

# TERMS AND CONDITIONS

## 1. In these terms and conditions:

**'Confidential Information'** means information that (i) is by its nature confidential; (ii) is designated by the Supplier to be confidential; or (iii) the Customer knows or ought to know is confidential, relating to the Goods or the Supplier's business which is not in the public domain, including trade secrets, know-how, scientific, technical, product, market or pricing information.

**'Contract'** means a contract between the Supplier and the Customer for the supply of Goods and/or Services.

**'Customer'** means the person, firm, organisation, partnership, corporation, trustee of a trust or other entity (including its executors, administrators, successors and permitted assigns) to whom Goods and/or Services are provided by the Supplier.

**'Goods'** means all goods supplied by the Supplier to the Customer (and where the context so permits shall include any supply of Services as hereinafter defined) and as are described on the invoices, quotation, or any other forms as provided by the Supplier to the Customer.

**'Intellectual Property Rights'** means all intellectual property rights throughout the world, whether present or future, including rights in relation to copyright, trade secrets, know how, trademarks (whether registered or unregistered or whether in word or logo/device form), designs, patents and patentable inventions, including the right to apply for registration of any such rights.

**'Order'** means a written order from the Customer requesting the supply of Goods and/or Services.

**'PPSA'** means the *Personal Property Securities Act 2009* (Cth).

**'PPSR'** means the Personal Property Securities Register.

**'Price'** means the Price payable for the Goods and/or the Services as determined in accordance with clause 2.

**'Services'** means all services supplied by the Supplier to the Customer (and where the context so permits shall include any supply of Goods as described above).

**'Supplier'** means Chavin Holdings Pty Ltd ACN 150 205 191 and its Related Bodies Corporate (as that term is defined in the *Corporations Act 2001*).

**'Supplier IP'** means all Intellectual Property Rights in and in relation to:

- Confidential Information;
- all documents, reports, computer programs, software, manuals, patents and patentable inventions relating to the Goods; and
- Works.

**'Works'** means all literary, artistic and other works, including all physical works, production materials and subject matter created solely or jointly with others, by the Supplier in the course of or in relation to this agreement in which Intellectual Property Rights may subsist and all drafts, variations, alterations and adaptations of such works or subject matter (whether currently existing or created in the future).

## Price and Payment terms

- At the Supplier's sole discretion, the Price shall be either:
  - as indicated on the Supplier's then current price list (as amended from time to time);
  - as indicated on invoices provided by the Supplier to the Customer in respect of Goods and/or Services; or
  - the Supplier's quoted price (subject to clauses 9 and 13 to 15) which shall be binding on the Supplier provided the Customer accepts the quotation in writing within the period specified in clause 9.
- Subject to clause 4, the terms of payment are strictly thirty (30) days from end of month (or such other period as nominated by the Supplier herein). The Supplier may, at any time, vary the terms of payment in accordance with these terms and conditions.
- Where the Customer does not have an approved commercial credit account with the Supplier, payment of the Price shall be due on or before delivery of the Goods and/or Services (or such other period as nominated by the Supplier from time to time).
- The Customer must check all invoices and advise the Supplier of any errors or omissions within seven (7) days of receipt. Failing advice from the Customer that the invoice contains any errors or omissions, the invoice may be deemed accepted by the Supplier.
- Should the Customer not pay for the Goods and/or Services supplied by the Supplier in accordance with the terms and conditions provided herein, or as agreed in writing by the Supplier and Customer from time to time, after issuing a written demand to the Customer demanding payment within fourteen (14) days, the Supplier will be entitled to charge an administration fee of ten (10) percent of the amount outstanding in respect of the Goods and/or Services.
- The Customer acknowledges that the Supplier shall be at liberty to:
  - charge a surcharge for credit card transactions equal to the Supplier's average costs of acceptance; and
  - charge the Customer a reasonable fee to produce and issue duplicate invoices, statements and other documents that may be requested by the Customer from time to time.

## Purpose of credit

- The Customer acknowledges and agrees that any credit to be provided to the Customer by the Supplier is to be applied wholly or predominantly for business purposes.

## Formation of Contract

- Quotations are exclusive of GST and shall remain valid for a period of thirty (30) days from the date of quotation, unless otherwise specified in writing. The Supplier, in its sole discretion, reserves the right to withdraw, vary or extend any quotation at any time prior to the formation of a Contract in accordance with clause 10.
- Quotations made by the Supplier are considered to be estimates only and 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 Order. Only written acceptance by the Supplier of an offer will complete a Contract.
- Placement of an Order, either verbally or in writing, will constitute acceptance of these terms and conditions.
- At the Supplier's sole discretion, a deposit may be required. The deposit amount or percentage of the Price due will be stipulated at the time of the Order of the Goods and/or Services and shall immediately become due and payable upon the formation of a Contract in accordance with clause 10.

## Variations

- Where the Customer requests or directs that any Goods and/or Services be supplied that are not strictly in accordance with the quotation or Order, then such Goods and/or Services shall constitute a variation, unless otherwise agreed between the parties.
- The Customer understands and agrees that:
  - all variations must be agreed between the parties in writing prior to the Goods and/or Services being supplied; and
  - all variations shall be, at the Supplier's discretion, invoiced at the rate(s) specified in the quotation, as specifically quoted, or in accordance with the Supplier's current prevailing rates (as amended from time to time).
- Notwithstanding clauses 13 and 14, and subject to any rights the Customer might have under any relevant legislation, the Supplier reserves the right to vary the quoted price if:
  - there is any movement in the cost of supplying the Goods and/or Services specified in the Order (including, without limitation, any actual increase in the costs to the Supplier in procuring or transporting the Goods, actual increases in labour in connection with the supply of the Goods and/or Services, currency fluctuations and availability of the Goods);
  - the Goods and/or Services specified in the Order are varied from the Goods and/or Services specified in the Supplier's quotation; or
  - otherwise as provided for in these terms and conditions.

## Cancellation of Orders

- Unless otherwise agreed in writing between the parties, the Customer may not cancel an Order (or any part of an Order), delivery of the Goods cannot be deferred and Goods ordered cannot be returned except with the prior written consent of the Supplier and then (subject to clause 35(b)) only upon terms that the Customer reimburse and indemnify the Supplier against all losses it has incurred or may incur as a result of the cancellation, deferral or return, including, without limitation, cartage, bank charges, other incidental expenses incurred on any part of the Order and loss of profits.
- Notwithstanding any other rights the Supplier may have under this agreement, the Supplier may, in its sole discretion, cancel any Order or delivery of any Order, by providing written notice to the Customer, if the Customer:
  - defaults in payment of any invoice by the due date;
  - enters into liquidation or, where the Customer is an individual, becomes bankrupt; or
  - breaches an essential term of this agreement.
- To the fullest extent permitted by law, the Supplier accepts no liability for any loss whatsoever incurred by the Customer or any third party as a result of the Supplier exercising its rights under clause 17.

## Delivery

- The Customer shall be liable for all costs associated with delivery, including freight, insurance, handling and other charges, unless otherwise agreed in writing.
- The Customer acknowledges and accepts that any period or date for delivery stated by the Supplier is intended as an estimate only and is not a contractual commitment. The Supplier will not in any circumstances be liable for any loss or damage suffered by the Customer or any third party for failure to meet any estimated delivery.
- Delivery will be made within normal business hours between Monday to Friday, 8.00am to 5.00pm only (unless otherwise agreed to in writing).
- Delivery is deemed to occur at the earlier of:
  - the collection of Goods from the Supplier by the Customer or any third party on behalf of the Customer;
  - the time of loading of Goods at the Supplier's premises for the purpose of delivery to the Customer;
  - the Customer's nominated carrier takes possession of the Goods in which event the carrier shall be deemed to be the Customer's agent.
- The Supplier is entitled to charge:
  - a reasonable fee for redelivery charges in the event the Customer does not, or is unable to, accept delivery of the Goods; and
  - the Customer for any costs which the Supplier incurs as a result of any delay in the delivery of the Goods caused by the Customer, its agents, or employees.
- The Supplier is entitled to charge a reasonable fee for storage and/or redelivery charges in the event the Customer does not, or is unable to, accept delivery of the Goods.
- The Customer accepts that the Supplier may deliver Goods by instalments and require payment for each separate instalment in accordance with these terms and conditions.
- The Customer acknowledges and accepts that it is not relieved from any obligation arising under these terms and conditions by reason of any delay in delivery.
- The Customer shall make all arrangements necessary to take delivery of the Goods whenever they are tendered for delivery.

## Storage of Goods

- If the Customer:
  - fails to provide the Supplier with delivery instructions within seven (7) days of receiving a request from the Supplier for such instructions;
  - requests that the Supplier stores any Goods at its premises beyond the delivery date initially specified by the Customer (or as agreed between the parties) (**Specified Delivery Date**);
  - does not, or is unable to, accept delivery of any Goods by the Specified Delivery Date; or
  - fails to collect any Goods by the Specified Delivery Date,then the Supplier may at its discretion charge the Customer a reasonable fee for the storage of any Goods for each day the Goods remain undelivered and/or uncollected.
- Notwithstanding clause 28, the Supplier reserves the right to:
  - at any time from the Specified Delivery Date issue an invoice to the Customer; and
  - in the event that any Goods remain undelivered and/or uncollected for at thirty (30) days from the Specified Delivery Date, deliver those Goods to the Customer's nominated address.

## Risk

- Risk of damage to or loss of the Goods passes to the Customer on delivery and the Customer must insure the Goods on or before delivery against all losses which may be sustained as a result of the loss, damage or destruction of the Goods (or any part thereof) by accident, theft, fire, flood, negligence and such other insurable causes as may be available and shall include the Supplier as co-insured.
- If any of the Goods are damaged or destroyed following delivery but prior to ownership passing to the Customer, the Supplier is entitled to receive all insurance proceeds payable for the Goods to the extent of the indebtedness of the Customer to the Supplier. The production of these terms and conditions by the Supplier is sufficient evidence of the Supplier's rights to receive the insurance proceeds without the need for any person dealing with the Supplier to make further enquiries.
- If the Customer requests that Goods are delivered either to an unattended location, left outside, or are left outside the Supplier's premises for collection, the Customer acknowledges that the Supplier will deliver the Goods as requested at the Customer's sole risk.

## Returns

- The Customer must inspect the Goods immediately upon delivery and must within seven (7) days after the date of inspection give written notice to the Supplier with particulars, of any claim that the Goods are not in accordance with this agreement. Further, the Customer must, upon request from the Supplier, allow the Supplier to enter upon any premises occupied by the Customer to inspect and/or test the Goods that are subject of the claim. If the Customer fails to give notice or refuses to allow the Supplier to inspect and/or test the Goods, then to the extent permitted by law, the Goods must be treated as having been accepted by the Customer (and the Customer shall have no claim against the Supplier for damage or non-conformity of the Goods with these terms and conditions or any Contract between them) and the Customer must pay for the Goods in accordance with these terms and conditions.
- The Customer cannot return Goods to the Supplier without the written agreement of the Supplier.
- After inspection has taken place as provided for by clause 33 (but subject to clause 34):
  - if the Supplier reasonably determines that:
    - the Goods are not damaged; or
    - the Goods were damaged by the Customer or the Customer failed to take reasonable steps to prevent the Goods from becoming damaged; and
    - the Goods are otherwise in conformity with these terms and conditions,the Customer is deemed to have accepted the Goods and the Supplier is entitled to the Price.
  - if the Supplier reasonably determines that:
    - the Goods are damaged; and
    - the Goods were not damaged by the Customer and the Customer did not fail to take reasonable steps to prevent the Goods from becoming damaged; or
    - the Goods are otherwise not in conformity with these terms and conditions,the Customer is entitled to any one or more, at the option of the Supplier:
    - the replacement of the Goods or the supply of equivalent Goods;
    - the repair of the Goods;
    - the payment of the cost of replacing the Goods or acquiring equivalent Goods;
    - the payment of the cost of having the Goods repaired.
- Where Goods are the subject of a notice under clause 33:
  - the Customer must leave the Goods in the state and condition in which they were delivered until such time as the Supplier or its duly authorised agent has inspected and/or tested the Goods;
  - the Customer must provide the Supplier with the relevant invoice number and the date the Goods were delivered; and
  - such inspection and/or testing must be carried out within a reasonable time after notification by the Customer.
- The Customer acknowledges and agrees that any return, other than a return due to a default by the Supplier under this agreement or as otherwise permitted by law, may incur a handling and administration charge of ten (10) percent of the purchase Price of the returned Goods.
- Unless otherwise agreed in writing between the parties, the Customer must pay all costs associated with the return of any Goods (either to the Supplier or from the Supplier to the Customer or any third party) including freight, insurance, handling and other charges. Goods to be returned to the Supplier must be packed and wrapped appropriately and must include all original packaging, documentation, accessories and other material supplied with the Goods. The Supplier accepts no liability for any damage that occurs to any Goods in return transit.

## Special Goods

- The Customer acknowledges that Orders for Goods that are non-stock and/or specifically imported at the Customer's request or direction (**Special Goods**) may have to be purchased in minimum quantities and that the Customer will be notified if this applies in respect of the Customer's Order.
- Notwithstanding anything herein to the contrary, and subject to any rights the Customer might have under the *Competition and Consumer Act 2010* or any relevant State or Federal Legislation, the Customer acknowledges and agrees that Special Goods are non-refundable and cannot be returned to the Supplier, unless otherwise agreed in writing by the Supplier.

## Retention of title

- Until such time as the Customer has made payment in full for the Goods and until such time as the Customer has made payment in full of all other money owing by the Customer to the Supplier (whether in respect of money payable under a specific Contract or on any other account whatsoever);

- (a) title in the Goods does not pass to the Customer;
- (b) the Customer agrees that property and title in the Goods will not pass to the Customer and the Supplier retains the legal and equitable title in those Goods supplied and not yet sold;
- (c) the Customer 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; and
- (d) the Customer will be entitled to sell the Goods in the ordinary course of its business but will sell as agent and bailee for the Supplier and the proceeds of sale of the Goods will be held by the Customer on trust for the Supplier absolutely.
42. The Customer's liability to the Supplier under these terms and conditions will not be discharged by the operation of clause 41(d) (but its levels of indebtedness will be reduced by the extent of the funds so remitted to the Supplier).
43. The Customer agrees that whilst property and title in the Goods remains with the Supplier, the Supplier has the right, with prior notice to the Customer, to enter upon any premises occupied by the Customer (or any receiver, receiver and manager, administrator, liquidator or trustee in bankruptcy of the Customer) to inspect the Goods of the Supplier and, when payment is overdue, to immediately enter the premises (as the Customer's invitee) to repossess the Goods which may be in the Customer's possession, custody or control when payment is overdue.
44. The Customer will be responsible for the Supplier's reasonable costs and expenses in exercising its rights under clause 43 where the Customer is otherwise in default of the terms of this agreement. 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 Customer against the Supplier, its employees, servants or agents.
45. The Customer 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 Customer on those Goods, and the Customer hereby grants an irrevocable licence to the Supplier to do all things necessary to sell the Goods bearing the name or trademark of the Customer.
46. For the avoidance of doubt, the Supplier's interest constitutes a 'purchase money security interest' pursuant to the PPSA.
- Personal Property Securities Act**
47. The Customer acknowledges that by assenting to these terms and conditions, the Customer grants a security interest to the Supplier in all Goods (and their proceeds) now or in the future supplied by the Supplier to the Customer (or to its account).
48. The Customer undertakes to do anything that is required by the Supplier:
- (a) so that the Supplier can acquire and maintain one or more perfected security interests under the PPSA in respect of the Goods and their proceeds;
- (b) to register a financing statement or financing change statement; and
- (c) to ensure that the Supplier's security position, and rights and obligations, are not adversely affected by the PPSA.
49. Unless the Customer has obtained the Supplier's prior written consent, the Customer undertakes not to:
- (a) register a financing change statement in respect of a security interest contemplated or constituted by these terms and conditions; and
- (b) create or purport to create any security interest in the Goods, nor register, or permit to be registered, a financing statement or a financing change statement in relation to the Goods in favour of a third party.
50. The Customer:
- (a) waives its right under section 157 of the PPSA to receive a copy of the verification statement relating to a security interest created under these terms and conditions;
- (b) agrees that to the extent permitted by the PPSA, the following provisions of the PPSA will not apply and are contracted out of: section 95 (to the extent that it requires the secured party to give notices to the grantor); section 96; section 118 (to the extent that it allows a secured party to give notices to the grantor); section 121(4); section 125; section 130; section 132(3)(d); section 132(4); section 135; section 142 and section 143; and
- (c) agrees that the following provisions of the PPSA will not apply and the Customer will have no rights under them: section 127; section 129(2) and (3); section 130(1); section 132; section 134(2); section 135; section 136(3), (4) and (5) and section 137.
51. The Customer agrees that it will, if requested by the Supplier, sign any documents, provide any information or do anything else the Supplier requests, to ensure that any security interest created in the Supplier's favour by these terms and conditions is, to the fullest extent possible under the PPSA, perfected in accordance with Part 2.2 of the PPSA.
52. Notwithstanding section 275 of the PPSA, the parties agree to keep confidential all information of the kind referred to in section 275 of the PPSA, unless compelled by law to disclose such information.
53. The Customer irrevocably grants to the Supplier the right to enter upon the Customer's property or premises, with notice, and without being in any way liable to the Customer or to any third party, if the Supplier has cause to exercise any of its rights under sections 123 and/or 128 of the PPSA, and the Customer shall reasonably indemnify the Supplier from any claims made by any third party as a result of such exercise.
54. The Customer will be responsible for the Supplier's reasonable costs and expenses in exercising its rights under clause 53 where the Customer is otherwise in default of these terms and conditions. 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 Customer against the Supplier, its employees, servants or agents.
55. The Customer 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 Customer or the Customer's authorised representative.
56. The Customer further agrees that where the Supplier has rights in addition to those under part 4 of the PPSA, those rights will continue to apply.
- Cancellation of terms of credit**
57. The Supplier reserves the right to withdraw credit at any time upon provision of 48 hours' written notice.
58. Notwithstanding clause 57, if the Customer defaults in the payment of any amount due to the Supplier pursuant to this agreement and does not cure such default within seven (7) days after being given notice of such default, the Supplier may terminate this agreement (to be effective immediately) upon notice to the Customer.
59. Upon the withdrawal of credit in accordance with clause 57, or upon termination of this agreement in accordance with clause 58, all liabilities incurred by the Customer become immediately due and payable to the Supplier.
60. For the avoidance of doubt, termination of this agreement will not affect:
- (a) the right of any party to whom money is owed hereunder at the time of termination to receive that money according to the provisions hereof; and
- (b) the rights and/or obligations pursuant to this agreement which by their nature are intended to survive termination of this agreement.
- Provision of further information**
61. The Customer undertakes to comply with any reasonable written requests by the Supplier to provide further information for the purpose of assessing the Customer's creditworthiness, including an updated credit application.
62. If the Customer 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 its directors to sign a guarantee and indemnity.
- Corporations**
63. If the Customer is a corporation, the Customer warrants that all of its directors have signed this agreement and acknowledges that all of its directors may be required to enter into a guarantee and indemnity with the Supplier in relation to the Customer's obligations to the Supplier.
- Trustee capacity**
64. If the Customer is the trustee of a trust (whether disclosed to the Supplier or not), the Customer warrants to the Supplier that:
- (a) the Customer enters into this agreement in both its capacity as trustee and in its personal capacity;
- (b) the Customer has the right to be reasonably indemnified out of trust assets;
- (c) the Customer has the power under the trust deed to sign this agreement; and
- (d) the Customer will not retire as trustee of the trust or appoint any new or additional trustee without advising the Supplier and having the new or additional trustee sign an agreement on substantially the same terms as this agreement.
65. The Customer must give the Supplier a copy of the trust deed upon request.

#### Partnership

66. If the Customer enters into this agreement in its capacity as a partnership, the Customer warrants that all of the partners have signed this agreement and that all of the partners may be required to enter into a guarantee and indemnity with the Supplier in relation to the Customer's obligations to the Supplier.
67. If the Customer 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

68. If the Customer becomes insolvent, to the extent permitted by law, the Customer remains liable under this agreement for payment of all liabilities incurred hereunder. The Customer remains liable under this agreement even if the Supplier receives a dividend or payment as a result of the Customer being insolvent.

#### Security/charges

69. The Customer charges in favour of the Supplier all of its estate and interest in any real property, whether held in its own right or as capacity as trustee, the Customer owns at present and in the future with payment of all monies which are now or in the future become owing to the Supplier whether pursuant to these terms and conditions or otherwise until all such monies are paid in full by the Customer.
70. The Customer charges in favour of the Supplier all of its estate and interest in any personal property, whether held in its own right or as capacity as trustee, the Customer owns at present and in the future with payment of all monies which are now or in the future become owing to the Supplier whether pursuant to these terms and conditions or otherwise until all such monies are paid in full by the Customer.
71. As security for the payment of the amount of its indebtedness to the Supplier from time to time, the Customer irrevocably appoints as its duly constituted attorney the Supplier's company secretary from time to time to execute in the Customer's name and as the Customer'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 Customer may own in any Land Titles Office in any state or territory of Australia, even though the Customer may not have defaulted in carrying out its obligations hereunder upon written notice and demand to the Customer (in the event that there is no default by the Customer in carrying out its obligations hereunder).
72. Where the Customer has previously entered into an agreement with the Supplier by which the Customer has granted a charge, mortgage or other security interest (including a security interest as defined in the PPSA) over or in respect of real or personal property, those charges, mortgages or other security interests and the terms which directly or indirectly create rights, powers or obligations in respect thereto will continue and co-exist with the obligations and security interests created in this agreement and will secure all indebtedness and obligations of the Customer under this agreement. The Supplier may, at its election and upon the provision of written notice, vary the terms of such previous charges, mortgages or other securities to reflect the terms herein.

#### Indemnity

73. The Customer agrees to indemnify the Supplier in respect of all liability, claims, damage, loss, costs and expenses (including collection costs, debt recovery fees, and legal costs on an indemnity basis) that the Supplier may suffer or incur at any time, directly or indirectly, as a result of:
- (a) damage to property or death of, or injury to, any person caused directly or indirectly by the Goods;
- (b) any claim against the Supplier in relation to any incident concerning the Goods or their use, operation, or storage; or
- (c) any default by the Customer in the performance or observance of the Customer's obligations under these terms and conditions.
74. The Customer's liability to indemnify the Supplier will be reduced proportionally to the extent only that:
- (a) any negligent act or omission by the Supplier or a breach of the Supplier's obligations under these terms and conditions has contributed to the liability, claim, damage, loss, cost or expense which is the subject of the indemnity; or
- (b) these terms and conditions make the Supplier specifically liable for any cost or expense or rectifying or repairing any defect in, malfunction of or damage to the Goods.
75. The Customer's liability to indemnify the Supplier is a continuing obligation separate and independent from the Customer's other obligations and survives termination of this agreement or any Order.
76. It is not necessary for the Supplier to incur any expense or make any payment before enforcing its rights of indemnity conferred by these terms and conditions.

#### Costs

77. The Customer must pay for its own legal, accounting and business costs and all costs incurred by the Supplier relating to any default by the Customer under this agreement. The Customer must also pay for all stamp duty and other taxes payable on this agreement (if any).
78. The Customer will pay the Supplier's costs and disbursements incurred in pursuing any recovery action, or any other claim or remedy, against the Customer, including collection costs, debt recovery fees and legal costs on an indemnity basis.
79. Subject to clauses 80 and 81, payments by, or on behalf of, the Customer will be applied by the Supplier as follows:
- (a) Firstly, in payment of any and all collection costs and legal costs in accordance with clauses 44, 54, 73, and 78.
- (b) Secondly, in payment of any interest incurred in accordance with clause 84.
- (c) Thirdly, in payment of the outstanding invoice(s), or part thereof in an order determined by the Supplier in its absolute discretion.
80. To the extent that payments have been allocated to invoices by the Supplier in its business records, the Supplier may, at its sole and unfettered discretion, allocate and/or retrospectively reallocate payments in any manner whatsoever at the Supplier's absolute discretion, including in a manner inconsistent with clause 79 herein.
81. Payments allocated (and/or reallocated) under clause 79 and/or 80 will be treated as though they were allocated (and/or reallocated) in the manner determined by the Supplier on the date of receipt of payment.

#### Taxes and duty

82. The Customer must pay GST on any taxable supply made by the Supplier to the Customer under this agreement. The payment of GST is in addition to any other consideration payable by the Customer for a taxable supply.
83. If as a result of:
- (a) any legislation becoming applicable to the subject matter of this agreement; or
- (b) 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 Customer, then the Customer must pay the Supplier these additional amounts on 48 hours' written demand.

#### Interest rates

84. The interest rate on any outstanding debts is a fixed rate of ten (10) percent per annum, which interest will accrue and be recoverable each day or part thereof that the debt remains outstanding.

#### Subcontracting and assignment

85. The Supplier may engage a subcontractor without the approval of the Customer to perform all or any of its obligations under these terms and conditions.
86. Neither party shall assign its benefits or obligation under these terms and conditions without the written consent of the other (which consent shall not be unreasonably withheld).

#### Intellectual Property

87. The Customer acknowledges that:
- (a) the Supplier IP in existence at the date of this agreement is and will at all times remain the property of the Supplier;
- (b) the Supplier IP created or developed following the date of this agreement vests in the Supplier as soon as those Intellectual Property Rights are created or developed and will at all times remain the property of the Supplier; and
- (c) it has no rights under this agreement or otherwise to use Supplier IP except as set out in this agreement.

#### Waiver

88. A waiver of any provision or breach of this agreement by the Supplier shall only be effective if made by an authorised officer of the Supplier in writing. A waiver of any provision or breach of this agreement by the Customer shall only be effective if made by the Customer's authorised officer in writing. If the Supplier or the Customer elect not to enforce its rights arising as a result of a breach of these terms and conditions, that will not constitute a waiver of any rights relating to any subsequent or other breach.

**Set-off**

89. All payments required to be made by the Customer under this agreement will be made free of any set-off, or counterclaim and without deduction or withholding, unless agreed to otherwise by the Supplier and the Customer in writing or as required by law.
90. 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 Customer by the Supplier.

**Limitation of liability**

91. In relation to the supply of Goods, to the fullest extent permitted by law, the Supplier's liability to the Customer for any loss, damage or injury, whether under contract, in tort, pursuant to statute or otherwise, is limited to:
- (a) the replacement of the Goods or the supply of equivalent Goods;
  - (b) the repair of the Goods;
  - (c) the payment of the cost of replacing the Goods or acquiring equivalent Goods;
  - (d) the payment of the cost of having the Goods repaired.
92. In relation to the supply of Services, to the fullest extent permitted by law, the Supplier's liability to the Customer for any loss, damage or injury, whether under contract, in tort, pursuant to statute or otherwise, is limited to:
- (a) the supply of the Services again; or
  - (b) providing for the cost of having the Services supplied again.
93. The Supplier is not liable for loss of profit, economic or financial loss, consequential loss, loss of opportunity or benefit, loss of a right or any other indirect loss suffered by the Customer as a result of the Goods and/or Services supplied under these terms and conditions.
94. All terms, conditions, warranties, indemnities and statements (whether express, implied, written, oral, collateral, statutory or otherwise) which are not expressly set out in these terms and conditions are hereby expressly excluded and, to the extent they cannot be excluded, the Supplier disclaims all liability in relation to them.

**Liability of parties**

95. If two or more parties are included within the same defined term in these terms and conditions:
- (a) these terms and conditions have separate operation in relation to each of them;
  - (b) a liability or obligation of those persons under these terms and conditions is a joint liability or obligation of all of them and a several liability or obligation of each of them; and
  - (c) a right given to those parties under these terms and conditions is a right given severally to each of them.

**Force majeure**

96. The Supplier is not liable to the Customer for any delay or failure to perform its obligations pursuant to these terms and conditions if such delay or failure to perform is due to force majeure being a circumstance beyond its reasonable control, including strikes, lockouts, fires, floods, storm, riots, war, embargoes, civil commotions, supplier shortages, plant or mechanical breakdown, disease or pandemic, government intervention or regulation, acts of God or any other activity beyond the Supplier's control.

**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 of agreement**

99. The Customer 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 Customer. Subject to clause 100, after fourteen (14) days of receipt of the written notice of the variation(s), the variation(s) will be deemed agreed by the Customer.

100. If the Customer does not agree with the variation(s) proposed by the Supplier, it must notify the Supplier in writing within fourteen (14) days from receipt of the written notice that the variation(s) is/are not agreed to. The Supplier and/or the Customer will then be at liberty to suspend/withdraw credit facilities until such time as agreement can be reached between the parties regarding the proposed variation(s). Clerical errors (such as spelling mistakes or grammatical errors) may be subject to correction by the Supplier without notification.
101. Any proposed variation to these terms and conditions or any Contract by the Customer must be requested in writing. The Supplier may refuse any such request without providing reasons either orally or in writing.
102. Variations requested by the Customer will only be binding upon the Supplier if they are in writing signed by an authorised officer of the Supplier.

**Jurisdiction**

103. The Customer acknowledges and agrees that this agreement will be governed by the laws of Western Australia, and the laws of the Commonwealth of Australia which are in force in Western Australia.
104. The Customer acknowledges and agrees that any Contract between the Supplier and the Customer is formed at the address of the Supplier.
105. The parties to this agreement submit to the non-exclusive jurisdiction of the courts of Western Australia and the relevant federal courts and courts competent to hear appeals from those courts.

**Entire agreement**

106. This agreement (and any documents incorporated by reference herein) constitutes the entire agreement between the parties relating in any way to its subject matter, unless agreed to otherwise by the Supplier and the Customer in writing. 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.
107. Notwithstanding clause 106, in circumstances where there is a pre-existing written credit agreement (**Original Agreement**) between the Customer and the Supplier, these terms and this agreement will constitute a variation of the Original Agreement whereby the terms of the Original Agreement are deleted and replaced with the terms herein, unless the terms of the Original Agreement are otherwise expressly or implicitly preserved by the terms herein in which case they will co-exist with the terms herein, and, to the extent of any inconsistency, these terms will prevail.
108. These terms and conditions shall apply to every Contract between the Supplier and the Customer. Any terms and conditions of the Customer's Order or of any other document deviating from or inconsistent with these terms and conditions are expressly rejected by the Supplier, unless otherwise agreed to by the Supplier and Customer in writing. For the avoidance of doubt, the Customer understands and agrees that these terms and conditions will prevail over, and the Supplier will not be bound by, any terms or conditions (express or implied) added or provided by the Customer, whether in an Order or otherwise, unless otherwise agreed in writing by the Supplier.

**Privacy Act**

109. The Customer agrees to the terms of the Privacy Statement pursuant to the *Privacy Act 1988* contained in this document.