

## LAVISTONE TERMS AND CONDITIONS

### 1. Definitions and Interpretation

#### 1.1 Definitions

In this Agreement, the following definitions apply unless the context requires otherwise:

**Accepted Order** means an Order accepted by the Supplier in accordance with this Agreement, or as otherwise agreed by the Supplier.

**ACL** means Schedule 2 to the Competition and Consumer Act 2010 (Cth).

**Additional Charges** means:

- (a) fees for any preliminary or additional work or services performed at the Customer's request;
- (b) costs incurred by the Supplier in connection with a request for a variation to an Order;
- (c) fees and other charges for work required to be done urgently, including any overtime costs.

**Agreement** means this agreement and any schedules and annexures.

**Business Day** means any day other than a Saturday, Sunday or public holiday in Victoria

**Delivery Address** means the address specified in the Order.

**Customer's Representative** means the Customer's nominated representative specified in the Order who is responsible for communicating with the Supplier in relation to the Order.

**Dispute** means any dispute or difference arising out of or relating to this Agreement, or where agreement between the parties is required by this Agreement and there is absence of agreement after a period of time in accordance with clause 15.

**Force Majeure** means an event outside the reasonable control of a party, including fire, storm, flood, earthquake, explosion, accident, act of the public enemy, war, rebellion, insurrection, sabotage, epidemic, quarantine restriction or labour dispute.

**Goods** means the goods which the Customer has requested and the Supplier has agreed to supply, more particularly described in the Accepted Order and, where relevant, include any related Services described in an Accepted Order.

**GST** has the meaning given by Section 195-1 of the *A New Tax System (Goods and Services Tax) Act 1999*.

**Insolvent** in respect of a party means that one of the following events has occurred:

- (a) the filing of an application for the winding up, whether voluntary or otherwise, or the issuing of a notice summoning a meeting at which it is to be moved a resolution proposing the winding up of the party;
- (b) the appointment of a receiver, receiver and manager, administrator, liquidator or provisional liquidator with respect to that party or any of its assets;
- (c) the assignment by that party in favour of, or composition or arrangement or entering into of a scheme of arrangement (otherwise than for the purposes solely of corporate reconstruction) with its creditors or any class of its creditors;
- (d) a partnership, proposes to dissolve or has been dissolved other than for the purposes of a transfer of business pursuant to a merger or acquisition;

the appointment of a trustee in bankruptcy of a party.

**Intellectual Property Rights** means current and future copyright, current and future trade mark, current and future design, current and future patent and circuit layout rights, rights in respect of trade secrets and other confidential information.

**Interest Rate** means the rate which is 4% above the default rate under the Penalty Interest Rates Act Vic.

**Loss** has the meaning in clause 16(a)(iv)

**Order** means an order tendered by the Customer to the Supplier whereby the Customer requests the supply of Goods to the Customer in the form to which these conditions are attached unless otherwise agreed.

**PPSA** means the *Personal Properties Securities Act 2010* (Cth).

**Price** means the price at which the Supplier agrees to supply the Goods, being the price described in the Accepted Order as varied by the Supplier from time to time under this Agreement.

**Quote** means an estimate given to the Customer by the Supplier which has been accepted before it has lapsed or been withdrawn or replaced.

**Services** means any services associated with the supply of Goods which the Supplier agrees to provide pursuant to an Accepted Order.

**Supply** means the supply of Goods and/or Services described in an Accepted Order or otherwise agreed to be supplied under the terms of this Agreement.

**Supply Requirements** means the requirements for a Supply as set out in the relevant Order.

**Tax Invoice** has the meaning given by Section 195-1 of the *A New Tax System (Goods and Services Tax) Act 1999*.

**Taxable Supply** has the meaning given by Section 195-1 of the *A New Tax System (Goods and Services Tax) Act 1999*.

#### 1.2

#### Interpretation

In this Agreement, the following rules apply unless the context requires otherwise:

- (a) headings are for convenience only and do not affect interpretation;
- (b) the singular includes the plural, and the converse also applies;
- (c) a gender includes all genders;
- (d) if a word or phrase is defined, its other grammatical forms have a corresponding meaning;
- (e) a reference to a person includes a corporation, trust, partnership, unincorporated body or other entity, whether or not it comprises a separate legal entity;
- (f) a reference to a clause, schedule or annexure is a reference to a clause of, or schedule or annexure to this Agreement;
- (g) a reference to an agreement or document (including a reference to this Agreement) is to the agreement or document as amended, supplemented, novated or replaced, except to the extent prohibited by this Agreement or that other agreement or document, and includes the recitals, and schedules and annexures to that agreement or document;
- (h) a reference to writing includes any method of representing or reproducing words, figures, drawings or symbols in a visible and tangible form;
- (i) a reference to a party to this Agreement or another agreement or document includes the party's successors, permitted substitutes and permitted assigns (and, where applicable, the party's legal personal representatives);
- (j) a reference to legislation or to a provision of legislation includes a modification or re-enactment of it, a legislative provision substituted for it and a regulation or statutory instrument issued under it;
- (k) a reference to conduct includes an omission, statement or undertaking, whether or not in writing;
- (l) a reference to dollars and \$ is to Australian currency;
- (m) a reference to an agreement includes any undertaking, deed, agreement and legally

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enforceable arrangement, whether or not in writing, and a reference to a document includes an agreement (as so defined) in writing and any certificate, notice, instrument and document of any kind;

- (n) all references to time are to Melbourne time;
- (o) a month means a calendar month;
- (p) a reference to year is a reference to each successive period of twelve (12) months, commencing on the Commencement Date, provided that the last Year will be taken to expire on the expiration of the Term.

### 2. Agreement to Supply

The Supplier agrees to supply and the Customer agrees to purchase the Goods and, where applicable, Services, subject to and in accordance with the terms and conditions of this Agreement.

### 3. Orders for Supply

- (a) Every request for the provision of Goods or Services must first be submitted by the Customer in the form of an Order unless the parties otherwise agree in writing that the supply of Goods or Services in another way;
- (b) In order to comprise a valid Order, it must clearly identify the Goods and Services the Customer requests and, where a Quote has been provided, the details of that Quote.
- (c) The Customer is deemed to have accepted these terms and conditions and the most recent Quote of the Supplier by submitting an Order.
- (d) If the Supplier agrees to Supply all or any part of the Goods or Services requested in the Order, it will accept the Customer's request by signing the Order or otherwise communicating in writing that the Order is accepted. Once the Supplier communicates its acceptance of the Order, the Order becomes an Accepted Order. The Supplier must make best endeavours to advise the Customer of the anticipated date of Supply in the Accepted Order.
- (e) The Supplier may in its absolute discretion refuse to provide Goods or Services where:
  - (i) Goods are unavailable for any reason whatsoever;
  - (ii) the Customer's credit limit cannot be agreed upon or has been exceeded; or
  - (iii) payment for Goods or Services previously provided to the Customer or any related corporation of the Customer or to any other party who is, in the reasonable opinion of the Supplier, associated with the Customer, has not been received by the Supplier.
- (f) An Order may not be cancelled without the prior written consent of the Supplier. The Customer acknowledges that the Supplier may incur costs in making preparations for filling the Order, and the Customer indemnifies the Supplier against any Losses incurred by the Supplier as a result of the purported cancellation or failure to proceed with an Order once accepted by the Supplier including, but not limited to, loss of profit from other orders foregone as a result of the scheduling of the Order.
- (g) Where the Order has been accepted in part or amended by the Supplier, the amended Order may be accepted by the Customer by signing or confirming its agreement to the Order as amended by the Supplier, in which case the amended Order will be deemed to be the Accepted Order.

- (h) The Supplier is not under any obligation to agree to accept any Order tendered by the Customer.
- (i) The Customer may request that its Order be varied by providing a request in writing to the Supplier. A request for a variation is not effective until agreed to in writing by the Supplier.
- (j) Where the Order is varied at the request of the Customer, the Customer acknowledges and agrees that it must pay any Additional Charge notified by the Supplier in connection with the variation, which will be in accordance with the Supplier's then-current charge rates. The Supplier may issue revised Quote in respect of the requested variation, which will supersede the original Quote and Accepted Order. If the revised Quote only specifies additional goods or services, the Quote for that additional work is taken to be in addition to the latest Quote for the Goods or Services or both.
- (k) The Supplier has an automatic extension of time for the provision of the Goods or Services equal to the delay caused by the variation.

### 3.2 Manufacture

Where the Customer requires the Supplier to manufacture any materials, then each Order must contain:

- (a) a detailed specification of the Goods to be manufactured;
- (b) details of any special requirements; and
- (c) desired date for delivery of the manufactured Goods, which will not be less than 2 weeks from the date the order is placed.

### 3.3

Where the Supplier receives such an Order, it will advise the Customer the Price for the Goods, and the Customer must advise within 5 Business Days whether the Order as varied by the Supplier is accepted.

## 4.

### Goods

### 4.1

#### Delivery Address and Packaging

- (a) The Supplier shall, subject to receipt of payment of the Price and any other moneys owing to the Supplier and satisfaction of any conditions stated in the Accepted Order, deliver the Goods specified in the Accepted Order to the Delivery Address together with any specific packaging, delivery, labelling and identification requirements set out in the Supply Requirements at the Customer's cost which must be paid at the time payment is due under the terms of the Accepted Order.
- (b) The Supplier must pack the Goods in suitable packaging as reasonably required to reach the Delivery Address in substantially their intended condition.

### 4.2

#### Acceptance of, Risk in and Title to Goods

- (a) Risk of loss or damage to the Goods passes to the Customer on delivery and to the fullest extent permitted by law, the Supplier disclaims and excludes any responsibility for the condition of the Goods upon delivery to the Delivery Address or liability for Losses incurred in connection with the Goods.
- (b) If the Customer fails to advise the Supplier in writing of any fault in Goods or failure of Goods to accord with the Accepted Order within 48 hours of delivery, the Customer is deemed to have accepted the Goods in their condition and to have accepted that the Goods are not faulty and accord with the Accepted Order. Nothing in this paragraph affects the Customer's rights for any alleged failure of a guarantee under the Australian Consumer Law.



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- (c) Property and title in Goods supplied to the Customer under these conditions do not pass to the Customer until all money (including money owing in respect of other transactions between the Supplier and the Customer) due and payable to the Supplier by the Customer have been fully paid.
- (d) If any Goods are re-taken by the Supplier, the risk of loss or damage to the Goods passes back to the Supplier upon removal from the Delivery Address.
- (e) Where Goods are to be collected by the Customer, risk of loss or damage to the Goods passes to the Customer at time specified for pick up. For the avoidance of doubt, if the specified pick up time is 4.00pm on Monday, then risk of loss or damage to the Goods passes to the Customer at 4.00pm Monday.

### 4.3 Return of Goods

- (a) To the fullest extent permitted by law:
  - (i) the Supplier is not obliged to provide any refund, replacement or compensation to the Customer in respect of Goods or Services supplied to the Customer;
  - (ii) the Supplier may in its discretion elect to resupply alternative Goods to fill the Accepted Order;
  - (iii) in no event will Goods will be accepted for return and credit after thirty (30) days from the date delivery is made to the Delivery Address unless the return or a claim is made under the ACL, in which case the Goods must be returned within a reasonable time;
- (b) If the Supplier in its sole discretion agrees to accept the return of any Goods:
  - (i) the Goods must be unaltered and in an "as new" and saleable condition free of any damage other than damage for which the Supplier is responsible;
  - (ii) the Supplier may deduct from any credit or refund any transport or restocking fee or other out of pocket costs incurred by the Supplier;
- (c) All returned Products and items, where permitted by Lavistone, must be delivered to Lavistone within 14 days of the delivery date, and must be in an unsoiled, undamaged and the same condition as provided by Lavistone and capable of resale, and where delivered in packaging, must be returned in or together with its original packaging undamaged;
- (d) At Lavistone's absolute discretion, should Lavistone accept the return of the Product, the Customer must pay to Lavistone a 15% handling cost of the value of the quantity returned (based on its original price) which will be charged to the invoice before any refund is issued; and

the Customer will be responsible for the cost of and for effecting the delivery to the Supplier of any Goods returned under this clause.

### 5.1 Payment Price

- (a) The Accepted Order shall detail the Price for the Goods or Services requested, in accordance with any Quote provided by the Supplier or where no Quote is obtained, as agreed between the Supplier and Customer and described in the Accepted Order.
- (b) In addition to the Price described in the Accepted Order, the Customer must also pay to the

Supplier all Additional Charges and GST at the same time as payment for the Goods is due to be made.

### 5.2 Invoicing

- (a) The Supplier may in its absolute discretion, issue an invoice to the Customer in any one or more of the following ways:
  - (i) prior to commencing the provision of the Goods or Services, for an amount equal to the Price stated in the Accepted Order and Additional Charges where the Supplier has not previously carried out work for the Customer or where the Supplier chooses to do so;
  - (ii) where the Goods or Services have a likely lead time of more than a month or where deemed appropriate by the Supplier, at the end of each week before the Order is completed, the Supplier may issue invoices for a proportion or the whole of the amount of the Price stated in the Accepted Order and require that proportion of the Price be paid in advance of any further Goods or Services being provided; or
  - (iii) upon completion of the provision of the Goods or Services or any time thereafter, for an amount outstanding of the Price and any Additional Charges.
- (b) If an Accepted Order is suspended for more than thirty (30) days at the request of the Customer or as a result of something for which the Customer is responsible, the Supplier may issue an invoice for a particular sum (to be specified by the Supplier) for the work already done and for other costs incurred by the Supplier (such as Additional Charges).

### 5.3 Payment

- (a) Unless otherwise agreed with the Supplier, if Supplier has not approved a credit facility for Applicant or an approved credit facility is withdrawn or cancelled, then, in the Supplier's absolute discretion, the Applicant must pay the Accepted Order in full, before any goods are delivered. For the avoidance of doubt, where payment is required in advance, the Supplier is not required to deliver the Goods or provide the Services unless and until the invoice in connection with those Goods or Services is paid.
- (b) The Supplier may withhold the provision of any Goods or Services where an invoice is due and not paid.
- (c) If the Customer has a bona fide dispute as to an amount in a Tax Invoice, then within three (3) Business Days of the date of the Tax Invoice, the Customer must:
  - (i) pay to the Supplier the undisputed amount of that Tax Invoice (if any); and
  - (ii) notify the Supplier of the disputed amount;and in that instance, clause 13 will be applied to resolve the dispute.

### 5.4 Method of Payment

Payment for each Order must be made by the Customer by direct credit of the Supplier's account nominated by the Supplier or such other form of payment as agreed by the Supplier. Unless otherwise stated, all payment shall be by way of cleared funds in Australian Dollars.

### 5.5 Interest



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Interest is payable by the Customer to the Supplier on demand at the Interest Rate on amounts not paid within the time specified in this Agreement.

### 5.6 Additional Charges

Where required by the Supplier the Customer must pay all Additional Charges incurred by or payable to the Supplier in connection with the supply of Goods or Services, including as a result of reliance on inadequate or incorrect information or material provided by the Customer or information or material supplied later than required by the Supplier in order for it to provide the Goods or Services within the specified time frame (if any).

### 5.7 GST

- (a) Except where it is expressly stated otherwise, the amount payable by a party for a Taxable Supply made by the other party under this Agreement is expressed as a GST exclusive amount.
- (b) Subject to clause 5.7(c) below, the party liable to make a payment to which clause 5.7(a) relates will also pay the amount of any GST payable by the other party in respect of the Taxable Supply.
- (c) A party to which a Taxable Supply is made is not required to pay the amount referred to in clause 5.7(b) until given a Tax Invoice for the Taxable Supply.

### 6. Non-Payment and Security Damages

The Customer must pay to the Supplier all Losses incurred by the Supplier as a result of the Customer's failure to pay to the Supplier all sums outstanding from the Customer to the Supplier (including, without limiting the generality of the obligation set out in this clause, any debt collection and legal costs (on a full indemnity basis) and interest in accordance with clause 5.5)).

### 6.2 Retention of Title

- (a) Until the Customer has paid all amounts outstanding in relation to the Goods and any other goods supplied by the Supplier to the Customer, title and property in the Goods shall not pass from the Supplier to the Customer (although this clause does not prevent the risk in the Goods from passing to the Customer).
- (b) If the Goods are in the Customer's possession, the Customer shall be deemed to be holding the Goods for the benefit of and as trustee for the Supplier and must store the Goods safely, securely and so that they are clearly identifiable as the property of the Supplier.
- (c) The Supplier may call for and recover possession of the Goods (for which purposes the Supplier's employees or agents may enter the Customer's premises and take possession of the Goods without liability to the Customer) and the Customer must deliver the Goods to the Supplier if so directed by the Supplier.
- (d) The Customer must not allow any person to have or acquire any security interest in the Goods.
- (e) The Customer may, in the ordinary course of the Customer's business, sell the Goods to a third party on the basis that:
  - (i) the proceeds of sale to the third party shall be held by the Customer as trustee for the Supplier and the Customer shall account to the Supplier for those sums (which shall be applied towards the amounts owing to the Supplier by the Customer); and
  - (ii) if the Supplier requires, the Customer shall assign to the Supplier the Customer's claim against the third party and shall

execute all documents necessary to effect that assignment.

### 6.3 Security Interest

Where Goods are supplied by the Supplier to the Customer without payment in full of all moneys payable in respect of the Goods and any Services provided by the Supplier in respect of those Goods, the Customer acknowledges that the Supplier has a right to register and perfect a personal property security interest.

To secure the Customer's obligation to pay for Goods supplied by the Supplier under this Agreement, the Customer grants a security interest in the Goods and, to the extent that the Goods are damaged or insufficient to satisfy the amounts owing to the Supplier, all assets and undertaking of the Customer ("Collateral") (including without limitation any book debt of the Customer in relation to an on-sale of Collateral or sale proceeds received by the Customer from an on-sale of Collateral) in favour of the Supplier.

### 6.4 Registration of Security Interest

The Supplier may register under the PPSA one (1) or more financing statements and/or one (1) or more financing change statements in relation to the interest of the Supplier in the Collateral at any time without notice to or consent of the Customer.

### 6.5 Perfection of Security

The Customer acknowledges and consents to the Supplier registering and perfecting a security interest under the PPSA, and if at any time the Supplier so requires, within seven (7) days of notice from the Supplier, the Customer must:

- (a) execute in favour of the Supplier such additional Collateral security documents over any Collateral as the Supplier may require; and
- (b) take any steps directed by the Supplier to perfect the security interest now created or any such Collateral security over any Collateral supplied under this Agreement in accordance with the PPSA.

### 6.6 Possession/Control of Collateral for PPSA Purposes

Without limiting clause 6.5, if at any time the Supplier so requests and to the extent requested, within two (2) days of such request, the Customer must take all steps to:

- (a) cause this Agreement to be perfected against any Goods comprised in the Collateral;
- (b) cause the Supplier to have possession of Collateral; or
- (c) cause the Supplier to have control of Collateral.

### 6.7 Attorney

The Customer hereby irrevocably appoints the Supplier to be its attorney to do all acts and things necessary to ensure the retention of title to goods including the registration of any security interest in favour of the Supplier with respect to the Goods under applicable law.

### 6.8 Insurance

- (a) The Customer must insure the Collateral including the Goods:
  - (i) with the Supplier's interest as security holder endorsed on the policy;
  - (ii) for its full replacement value.
- (b) If requested by the Supplier, the Customer must deliver to the Supplier a certificate of currency evidencing the insurance required pursuant to clause 6.7(a) within two (2) days.
- (c) The Customer must not do or prevent anything that might render the insurance void or unenforceable or which might prejudice a claim under the insurance policy.
- (d) Any insurance payment relating to Collateral must be paid to the Supplier and if in the first instance is paid to the Customer, the Customer agrees it will hold the proceeds of any such insurance payment on trust for and as agent for the Supplier immediately when they are



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received and must immediately pay the said proceeds to the Supplier or such part required to pay all monies due in respect of Collateral, the subject of the insurance payment.

### 6.9 Dealings Restricted

Except with the Supplier's prior written consent, the Customer must not:

- (a) dispose of Collateral other than in the ordinary course of its business pursuant to this Agreement, however the Supplier may require that proceeds of a sale to be remitted to the Supplier;
- (b) create or allow any Encumbrance over any of the Collateral in favour of a third party;
- (c) allow Collateral to become an accession to or co-mingle with other goods;
- (d) relocate or permit the relocation of Collateral outside the jurisdiction specified in this Agreement;
- (e) permit any transaction which would give rise to a PPSA security interest having priority over the Supplier's interest in the Collateral.

### 6.10 Acknowledgement

The Customer acknowledges and agrees:

- (a) the Supplier is entitled to register and perfect at its cost a Purchase Money Security Interest (as defined in the PPSA) or any other form of security interest permitted under the PPSA in respect of the Collateral on the Personal Property Security Register (created under the PPSA) at any time after an Order is accepted;
- (b) the Customer waives its right to provision of a verification statement under the PPSA in relation to registration events concerning Collateral;
- (c) registration may cover multiple security interests or multiple security agreements between the Supplier and the Customer;
- (d) the Supplier's security interest in the Goods supplied under this Agreement in respect of which moneys owing under this Agreement are unpaid will attach to the Collateral from the time of delivery of Collateral to the Customer;
- (e) the Supplier has no obligation to remove its registration against Collateral supplied from time to time under this Agreement to the Customer unless:
  - (i) this Agreement has terminated and no moneys are owed to the Supplier in respect of Collateral in which event the Supplier will, if requested by the Customer or required under the PPSA, at its cost remove its registered financing statement;
  - (ii) all moneys owed under this Agreement in respect of Goods forming part of the Collateral are paid to the Supplier and the Customer requests the removal of the security interest in respect of same in which event the Supplier will at its cost register a financing change statement or other required document to remove its security interest over the said Goods forming part of the Collateral.

### 6.11 General Lien

The Supplier shall, in respect of all sums owed by the Customer to the Supplier, have a general lien on all property of the Customer in the Supplier's possession and may, after fourteen (14) days' notice to the Customer, sell that property and apply the proceeds (net of any sale costs) in satisfaction of all or any part of the sums owed. In the event that any of the Customer's property held by the Supplier enjoys copyright protection

in favour of the Customer, the Customer hereby grants to the Supplier an irrevocable licence to exercise the rights conferred on the Supplier under this clause.

### 7. Release and Indemnity

7.1 The Customer indemnifies the Supplier and its representatives and agents and holds them forever harmless against all claims, losses, damage, expense, liability and costs (including legal costs on a solicitor and own client basis) incurred arising out of or in connection with:

- (a) any breach by the Customer or any of its servants or agents of any obligation under this Agreement;
- (b) the use of any of the Goods;
- (c) the exercise, non-exercise, attempted exercise or delayed exercise of any power of the Supplier under the PPSA; and
- (d) any other matter in respect of this Agreement or any of the Collateral.

7.2 The Customer releases the Supplier and all of its representatives, servants or agents against and in relation to the use or application of any of the Goods or other products supplied by the Supplier.

### 8. General Supply Matters

#### 8.1 Property Left with Supplier

If the Customer leaves property (including goods or Orders which are not collected by Customer) in the Supplier's possession without specific instructions as to what is to be done with it, the Supplier may, three (3) months after gaining possession of the property, on the first day on which the goods or Orders were to be collected, dispose of or sell the property and retain any proceeds of sale as compensation for holding and handling the property.

#### 8.2 Responsibility to Insure

The Supplier has no obligation to insure any property of the Customer in the Supplier's possession. The Customer must pay the cost of any insurance arranged by the Supplier at the request of the Customer.

#### 8.3 Intellectual Property Rights

All intellectual property rights in the Goods and any works created by the Supplier in connection with the Supply of Goods or Services are, vest in and remain the property of the Supplier.

#### 8.4 Confidential Information

The Customer must keep confidential all ideas, know how, intellectual property, techniques and concepts of the Supplier which have been disclosed to the Customer ("**Confidential Information**"). The Customer undertakes and agrees not to:

- (a) use any part of the Confidential Information for any purpose other than that authorised by the Supplier in writing; and
- (b) disclose the Confidential Information to any person other than those persons who are employed by the Customer and necessarily require access to the Confidential Information for the purposes of using the Goods.

### 9. Liability for Errors

#### 9.1 Samples

If the Supplier submits to the Customer a sample of the Goods, the Supplier will not be responsible for any errors in the Goods which appeared in the sample and which were not corrected by the Customer before the Supplier accepted the Order or the Customer accepted the amended Order.

#### 9.2 Customer's Property

The Supplier will not be liable for the damage, loss or destruction of any property (including Goods which are not collected by Customer) of the Customer in the Supplier's possession.

### 10. Acknowledgements

- (a) The Customer acknowledges that, to the fullest extent permitted by law, the Supplier does not, either expressly or impliedly, warrant or

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- guarantee or give any undertaking as to the completeness or accuracy of any document, information, data or statement given or made to the Customer. The Customer is responsible for forming its own independent judgments, interpretations, conclusions and deductions about any information or data supplied by the Supplier.
- (b) Despite any other provision of this Agreement or other representation or statement to the contrary, any forecasts of volumes provided by the Supplier at any time are provided as estimates only and will not be binding on either party.
11. **Subcontracting**
- (a) The Supplier may subcontract, license, franchise or otherwise arrange for another person to perform any part of this Agreement or to discharge any of its obligations under any part of this Agreement without the prior written consent of the Customer.
- (b) The Customer further acknowledges the Supplier may use individual independent contractors as a normal part of its workforce.
12. **Termination**
- 12.1 **By Supplier Without Cause**
- The Supplier may terminate this Agreement, without cause upon ten (10) Business Days' notice served on the Customer in which case any moneys received for Goods not delivered shall be refunded other than arising as a result of the Customer's default.
- 12.2 **Termination by Supplier**
- The Supplier may terminate this Agreement in whole or at the Supplier's discretion, in part
- (a) without cause by giving 10 Business Days' notice; or
- (b) by giving the Customer written notice if:
- (i) the Customer breaches a provision of this Agreement and:
- (A) the breach is incapable of remedy; or
- (ii) the breach is capable of remedy and the Customer fails to remedy that breach within seven (7) days of receiving notice from the non-breaching party requiring it to do so; or
- (iii) the Customer becomes insolvent.
- 12.3 **Consequences**
- In addition to the rights above, where the Customer commits an event of default, except where payment in full has been received by the Supplier, the Supplier may:
- (a) terminate any or all Orders and credit arrangements (if any) with the Customer;
- (b) refuse to deliver Goods or provide further Services;
- (c) repossess and re-sell any Goods delivered to the Customer, the payment for which has not been received; or
- (d) retain (where applicable) all money paid by the Customer on account of Goods or Services or otherwise.
- 12.4 **Payments on Termination**
- Upon termination or expiry of this Agreement for any reason, the Customer agrees to immediately pay the Supplier all amounts that are due and owing including in respect of all Goods supplied to the Customer and all Goods manufactured pursuant to an Accepted Order which have not been supplied to the Customer.
- 12.5 **Effect of Early Termination**
- Termination does not affect any rights or obligations of the Customer to the Supplier which have accrued before termination.
13. **Exclusions and limitation of liability**
- (a) The Customer expressly agrees that use of the Goods and Services is at the Customer's risk. To the full extent allowed by law, the Supplier's liability for breach of any term implied into these terms of trade by any law is excluded.
- (b) All information, specifications and samples provided by the Supplier in relation to the Goods or Services are approximations only and, subject to any guarantees under the ACL, small deviations or slight variations from them which do not substantially affect the Customer's use of the Goods or Services will not entitle the Customer to reject the Goods upon delivery, or to make any claim in respect of them.
- (c) The Supplier gives no warranty in relation to the Services provided or supplied. Under no circumstances is the Supplier or any of its suppliers liable or responsible in any way to the Customer or any other person for any loss, damages, costs, expenses or other claims (including consequential damages and loss of profits or loss of revenues) as a result, direct or indirect of any defect, deficiency or discrepancy in the Goods or Services. This includes their form, content and timeliness of deliveries, failure of performance, error, omission or defect.
- (d) Any advice, recommendation, information, assistance or service given by the Supplier in relation to Goods or Services or both, is given in good faith and is believed to be accurate, appropriate and reliable at the time it is given. It is provided without any warranty or accuracy, appropriateness or reliability. The Supplier does not accept any liability or responsibility for any Loss suffered as a result of the Customer's reliance on such advice, recommendation, information, assistance or service.
- (e) To the fullest extent permissible at law, the Supplier is not liable for any direct, indirect, punitive, incidental, special, consequential damages or any damages whatsoever including, without limitation, damages for loss of use, data or profits, arising out of or in any way connected with the provision of or failure to provide Goods or Services, or otherwise arising out of the provision of Goods or the Services, whether based on terms of trade, negligence, strict liability or otherwise, even if the Supplier has been advised of the possibility of damages.
- (f) Where liability for breach of any guarantee implied or imposed by the ACL can be limited, the Supplier's liability (if any) arising from any breach of those guarantees is limited with respect to the supply of Goods, to the replacement or repair of the Goods or the costs of resupply or replacement of the Goods or with respect to Services to the supply of Services again or cost of re-supplying the Services again.
- (g) The Seller is not responsible to the Buyer or any person claiming through the Buyer for any loss or damage to Goods in transit caused by any event of any kind or by any person (whether or not the Seller is legally responsible for the actions of that person).
- 13.2 **Limitations on Warranties**
- (a) The Supplier is not aware of any particular hazard relating to the transportation of the Goods, however the Customer acknowledges that the Supplier has no control over the use or manner of application of the Goods and the

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- Customer both on its own behalf and on behalf of all of its servants and agents releases the Supplier and all of its servants and agents and holds them forever harmless in connection with any loss or damage sustained in connection with the Goods, including in connection with inhalation of particles, (including crystalline silica particles which may be found in or result from stone cutting, grinding, drilling or otherwise disturbing the material), without adequate and appropriate safety measures. The Customer expressly acknowledges that such inhalation including in connection with working with stone, is or may pose dangers to human health and may cause serious reversible and irreversible diseases such as lung disease and lung cancer.
- (b) The Customer is responsible for taking all precautions as would be reasonably required in using, dealing with or working on the Goods or any other products supplied by the Supplier after having been made aware of potential dangers inherent in or associated with the Goods or other products supplied by the Supplier. The Supplier recommends that, at a minimum, fabrication of the stones should be in accordance with the Lavistone Fabrication Guideline, which is available to the Customer on request.
14. **Indemnity**
- (a) The Customer indemnifies and keeps indemnified the Supplier, its servants and agents in respect of any claim or demand made or action commenced by any person (including, but not limited to, the Customer) against the Supplier or, for which the Supplier is liable, in connection with any Loss arising from or incidental to the provision of Goods or Services, any Order or the subject matter of these terms of trade including.
- (b) This includes, but is not limited to, any legal costs incurred by the Supplier in relation to meeting any claim or demand or any party/party legal costs for which the Supplier is liable in connection with any such claim or demand.
- (c) This provision remains in force after the termination of these terms of trade.
15. **Disputes**
- 15.1 **Dispute Resolution**  
A party must not start arbitration or court proceedings (except proceedings seeking injunctive, declaratory or interlocutory relief) in respect of a dispute arising out of this Agreement ("**Dispute**") unless it has complied with this clause 15.
- 15.2 **Notification of Dispute**  
A party claiming that a Dispute has arisen must notify the other party in writing, giving details of the Dispute.
- 15.3 **Resolution of Dispute**  
During the period of twenty-one (21) days after a notice is given under clause 15.2 (or such longer period agreed in writing by the parties to the Dispute) ("**Initial Period**") each party to the Dispute ("**Disputant**") must use its best efforts to resolve the Dispute.
- 15.4 **Mediation**  
If the Disputants are unable to resolve the Dispute within the period described in clause 15.3, each Disputant agrees that the Dispute must be referred for mediation, at the request of any Disputant, to:
- (a) a mediator agreed on by the Disputants; or
- (b) if the Disputants are unable to agree on a mediator within seven (7) days after the end of the Initial Period, a mediator nominated by the then current President of the Law Institute of Victoria or the President's nominee.
- 15.5 **Role of Mediator**  
The role of any mediator is to assist in negotiating a resolution of the Dispute. A mediator may not make a decision that is binding on a Disputant unless that Disputant has so agreed in writing.
- 15.6 **Confidentiality**  
Any information or documents disclosed by a Disputant under this clause 15:
- (a) must be kept confidential; and
- (b) may not be used except to attempt to resolve the Dispute.
- 15.7 **Costs**  
Each Disputant must bear its own costs of complying with this clause 15 and the Disputants must bear equally the costs of any mediator engaged.
- 15.8 **Performance**  
Unless prevented by the nature of the Dispute, the Disputants will continue to perform this Agreement while attempts are made to resolve the Dispute.
16. **Guarantee**
- (a) The Guarantor, in consideration of the Supplier having entered into this Agreement at the Guarantor's request:
- (i) guarantees that the Customer will perform all its obligations under this Agreement;
- (ii) guarantee that the Customer will comply with all relevant laws and regulations when fabricating stones; must pay on demand any amount which the Supplier is entitled to recover from the Customer; and
- (iii) indemnifies the Supplier against all losses, costs, damages and legal expenses (on a full indemnity basis) ("**Loss**") resulting from the Supplier having entered into this Agreement whether from the Customer's failure to perform its obligations under this Agreement or being or becoming unenforceable against the Customer.
- (b) The liability of the Guarantor will not be affected by:
- (i) the Supplier granting to the Customer or a Guarantor time or any other indulgence, or agreeing not to sue the Customer or another Guarantor;
- (ii) failure by any Guarantor to sign this Agreement;
- (iii) assignment or variation of this Agreement.
- (c) The Guarantor agrees that:
- (i) the Supplier may retain all money received including dividends from the Customer's bankrupt estate, and need allow the Guarantor a reduction in its liability under this guarantee only to the extent of the amount received;
- (ii) the Guarantor must not seek to recover money from the Customer to reimburse the Guarantor for payments made to the Supplier until the Supplier has been paid in full;
- (iii) the Guarantor must not prove in the bankruptcy or winding up of the Customer for any amount which the Supplier has demanded from the Guarantor; and
- (iv) the Guarantor must pay the Supplier all money which the Supplier refunds to the Customer's liquidator or trustee in bankruptcy as



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- preferential payments received from the Customer.
- (d) If any of the Customer's obligations are unenforceable against the Customer, then this clause is to operate as a separate indemnity and the Guarantor indemnifies the Supplier against all Loss resulting from the Supplier's inability to enforce performance of those obligations. The Guarantor must pay the Supplier upon demand the amount of the Loss resulting from the unenforceability.
- (e) If there is more than one (1) Guarantor, this guarantee binds them separately, together and in any combination.
17. **Notices**
- 17.1 **Requirements**  
If either party gives or is required to give a notice to the other party under this Agreement, it must be:
- (a) in writing; and
- (b) directed to the recipient's address specified in the Parties section on page 1 of this Agreement or as advised from time to time; or
- (c) hand delivered or sent by pre-paid post to that address; or
- (d) sent by facsimile to the contact number in the Reference Schedule.
- 17.2 **When notice is taken as received**  
A notice given in accordance with clause 17.1 is taken to be received:
- (a) if hand delivered, upon delivery during the hours of 9:00am to 5:00pm on a Business Day, otherwise it will be deemed to have been delivered on the next Business Day; or
- (b) if sent by pre-paid post, three (3) days after the date of posting for local or interstate mail and seven (7) days after the date of posting for international mail; or
- (c) if sent by facsimile, when the sender's facsimile system generates a message confirming successful transmission of the total number of pages of the notice but where that time is after 5:00pm in the place of receipt or on a day that is not a Business Day, the notice will be deemed to have been given at 9:00am on the next Business Day.
18. **General**
- 18.1 **Assignment**
- (a) The Customer must not assign or otherwise transfer this Agreement or any part of it to any other person without the prior written consent of the Supplier.
- (b) The Supplier may assign its rights and obligations under this Agreement to any person at any time by giving written notice to the Customer.
- 18.2 **Entire Agreement**  
This Agreement, including its schedules and annexures:
- (a) constitutes the entire agreement between the parties as to its subject matter; and
- (b) in relation to that subject matter, supersedes any prior understanding or agreement between the parties.
- 18.3 **Governing Law**  
This Agreement is governed by the laws of the State of Victoria. The parties submit to the non-exclusive jurisdiction of the courts of Victoria.
- 18.4 **Amendments to Agreement**  
No amendment of this Agreement will be of any force or effect unless in writing signed by each party.
- 18.5 **Waiver**  
The failure of a party to require performance of any obligation under this Agreement is not a waiver of that party's right:
- (a) to insist on performance of, or claim damages for breach of, that obligation unless that party acknowledges in writing that the failure is a waiver; and
- (b) at any other time to require performance of that or any other obligation under the Agreement.
- 18.6 **Severability**  
If any provision of this Agreement is held invalid, unenforceable or illegal for any reason, that provision will be deleted and the remaining provisions of the Agreement will remain in full force.
- 18.7 **Survival**  
Any obligations in this Agreement which, by their nature are continuing, will survive termination or expiration of this Agreement.
- 18.8 **Force Majeure**
- (a) If an event of Force Majeure occurs:
- (i) the obligations of a party under this Agreement other than an obligation to pay amounts owing under this Agreement will be suspended to the extent that it is wholly or partially precluded from complying with its obligations under this Agreement by Force Majeure; and
- (ii) a party affected by Force Majeure must notify the other party as soon as practicable of the Force Majeure and the extent to which that party is unable to comply with its obligations.
- (b) If a failure or delay in performance exceeds ninety (90) days, either party may immediately terminate this Agreement by written notice to the other party.
- 18.9 **Further Assurances**  
Each party must do anything necessary (including executing agreements and documents) to give full effect to this Agreement and the transactions contemplated by it.
- 18.10 **Relationship of Parties**  
The parties are independent contractors. Neither party may act as or represent itself to be the agent or partner of the other. Neither party may bind or purport to bind the other.
- 18.11 **Time of the Essence**  
Time is of the essence in relation to all of the Customer's obligations set out in this Agreement.