not disclose any such pricelists without the written consent of the Supplier.

5.12 The Customer acknowledges that the Supplier is entitled to sell the Products to other customers at prices which are different to the prices which are charged to the Customer from time to time.

6. INSPECTION, DEFECTS AND RETURNS

6.1 The Customer must:-

- (a) inspect the Products upon delivery;
- (b) within seven (7) business days of the supply of any Products (time being of the essence), notify the Supplier of details of any alleged defect, error, omission,

shortage in quantity, or past the agreed delivery date, damage or failure to comply with the description or quotation. This must be done by email to info@activeoutthere.com.au and they will note any variance to standard.

- (c) provide the Supplier with:-
 - (i) such photographic and other proof of the alleged defect, error, omission, shortage in quantity, damage or failure to comply as may be requested by the Supplier;
 - (ii) the Supplier's product details (item code or name) and the relevant invoice number;
- (d) allow the Supplier to inspect the alleged defect, error, omission, shortage, damage or failure to comply within a reasonable time of receiving notification; and
- (e) the Supplier's Product details (item code or name), invoice number and details of the defect claimed.

6.2 The Customer will be deemed to have accepted the Products free of defect or any non-conformity unless the Supplier receives a substantiated written claim within seven (7) days of the date the Supplier delivers or otherwise attempt to deliver the Products to the Customer, as the case may be.

6.3 If a claim is made by a Customer, the Supplier will endeavour to contact the Customer within seven (7) business days along with photographs and other information required by the Supplier. The Supplier may then request further images or information relating to the claim in order for the Supplier to clearly identify/determine the defect. The Supplier will not approve any claims that:-

- (a) result from transit damage, where the relevant Products were not freighted by the Supplier or the Supplier's approved freight companies/carriers.
- (b) are due to the natural characteristic of the relevant Product. This information can be found under Care Instructions on the Supplier's website. The Customer must comply with those Instructions and must provide the relevant part of the Instructions to each of its customers when they purchase a Product.
- (c) arise from the improper use or care of the relevant Product.

For clarity, any warranty in relation to the Products will not apply if clauses 6.3(a), (b) or (c) applies.

6.4 No claim will be accepted unless first authorised in writing by an authorised officer of the Supplier and a Return Authority (RA) number has been provided. The RA number will need to be on any claim and return.

6.5 If the Supplier, acting reasonably accepts a claim by the Customer for a defect, error, omission, shortage, damage or failure to comply with description or quotation, the Customer must return the relevant Product(s) to the Supplier at its place of business if requested by the Supplier. The Supplier's maximum liability to the Customer will then be to:-

- (a) supply a replacement of the relevant Product(s) (or part(s) of the relevant Product(s) if that is deemed sufficient by the Supplier) or supply equivalent

Product(s) (or part(s) if that is deemed sufficient by the Supplier) to the Customer. The Supplier reserves the right to substitute similar items should the colour or model in question no longer be available;

- (b) repair the relevant Product(s) and deliver them to the Customer; or
- (c) refund to the Customer the cost of the relevant Product(s).

6.6 If the Supplier is of the reasonable opinion that the Products when returned are other than in the same condition as when they were delivered to the carrier or directly to the Customer, a charge equal to the cost necessary to restore the Products to their original condition shall be payable by the Customer upon demand by the Supplier. If Products are returned to the Supplier which the Supplier is unable to resell to a third party or resell for the same amount as was sold to the Customer, then the Supplier may charge the Customer an amount equal to the loss incurred as a result of the Customer returning the Products.

6.7 Except in the case of any Product(s) which are defective or damaged or fail to comply with their description, the Supplier is under no obligation to accept any return of any Products sold to the Customer. Despite the foregoing, if the Supplier, in its discretion, agrees to accept any return of any Product which is not defective or damaged or fails to comply with its description:-

- (a) the Products must be returned to the Supplier in their original packaging (both internal & external) as originally delivered.
- (b) freight Charges paid re the initial delivery are non-refundable;
- (c) freight charges paid for the return of the relevant Products must (unless otherwise agreed) be paid directly by the Customer or, if the return freight is arranged by the Supplier, must be paid by the Customer and deducted from the credit (if any due) to the Customer on the return of this stock;
- (d) the Supplier will be entitled to charge a re-stocking fee equivalent to 25% of the value of the returned Products to cover the additional administration and warehouse costs associated with the return of these items; and

A credit will only be processed once the relevant Products are received at the above address, checked and found to be in a good and as new condition.

7. WARRANTIES AND REPRESENTATIONS

7.1 The Supplier warrants and represents to the Customer that:

- (a) The Supplier has the legal right and power without obtaining the consent of any person or authority to enter into these Terms and Conditions and sell the Products;
- (b) To the best of the Supplier's knowledge, information and belief there are no existing, pending or threatened matters or circumstances which will remove, limit or otherwise effect:
 - (i) the legal right or power of to sell the Products; or
 - (ii) the ability of the Supplier to provide the Products in accordance with these Terms and Conditions.

- 7.2 The Customer warrants and represents to the Supplier that:
- (a) the Customer has the legal right and power without obtaining the consent of any person or authority to perform its obligations under these Terms and Conditions;
 - (b) to the best of its knowledge, information and belief there are no existing, pending or threatened matters or circumstances which will remove, limit or otherwise effect its legal right or power to perform its obligations under these Terms and Conditions.
 - (c) it must comply with all instructions provided by the Supplier to the Customer regarding the care, handling and storage of the Products, including those instructions which may be viewed at <http://www.activeoutthere.com.au/terms-conditions.php>
- 7.3 Each party must promptly notify and fully disclose to the other party in writing material details of any event or occurrence, actual or threatened, which materially effects their ability to perform their obligations under these Terms and Conditions.
- 7.4 The Customer acknowledges that no employee or agent of the Supplier, other than a director, is authorised to make or issue any statement, warranty or representation as to the Products. The Customer therefore shall not be entitled to rely or seek to rely upon any statement made or issued by an agent or employee of the Supplier other than a written statement by a director of the Supplier.
- 7.5 The Products come with all warranties that cannot be excluded under the Australian Consumer Law. Where a valid claim is made under a statutory or other warranty (and if such warranty is not voided for any of the reasons set out in these Terms and Conditions or by operation of law), the Supplier will, at its option either:-
- (i) repair or replace the relevant Products or the affected part of them; or
 - (ii) wholly or partially recompense the Customer if the Products or part of them is defective.
- 7.6 Any warranties implied by law will end immediately if the Products become defective or damages as a consequence of misuse, lack of proper care and maintenance, commercial use, use within a commercial or rental environment or handling in transit.
- 7.7 The Supplier will not be required to repair or replace a Product if the Supplier, acting reasonably, believes it is unreasonable that it be required to do so. Without limiting the generality of the foregoing, the Customer acknowledges that if the Customer purchases Products which are:-
- (a) sold as part of any clearance sale conducted by the Supplier;
 - (b) sold from the clearance section of the Supplier's premises or website;
 - (c) formerly display or showroom items and have been discounted accordingly;
- then such Products (irrespective of whether or not marked as clearance or display or showroom items) shall be sold in their as is condition and, to the extent permitted by law, no warranty of any nature shall apply to those Products.

7.8 The Supplier must be notified of an imperfection in the Products within 7 days of the Products being delivered failing which any warranty applying to the Products will cease to apply.

7.9 Any warranties provided (whether provided by the Supplier or implied by law) do not apply if:

- (a) the defect becomes apparent after the expiration of the relevant warranty period (or if there is no such period then after more than one (1) month after the date of the invoice);
- (b) the Products have not been used or stored in accordance with instructions issued by the Supplier;
- (c) the Products have been subject to any alteration or repair by any person other than authorised in writing by the Supplier. If the alteration or repair is unrelated to the defect then the warranty remains applicable;
- (d) the Customer fails to notify the Supplier of its claim within seven (7) days of the defect becoming apparent and to return the Products to the Supplier on the Supplier's request to do so; or
- (e) the Products have not been used for the purpose for which they were designed.

7.10 Except as provided for in these Terms and Conditions, to the full extent permitted by law the Supplier will not be liable for economic or consequential loss, injury, expense or damage to the Customer or any person to whom the Products are transferred, or in respect of any person to whom the Customer or the person using the Products make them available or their property, arising from any defect in or failure of the Products, notwithstanding negligence on the part of the Supplier or the Supplier's suppliers, employees, agents, successors or assigns.

8. PRIVACY ACT

8.1 If the Supplier considers it relevant to assessing the Customer's application for commercial credit, the Customer agrees to the Supplier obtaining from a credit-reporting agency a credit report containing personal credit information about the Customer in relation to commercial credit provided by the Supplier. The Customer agrees that the Supplier may give and seek from any credit providers named in the credit application form information about the Customer's credit arrangement. The Customer understands that this information can include any information about its credit worthiness, credit standing, credit history or credit capacity that credit providers are allowed to give or receive from each other under the Privacy Act.

8.2 The Customer's personal and company data is known to the Supplier only when voluntarily submitted or posted to the Supplier. The Supplier may use this data for ongoing marketing purposes direct to the Customer. If at any point the Customer no longer wish to receive communication from the Supplier, please advise the Supplier accordingly in writing.

8. INSURANCE

8.1 Until the Supplier has been paid in full for a Product, the Customer will effect and keep current a valid and enforceable insurance policy, with a reputable insurance company,

against theft, damage and loss of the Product.

8.2 The Customer agrees to provide the Supplier, if requested, with certificates of currency or other evidence satisfactory to the Supplier that the Customer has insurances referred to in **clause 8.1**.

9. ASSIGNMENT

9.1 The Customer may not assign any of its rights or obligations under these Terms and Conditions without the prior written consent of the Supplier. The Supplier may assign its rights and/or obligations under these Terms and Conditions.

10. TERMINATION

10.1 These Terms and Conditions will continue unless and until terminated in accordance with this **clause 10**.

10.2 The Customer may immediately terminate these Terms and Conditions at any time if:

- (a) the Supplier commits a serious or persistent breach of any of the material provisions of these Terms and Conditions which is incapable of being remedied and which would or would not be likely to have a materially adverse impact on the activities of the Customer;
- (b) the Supplier fails to remedy, to the reasonable satisfaction of the Customer, a serious or persistent breach of any of the material provisions of these Terms and Conditions which is capable of being remedied and which would or would be likely to have a materially adverse impact on the activities of the Customer, within 90 Days of receiving notice of that breach;
- (c) a receiver, administrator, liquidator or provisional liquidator is appointed in respect of the Supplier or in respect of any of the assets or undertaking of the Supplier; or
- (d) the Supplier is unable or unwilling to pay its debts as and when they fall due.

10.3 The Supplier may immediately terminate these Terms and Conditions and cease supplying the Products to the Customer at any time if:

- (a) the Customer commits a breach of these Terms and Conditions which is incapable of being remedied;
- (b) the Customer fails to remedy, to the satisfaction of the Supplier, a breach of any provision of these Terms and Conditions which is capable of being remedied within 7 Business Days of receiving notice of that breach;
- (c) a receiver, administrator, liquidator or provisional liquidator is appointed in respect of the Customer or in respect of any of the assets or undertaking of the Customer;
- (d) the Customer is unable or unwilling to pay its debts as and when they fall due;
- (e) the Supplier gives to the Customer no less than 60 days notice of its intention to end these Terms and Conditions;
- (f) the Supplier elects to cease supplying the Customer with Products; or

(g) ceases to carry on business.

10.4 On termination of these Terms and Conditions for any reason, the Customer must promptly cease the use of Confidential Information belonging to the Supplier and the Customer must promptly return to the Supplier any Confidential Information in the Customer's possession or control.

10.5 On termination of these Terms and Conditions for any reason, the Customer must purchase from the Supplier at the actual cost incurred by the Supplier together with its usual profit margin, all Products in the possession of, or ordered by, the Customer.

11. CONFIDENTIAL INFORMATION

11.1 Ownership of the Customer's Information:

- (a) The Customer's Confidential Information belongs to the Customer and shall remain its property.
- (b) The Supplier has no right to use the Customer's Confidential Information or any part of it other than as permitted by these Terms and Conditions.
- (c) The Supplier obligations under these Terms and Conditions will continue until the Customer's Confidential Information is lawfully made publicly available.

11.2 Ownership of the Supplier's Information:

- (a) The Supplier's Confidential Information belongs to the Supplier and shall remain its property.
- (b) The Customer has no right to use the Supplier's Confidential Information or any part of it other than as permitted by these Terms and Conditions.
- (c) The Customer's obligations under these Terms and Conditions will continue until the Supplier's Confidential Information is lawfully made publicly available.

11.3 Both parties' duties of non disclosure:

- (a) Both parties agree not to disclose or allow each other's Confidential Information to be disclosed to any of their respective representatives or any other person without the prior authorisation of the other.
- (b) Both parties will make all reasonable efforts to ensure that both they and their respective representatives will:
 - (1) keep the other's Confidential Information confidential;
 - (2) not use or allow the other's Confidential Information to be used other than as permitted by these Terms and Conditions;
 - (3) not make any notes or memoranda relating to the other's Confidential Information except as permitted by these Terms and Conditions;
 - (4) take all reasonable steps to protect the other's Confidential Information and to prevent unauthorised use, copying duplication and access to the other's

Confidential Information.

- 11.4 Both parties must do their best to stop any person, including any of their respective representatives, from using or disclosing the other's Confidential Information to any other person except to the extent permitted by these Terms and Conditions.
- 11.5 If either party finds out about a breach of this **clause 11** of these Terms and Conditions they must:
- (a) notify the other immediately if it or any of its representatives suspect or become aware of any breach of this **clause 11**; and
 - (b) at its own expense it must take all reasonable steps required to prevent or stop the suspected or actual breach.

12. FORCE MAJEURE

- 13.1 If a Force Majeure Event affecting the Supplier precludes the Supplier from partially or wholly complying with its obligations under these Terms and Conditions then as soon as reasonably practicable after that Force Majeure Event arises, the Supplier must notify the Customer as to the following:
- (a) the Force Majeure Event;
 - (b) which obligations the Supplier is precluded from performing (Affected Obligations);
 - (c) the extent to which the Force Majeure Event precludes the Supplier from performing the Affected Obligations (Precluded Extent); and
 - (d) the expected duration of any delay arising directly out of the Force Majeure Event.
- 13.2 The obligations of the Supplier will be suspended during the continuance of the Force Majeure Event.

13. DISPUTE RESOLUTION

- 13.1 Neither of the parties may start court proceedings in respect of a dispute arising out of or in connection with these Terms and Conditions unless it has complied with this clause.
- 13.2 A party claiming that a dispute has arisen must notify the other party giving details.
- 13.3 During the 5 day period after a notice is given under **clause 13.2** (or longer period agreed in writing) senior executives of the parties must use their best efforts to resolve the dispute by negotiation.
- 13.4 If the dispute is not resolved under **clause 13.3**, the dispute must be referred for mediation, at the request of any of the parties, to:
- (a) a mediator agreed on by the parties; or
 - (b) if the parties are unable to agree on a mediator within seven days of the expiration of the 5 day period referred to in **clause 13.3**, a mediator nominated by the Law Institute of Victoria will be appointed.
- 13.5 If either party breaches any provision of **clause 13.2** to **13.4**, the other parties need not comply with **clause 13.1** in relation to that dispute.

13.6 The existence of a dispute or the application of any part of the process in this clause will not of itself relieve either party from any obligation under these Terms and Conditions. The Customer must continue to make payments to the Supplier under these Terms and Conditions, except to the extent of any amount which is disputed.

14. NOTICES

14.1 All notices to be given under these Terms and Conditions must be in writing. A notice will be deemed to be given in any of the following circumstances:

- (a) if delivered by hand to the receiver;
- (b) three days after postage in a postage paid envelope to the address of the receiver shown in these Terms and Conditions or to such other address for notices as shall be notified from time to time by the parties;
- (c) on receipt of a facsimile sent to the receiver's current facsimile number but only if the sender possesses an identifiable transmit confirmation code.

15. PROPERTY

15.1 Property and ownership (including legal and equitable title) in any Products sold by the Supplier to the Customer remains with the Supplier until the Customer meets all of its obligations pursuant to these Terms and Conditions, including without limitation payment in full of the Unit Price and all other amounts owing to the Supplier by the Customer.

15.2 The Products are at the Customer's risk from the time at which they are dispatched to the Customer or its nominee, provided that if the Products are sold on an FIS basis, the Products are at the Customer's risk from the time at which they are delivered to the Customer. Without limiting clause 8, the Customer must insure (and keep insured) the Products as follows after risk in the Products passes to the Customer:

- (a) the Products must be insured for their full insurable or replacement value (whichever is higher); and
- (b) the Products must be insured by an insurer licensed or authorised to conduct the business of insurance in the place where the Products will be stored.

15.3 If the Customer fails to pay for the Products in accordance with **clause 5**, then in addition to the Supplier's other rights under these Terms and Conditions and at law:-

- (a) the Customer must deliver the Products to the Supplier, where demanded by the Supplier or its Agent;
- (b) the Supplier may recover possession of the Products by any necessary means at any site owned, possessed or controlled by the Customer;
- (c) the Customer agrees that the Supplier has an irrevocable licence to exercise its rights under this clause;
- (d) the Customer is liable for all costs associated with the exercise of the Supplier's rights under this clause, and this liability will be payable on demand.

15.4 The Supplier and the Customer agree that, until property and ownership (including legal and equitable title) of the Products has passed to the Customer:

- (a) the Customer will not supply any of the Products to any person outside of its ordinary or usual course of business;
- (b) the Customer will not allow any person to have or acquire any security interest in the Products;
- (c) the Customer will not create any absolute or defeasible interest in the Products in relation to any third party except as may be authorised by the Supplier;
- (d) the Customer must not remove, deface or obliterate any identifying place, mark or number on any of the Products;
- (e) where the Customer is in actual or constructive possession of the Products:
 - (i) the Customer holds the Products as fiduciary bailee and agent for the Supplier;
 - (ii) after giving twenty-four (24) hours notice to the Customer, the Supplier will be entitled to enter upon the Customer's premises between 9am and 5pm to inspect the Products. No notice is required in the case of an emergency;
 - (iii) the Customer will not deliver the Products, or any document of title to the Products, to any person except as directed by the Supplier;
 - (iv) the Customer must store the Products separately and in a manner that enables the Products to be identified and cross-referenced to particular invoices issued to the Customer by the Supplier;
 - (v) the proceeds of any Products sold must be kept in a separate account by the Customer and must not be mixed with any other moneys, including funds of the Customer;
- (f) the Customer acknowledges that if it should mix the Products with other products or items such that the Products are no longer separately identifiable, then the Customer and the Supplier will be owners in common of the new product;
- (g) the Customer has no right to claim any interest in the Products to secure any liquidated debt or obligation the Supplier owes to the Customer;
- (h) the Customer cannot claim any lien over the Products;
- (i) the Supplier may bring an action for any amount owing to the Supplier in respect of Products even where ownership of the Products has not passed to the Customer.

16. PERSONAL PROPERTY SECURITIES ACT 2009 (CTH) ('PPSA')

- 16.1 The Customer acknowledges that, in addition to the other rights of the Supplier under these Terms and Conditions and at law, these Terms and Conditions constitute a security agreement that creates a security interest in favour of the Supplier in all Products supplied by the Supplier to the Customer to secure payment from time to time, including future advances. The Customer agrees to grant to the Supplier a 'Purchase Money Security Interest'.

- 16.2 The Customer acknowledges that by assenting to these Terms and Conditions, the Customer grants a security interest to the Supplier.
- 16.3 The Customer undertakes to:
- (a) sign any further documents and/or provide any further information (which information the Customer warrants to be complete, accurate and up-to-date in all respects) that the Supplier may reasonably require to enable registration of a financing statement or financing change statement (as defined in section 10 of the PPSA) on the Personal Property Securities Register ('PPSR');
 - (b) not register a financing change statement or make a demand to alter the financing statement pursuant to section 178 of the PPSA in respect of the Products without the prior consent of the Supplier;
 - (c) pay all costs incurred by the Supplier in registering and maintaining a financing statement (including registering a financing change statement) on the PPSR and/or enforcing or attempting to enforce the security interest created by these Terms and Conditions including executing subordination agreements; and
 - (d) be responsible for the full costs incurred by the Supplier (including actual legal fees and disbursements on a solicitor and client basis) in obtaining an order pursuant to section 182 of the PPSA.
- 16.4 The Customer waives any right it may have under section 115 of PPSA upon enforcement.
- 16.5 Unless otherwise agreed to in writing by the Supplier, the Customer waives any right to receive the verification statement in respect of any financing statement or financing change statement relating to the security interest under section 157 of the PPSA.
- 16.6 The Customer agrees that immediately on request by the Supplier the Customer will procure from any person(s) considered by the Supplier to be relevant to its security position such agreement and waivers as the Supplier may at any time require.
- 16.7 The Customer agrees to promptly do anything the Supplier requests (such as obtaining consents, providing information and signing and producing documents) in order to perfect, preserve, maintain, protect, or otherwise give full effect, under the PPSA and related regulations, to these Terms and Securities and the Security Interest created by these Terms and Conditions.

17. LIMITATION OF LIABILITY

- 17.1 Notwithstanding any other provision of these Terms and Conditions:
- (a) in no circumstances will the Supplier be liable to the Customer, or any assigned party in contract, tort (including without limitation negligence or breach of statutory duty) or otherwise (whatsoever the cause) to compensate the Customer or any assigned party for any special, indirect or consequential loss or any loss of production, loss of revenue, loss of profit or anticipated profit, or business interruption.
 - (b) the Supplier, its servants, agents and sub-consultants will be deemed to have been discharged from all liability whatsoever in respect of the Products, whether under the law of contract, tort or otherwise, at the expiration of one year from the receipt of the Products.

- (c) the total liability of the Supplier in relation to these Terms and Conditions or to the Customer for any reason is limited to the amount payable by the Customer to the Supplier in respect of the Product giving rise to the liability.

17.2 **Clause 17.1(c)** will not apply to:

- (a) liability out of which by law the Supplier cannot contract;
- (b) liability for fraud or malicious or deliberate criminal acts or omissions on the part of the Supplier;
- (c) liability for any act or failure to act by the Supplier which was intended to cause, or which was in reckless disregard of, or wanton indifference to, the harmful consequences that the Supplier knew, or ought reasonably to have known, that act or failure to act would have on the safety, property or interests of the Customer.

17.3 The Supplier is not responsible to the Customer or any person claiming through the Customer for any loss or damage to the Products in transit caused by any event of any kind by any person (whether or not the Supplier is legally responsible for the person who caused or contributed to that loss or damage). The Supplier must provide the Customer with such assistance as may be necessary to press claims on carriers so long as the Customer:

- (a) has notified the Supplier and the carriers in writing immediately after loss or damage is discovered on receipt of the Products; and
- (b) lodge a claim for compensation on the carrier within three (3) days of the date of receipt of the Products.

18. **RELEASE AND ACKNOWLEDGEMENT**

18.1 To the full extent permitted by law, the Customer releases the Supplier from any liability or obligation to the Customer or any assigned party arising out of the Supplier's performance or non-performance of any obligation under these Terms and Conditions and/or any Products supplied to the Customer in respect of:

- (a) loss (including consequential loss) in relation to property or otherwise;
- (b) personal injury, disease or illness to, or death of, persons;
- (c) economic loss; and
- (d) loss in relation to the environment.

18.2 Despite anything else contained in these Terms and Conditions, the Customer at all times indemnifies and releases the Supplier, its employees and agents and any Related Body Corporate of the Supplier from and against any loss or damage to Products or any Products of the Customer being held by the Supplier arising from or as a result of flood, storm or water damage.

19. **INDEMNITY**

19.1 The Customer at all times indemnifies and holds harmless the Supplier, its employees and agents and any Related Body Corporate of the Supplier from and against any Loss (including without limitation actions, proceedings, judgments, legal fees and charges) that

may be incurred by, billed, made or recovered against the Supplier in connection with the performance or non-performance of the Customer's obligations under these Terms and Conditions and/or the supply of any Products, including without limitation:

- (a) loss (including consequential loss) in relation to property, including without limitation the Supplier's property;
- (b) loss in respect of personal injury, disease, illness or death;
- (c) economic loss; and
- (d) loss in relation to the environment.

19.2 The indemnity in **clause 19.1** does not apply to the extent that any claims, damages, expenses, losses or liabilities are caused by:

- (a) any negligent act or omission of the Supplier or the Supplier's employees, agents or contractors, as the case may be; or
- (b) a breach by the Supplier of these Terms and Conditions.

19.3 The indemnity contained in **clause 19.1** does not in any way limit or affect any other rights that the Supplier may have arising out of any default by the Customer in the performance of the Customer's obligations under these Terms and Conditions.

20. CUSTOMER'S LIABILITY

20.1 The Customer's liability for the performance of obligations under these Terms and Conditions is not released, discharged or relieved by anything that but for this clause might have that effect, including without limitation:

- (a) the grant of a waiver or other indulgence to the Customer or any assigned party by the Supplier;
- (b) any transaction or arrangement between the Supplier and the Customer or any assigned party;
- (c) the Customer being subject to an Insolvency Event;
- (d) the Supplier being subject to an Insolvency Event;
- (e) the Supplier exercising, delaying or refraining from exercising any right, power or remedy given to it by law, by these Terms and Conditions, or by any other document or agreement with the Customer or any assigned party;
- (f) the Supplier obtaining a judgment against the Customer or any assigned party for the payment of any money under these Terms and Conditions and/or any other document or agreement between the Supplier and the Customer or any assigned party; and
- (g) any change in circumstance of the Supplier or the Customer or any assigned party (including a change of circumstance of a person, the members of a partnership or the composition of a Supplier).

21. GENERAL

- 21.1 The nature of the obligations of these Terms and Conditions are such that:
- (a) any provision in these Terms and Conditions which binds more than one person binds all of those persons jointly and each of them individually; and
 - (b) each obligation imposed on a party by these Terms and Conditions in favour of the other is a separate obligation.
- 21.2 A failure, delay, relaxation or indulgence by a party in exercising any power or right conferred on the party by these Terms and Conditions does not operate as a waiver of the power or right. A single or partial exercise of the power or right does not preclude a further exercise of any power or right under these Terms and Conditions. A waiver of a breach does not operate as a waiver of any other breach.
- 21.3 If any provision of these Terms and Conditions offends any law applicable to it and is as a consequence illegal, invalid or unenforceable then:
- (a) where the offending provision can be read down so as to give it a valid and enforceable operation of a partial nature it must be read down to the extent necessary to achieve that result; and
 - (b) in any other case the offending provision must be severed from these Terms and Conditions in which event the remaining provisions of the Agreement operate as if the severed provision had not been included.
- 21.4 These Terms and Conditions bind and benefit the parties and their respective successors and permitted assigns.
- 21.5 A party cannot assign or otherwise transfer the benefit of these Terms and Conditions without the prior written consent of the other party.
- 21.6 These Terms and Conditions cannot be varied or amended except in writing signed by both parties.
- 21.7 Each party must pay its own legal costs of and incidental to the preparation and completion of these Terms and Conditions.
- 21.8 These Terms and Conditions will be governed by and construed in accordance with the laws of the Victoria Australia, the parties irrevocably submit to the exclusive jurisdiction of the courts of Victoria Australia.
- 21.9 In the event of any conflict between these Terms and Conditions and those that may be included in or implied by any document forming part of any enquiry, specification, order or contract, then these Terms and Conditions will prevail, except in so far as they are expressly varied by the Supplier in writing or otherwise by law. The provisions of these Terms and Conditions will prevail over any terms and conditions of the Customer whether or not any inconsistency arises.
- 21.10 Except to the extent required by law, no conditions or warranties expressed or implied by any law, ordinance rule or regulation (including those expressed or implied by statute, the common law, equity, and trade customs or usage) are binding upon the Supplier unless set out in these Terms and Conditions. To the extent permitted by law, the Supplier's liability for a breach of a condition or warranty which is required or implied by law is limited to, at the Supplier's discretion:-
- (a) the replacement of the Products or the supply of equivalent Products;

- (b) the repair of the Products;
- (c) the payment of the reasonable cost of having the Products repaired; or
- (d) refunding to the Customer the cost of the Product.

To the extent permitted by law, any warranties provided or implied or required by law do not apply if:-

- (i) the Products have not been used or stored in accordance with instructions provided by the Supplier or that would otherwise be reasonable in all the circumstances;
- (ii) the Products have been subject to any alteration or repair by any person other than authorised in writing by the Supplier;
- (iii) the Customer fails to notify the Supplier of the Customer's claim within 7 days of the defect becoming apparent or fails to return the relevant Product to the Supplier upon being requested to do so by the Supplier; or
- (iv) the Products have not been used for the purpose for which they were designed.

21.11 All Products are sold on the understanding that all licences, permits and the like required under relevant statutes, ordinances, rules and regulations have been obtained by the Customer.

21.12 The cost of any testing that is beyond the Supplier's standard tests is payable by the Customer.

21.13 The Supplier reserves the right to make a reasonable charge for storage if:

- (a) delivery instructions are not provided by the Customer within fourteen (14) days of a request by the Supplier for such instructions. Such charge is payable from the first day after delivery instructions were sought until the date of receipt of said instructions; and
- (b) the Customer does not want the Products to be delivered to it from the time they are ready for delivery. Such charge is payable from the first day the Products are ready to be delivered to the Customer until it instructs the Supplier to deliver the Products.

21.14 All descriptions, specifications, illustrations, drawings, data, dimensions and weights contained in catalogues, price lists or other promotional material (including the website) or other documents of the Supplier or elsewhere are approximations only. The Supplier will not be bound to accept any change in product dimension, materials or finish, a reduction in the quantity ordered or other particulars of an order for the Products after the Supplier has ordered the Products from its supplier or any special materials related to the supply of the Products. If the Supplier is required to process the Customer's goods or materials then the Supplier does not give any warranty or assurance that materials, quantities, preprinting supplied by the Customer are suitable for such processing. The Supplier accepts no responsibility and will not be liable to the Customer for any damage done or caused to such materials or goods.

23. INTELLECTUAL PROPERTY

- 23.1 The Customer acknowledges that the Supplier is the sole owner of all Intellectual Property which vests in the Products. If the Customer does not pay the Unit Prices in full, any licence implied by law to use any work product or any Intellectual Property in the Products will terminate and the Customer will be required to return all original and copies of work product and Intellectual Property to the Supplier within seven days of being requested to do so.
- 23.2 All designs, photography, catalogues, drawings or technical specifications of any Products shall not be reproduced in any form without the Supplier's written authority.
- 23.3 The Customer must not use any images of the Products, whether sourced/downloaded from the Supplier's website or obtained by other means, to sell the Products on-line without first obtaining the written approval of the Supplier.
- 23.4 The Customer must comply immediately with any request by the Supplier for the Customer to remove from its website any images or photos of any of the Products.
- 23.5 The Customer must not engage in any search engine optimisation which in any reduces the exposure or visibility of the Supplier on google.com or any other search engine.

24. ONLINE SELLING AND OTHER RESTRICTED SALES

- 24.1 The Customer must not, without the prior written approval of the Supplier, sell to any third party any Products which it has purchased from the Supplier if it knows or ought to know that the third party:-
- (a) resides or is based outside of Australia or New Zealand; or
 - (b) will resell any of those Products, including but not limited to the on-sale of those goods online, via mail order or on the third party's own website or on other websites such as eBay, Gumtree, Amazon.com or Play.com.
- 24.2 Any breach by the Customer of this clause 24 will result in the immediate termination of these Terms and Conditions pursuant to clause 10.3(a).