

**INTRODUCTION**

By submitting a credit application or ordering Goods from Shermac, the Customer agrees that the following terms and conditions of sale shall apply to the supply. These terms and conditions replace any previous terms and conditions of sale and create a security interest in favour of Shermac for the purposes of the PPSA. Any supply of Goods by Shermac to the Customer made after the date of acceptance of these terms and condition is a supply pursuant to the Contract as defined and any such supply does not give rise to a new or separate agreement.

**DEFINITIONS**

In these terms and conditions (unless a contrary intention is stated):

- (a) **"Agreement"** means these terms and conditions of trade and includes any schedule or annexure to it;
- (b) **"Consumer"** means a person who is a consumer for the purposes of Australian consumer law;
- (c) **"Costs"** means the costs payable by the Customer for Goods as specified in clause 1.5 of this Agreement;
- (d) **"Customer"** means a person whose order for the purchase of Goods is accepted by Shermac;
- (e) **"Goods"** means any goods and services ordered by the Customer from Shermac and accepted to be sold to the Customer by Shermac;
- (f) **"Force Majeure Event"** means any event outside the reasonable control of Shermac including acts of God, war, riots, strikes, lock outs, trade disputes, break downs, mechanical failures, interruptions of transport, Government action or any other cause whatsoever, whether or not of a like nature to those specified above
- (g) **"Intellectual Property Rights"** means any intellectual or industrial property rights (including any registered or unregistered trademarks, patents, designs or copyright);
- (h) **"Liability"** means any direct or consequential liabilities, claims, losses, costs, charges, damages, injury or expenses of any nature;
- (i) **"PMSI"** means a purchase monies securities interest and has the meaning given in section 14 of the PPSA;
- (j) **"PPSA"** means the *Personal Property Securities Act 2009* as amended from time to time; and
- (k) **"Shermac"** means Shermac Australia Pty Ltd ABN 54 622 839 810.

**GENERAL**

- 1.1 Unless otherwise specifically agreed in writing by Shermac, where any terms and conditions of the Customer's order are inconsistent with this Agreement, then the terms and conditions of this Agreement will prevail. Any variations or additions to this Agreement not expressly agreed to in writing by Shermac are expressly rejected by Shermac.
- 1.2 A quotation shall not constitute an offer to sell Goods to the Customer. No contract for the supply of Goods shall exist between Shermac and the Customer until a Customer's order for Goods has been accepted by Shermac (such acceptance of a Customer's orders may be made and communicated by Shermac in writing or by overt act of acceptance). Shermac may accept or refuse any order for Goods in its absolute discretion and may make its acceptance of an order conditional upon it receiving a satisfactory credit assessment of the Customer.

- 1.3 Shermac may vary these terms and conditions by notice in writing to the Customer. If the Customer is a Consumer, then the Customer may consider the variation and, if not acceptable, may elect not to proceed with the purchase of the Goods ordered before the date of the variation but which are intended to be subject to the variation. If the Customer is not a Consumer, the Customer agrees that Goods delivered and/or ordered after the date of the notice of the variation will be subject to the variation and acceptance of the Goods or the placing of the order shall be deemed to be an acceptance of such varied terms and conditions.
- 1.4 These terms and conditions and all obligations hereunder shall be binding on the Customer's personal representatives, successors and permitted assigns and shall be for the benefit of Shermac's successors and assigns.

**ACCOUNT TERMS**

- 1.5 The Costs of the Goods shall be as stated in the Schedule to this Agreement or otherwise as agreed by Shermac and the Customer.
- 1.6 Unless otherwise agreed in writing by Shermac, the Customer shall pay the Costs for all Goods on or prior to the delivery or collection of the Goods ("COD"). In all other circumstances, the Costs shall be payable within 30 days of the date of issue of an invoice by Shermac to the Customer.
- 1.7 For the avoidance of doubt, where payment of the Costs is on COD, Shermac reserves the right not to deliver or provide the Goods until payment of the Costs has been received in full.
- 1.8 Unless otherwise stated, all prices quoted by Shermac and fees charged for all Goods under this Agreement are exclusive of GST.
- 1.9 Shermac may, in its discretion, require the Customer to pay a deposit with respect to the Goods. Shermac reserves the right not to provide the Goods until such time as the required deposit is paid in full.
- 1.10 Where Shermac has agreed to provide the Goods to the Customer other than on a COD basis and the Customer does not pay Shermac the Costs in full by the due date, the Customer shall pay 10% interest on monies due calculated on a daily basis from the due date for payment until the actual date of payment.
- 1.11 The Customer shall pay any legal costs (on a full indemnity basis), stamp duties, any bank charges or merchant fees or like charges levied on Shermac by any banker or other credit provider whose banking or credit card facilities are utilised by the Customer for paying Shermac any amounts on any account and any other expenses payable of and incidental to the performance or enforcement of or any litigation on these terms and conditions or any credit application or any security documents signed by the Customer or any guarantor together with any other collection costs and dishonoured cheque fees.
- 1.12 Any monies received by Shermac from the Customer may be applied towards any amount that the Customer owes to Shermac from time to time (including interest) whether pursuant to this Agreement or otherwise, at Shermac's discretion.

**SETOFF**

The Customer acknowledges that Shermac reserves the right in its absolute discretion to set-off any amounts due to it by the Customer against any amounts due by Shermac to the Customer howsoever arising under the trading relationship between the parties.

**RISK AND PASSING OF PROPERTY**

Goods supplied by Shermac to the Customer shall be at the Customer's sole risk immediately upon delivery of those Goods to the Customer or on delivery of those Goods to any third party at the Customer's request and direction (including delivery to a Customer's transport agent or contractor).

**RETENTION OF TITLE**

1.13 Property in and title to all Goods supplied by Shermac to the Customer will not pass to the Customer until full payment for those Goods and all other amounts owing has been received and cleared in full by Shermac.

1.14 Until full payment is received in accordance with clause 1.13:

- (a) the Customer will hold the Goods as fiduciary and bailee for Shermac;
- (b) Shermac may enter the Customer's premises (or such other premises on which the Customer may have located Goods supplied by Shermac) without liability for trespass or any resulting damage to retake possession of such Goods or inspect the Goods if Shermac elects to do so in its absolute discretion; and
- (c) to keep and resell any Goods removed or repossessed pursuant to this provision,

but without imposing any liability on Shermac to re-take possession of any such Goods or Shermac's right to pursue any action against the Customer for the balance payable in respect of any such Goods notwithstanding that risk but not title in any Goods may have passed to the Customer on delivery to the Customer.

1.15 In the event that the Customer uses the Goods in some manufacturing or construction process of its own or some third party, then the Customer must hold such part of the proceeds of sale of such manufacturing or construction process as relates to the Goods in trust for Shermac. Such part will be an amount equal in dollar terms to the amount owing by the Customer to Shermac at the time of the receipt of such proceeds. The Customer will pay Shermac such funds held in trust upon the demand of Shermac.

**PPSA**

1.16 The Customer agrees that this Agreement creates a:

- (a) PMSI in the Goods (and their proceeds) supplied presently and in the future by Shermac to the Customer; and
- (b) Security interest in the Goods where the Goods are provided on a 'commercial consignment' basis (as that term is defined in the PPSA).

1.17 Customer agrees to do all things necessary and execute all documents reasonably required to register the PMSI and/or security interest granted by the Customer under this Agreement and to ensure that Shermac acquires a perfected security interest in the Goods under the PPSA.

1.18 The Customer will, on demand, pay all of Shermac's expenses and legal costs (on a solicitor/agent/client basis) in relation to or in connection with the registration of Shermac's security interest and all other costs associated with protection and enforcement of Shermac's security interest created by this Agreement or by undertaking an audit under the provisions of the PPSA, or the repossession of the Goods the subject of this Agreement or the exercise, enforcement or preservation of any right or interest under this Agreement or any contract that Shermac has with the Customer.

1.19 The security interests created under clause 1.16 do not lose its priority as a result of the renewal, refinance,

consolidation or restructure of the subject matter of this Agreement and any purchase money obligations.

1.20 Until ownership of the Goods passes to the Customer, the Customer waives its rights under the following provisions of the PPSA, to the extent that it is permitted by law to: sections 95, 96, 118, 121(4), 125, 129(2), 129(3), 130, 132(3)(d), 132(4), 135, 142 and 143, 157(1) and 157(3).

1.21 To the extent permitted by the PPSA, this Agreement excludes any provisions of the PPSA which may be excluded in Shermac's discretion and which would otherwise confer rights on the Customer.

1.22 The Customer further agrees that where Shermac has rights in addition to those under Part 4 of the PPSA, those rights shall continue to apply.

1.23 The Customer's right to possession of the Goods still owned by Shermac under this Agreement shall cease if:

- (a) the Customer being an individual, commits an act of bankruptcy;
- (b) the Customer being a company, circumstances arise where a receiver, manager, administrator or controller becomes entitled to take possession of any of its assets, any proceedings are instituted for winding up, or the Customer entering into a Deed of Company Arrangement;
- (c) the Customer ceases or threatens to cease conducting business in the normal manner or applies for deregistration or receives a deregistration notice;
- (d) any cheque the Customer provides to Shermac is dishonoured for payment;
- (e) the Customer failing to comply with any demand for payment issued by Shermac; or
- (f) the Customer breaching any term of this Agreement are/or are in default of any other agreement between Shermac and the Customer.

1.24 The Customer expressly and irrevocably agrees that Shermac is entitled to enter any premises where the Goods supplied by Shermac are located to repossess, remove and sell such Goods. The Customer (its successor and assigns, including any external manager or administrator) shall not object to Shermac, or its agents entering any premises for the purpose of this clause and agrees to indemnify and keep Shermac indemnified in respect of any claims, actions and costs that may arise against Shermac in relation to the removal, repossession and sale of the Goods pursuant to this Agreement including any claims brought by third parties.

1.25 The Customer agrees that repossession and retention of the Goods pursuant to the PPSA will only satisfy so much of the monies which may become payable to Shermac by the Customer, as is equivalent to Shermac's estimation of the market value of the Goods as it is at the date of repossession and the repossession and retention will immediately extinguish any rights for interest Shermac has on the value of the Goods recovered.

1.26 Until ownership of the Goods passes, the Customer must not give Shermac a written demand or allow any other person to give Shermac a written demand requiring Shermac to register a financing change statement under the PPSA or enter into or allow any other person to enter into the personal property securities register a financing change statement under the PPSA.

1.27 The Customer agrees not to change the Customer's name or undertake any changes to any documents that Shermac has registered, requires to be registered

or are capable of being registered without Shermac's prior written consent. For avoidance of doubt, these terms regarding the PPSA apply even where the Customer is a Consumer.

- 1.28 Where the Goods are provided on the basis of a 'commercial consignment' (as that term is defined in the PPSA), the Customer agrees to sign all consignment notes provided by Shermac to the Customer and to otherwise comply with and do any other thing required by Shermac to ensure that Shermac may obtain a perfected security interest in the Goods.

**CHARGE**

For the better securing of the payment of all amounts payable by the Customer to Shermac pursuant to this Agreement and interest aforesaid, the Customer hereby charges their interest in any real property in their name with the due payment of all amounts payable under this Agreement and interest owing, and consents to Shermac registering a caveat against the Customer's interest in such properties to further secure the repayment of all amounts payable and interest.

**TERMINATION**

- 1.29 Shermac reserves the right to suspend or discontinue the supply of the Goods to the Customer without being obliged to give any reasons in the event of any breach of this Agreement by the Customer and Shermac shall not be liable to the Customer for any loss or damage the Customer may sustain as a result of such refusal to supply.
- 1.30 Notwithstanding clause 1.29, Shermac may terminate this Agreement immediately and without notice where:
- (a) the Customer fails to pay any amount due and payable by the due date for payment in accordance with this Agreement;
  - (b) where the Customer is a company, the Customer becomes subject to any winding up petition or order, appointment or receiver, official management, assignment, arrangement, or compromise for the benefit of creditors;
  - (c) where the Customer is a person, the Customer goes into bankruptcy or is wound up; or
  - (d) Shermac forms the reasonable view that the:
    - (i) Customer will be unable to pay the Costs or any other amounts with respect to the Goods; or
    - (ii) Goods will not be available for delivery or provision within a timeframe that the Customer has requested.

**LIABILITY AND WARRANTIES**

- 1.31 Except as expressly provided in this Agreement, any terms, conditions, warranties, undertakings, inducements or representations whether express, implied, statutory or otherwise relating in any way to the subject matter of this Agreement and the Goods are excluded to the maximum extent permitted by law.
- 1.32 The liability of Shermac for a breach of any term, condition or warranty implied by law will be limited to any one or more of the following at the election of Shermac:
- (a) in relation to the Goods;
    - (i) the replacement of the Goods or the supply of equivalent goods;
    - (ii) the repair of such Goods;
    - (iii) the payment of the cost of replacing the Goods or of acquiring equivalent goods; or
    - (iv) the payment of the cost of having the

Goods repaired, and

- (b) Where the Goods are services:
    - (i) the supply of service again; or
    - (ii) the payment of the cost of having the services supplied again.
- 1.33 The Customer acknowledges it has not relied on any representation or warranty made by Shermac which has not been stated expressly in this Agreement or upon any descriptions or illustrations or specifications contained in any document including any catalogues or material published by Shermac.
- 1.34 Except as required by law or regulation or as set out in this Agreement, Shermac expressly excludes all Liability for all warranties, conditions, non-fraudulent representations, express or implied concerning the Goods, including, including but not limited to those relating to the availability, performance, quality or fitness for purpose of the Goods.
- 1.35 Under no circumstances will Shermac be liable to the Customer for loss of profits, loss of contracts, loss of use of the Goods or any interruption or for any indirect or consequential loss whatsoever, whether arising from negligence, breach of contract, failure of the Goods or otherwise.
- 1.36 The provisions of clauses 1.31 to clause 1.35 survive the termination or expiry of this Agreement.

**INDEMNITY**

- 1.37 The Customer shall indemnify and keep indemnified Shermac from any Liability which may be incurred or suffered by Shermac arising from any one or more of the following:
- (a) the breach by the Customer of a term or any of the Customer's obligations under this Agreement;
  - (b) any negligent act or omission or misconduct by the Customer arising from the use of the Goods or otherwise arising out of the Customer's obligations under this Agreement;
  - (c) the use of the Goods; and
  - (d) any claims or demands made upon Shermac by reason of any loss, injury or damage which may be suffered by any person from the use of the Goods.
- 1.38 The provisions of this clause 1.37 survive the termination or expiry of this Agreement.

**DELIVERY**

- 1.39 Unless otherwise specified between the Customer and Shermac, transportation costs in connection with the Goods, including the supply of additional labour, equipment, materials and transportation expenses and other requirements are at the cost of the Customer.
- 1.40 Unless otherwise agreed, the Customer is responsible for the supply of all necessary craneage, labour and other handling equipment to offload, assemble, erect, dismantle and load the Goods.

**INTELLECTUAL PROPERTY**

- 1.41 Shermac owns all Intellectual Property Rights developed by it, or its personnel in the Goods.
- 1.42 Any Intellectual Property Rights in the Goods and any instructions relating to them remain with Shermac and do not pass to the Customer. Shermac grants to the Customer a non-exclusive, royalty free license to use Shermac's Intellectual Property to the extent such materials form part of, or are integral to, the Goods.

### CONFIDENTIALITY

The Customer shall treat as confidential all information, data, drawings, specifications, samples and documentation supplied by Shermac under or in connection with this Agreement, and will not disclose them to any third party without the prior written consent of Shermac.

### GST

- 1.43 Any expression used in this clause and which is defined in the "A New Tax System, (Goods and Services Tax) Act 1999" has the same meaning in this clause 1.44 to clause 1.45.
- 1.44 Unless otherwise expressly stated, all amounts stated to be payable by the Customer under this Agreement are exclusive of GST.
- 1.45 If GST is imposed on any supply made under or in accordance with this Agreement, the recipient of the taxable supply must pay to the supplier an additional amount equal to the GST payable on or for the taxable supply. Payment of the additional amount will be made at the same time as payment for the taxable supply is required to be made in accordance with this document, subject to the provision of a tax invoice by the supplier to the recipient.

### FORCE MAJEURE

- 1.46 Shermac will not be liable for the consequences of any failure or delay in performing any of its obligations under this Agreement to the extent that such failure or delay is due directly or indirectly to any Force Majeure Event.
- 1.47 If a Force Majeure Event arises, Shermac will notify the Customer in writing of the Force Majeure Event and the likely impact it will have on Shermac's performance under this Agreement. If the Force Majeure Event affects the capacity of Shermac to complete its material obligations under this Agreement in a timely manner, Shermac may by notice to the Customer terminate this Agreement without any

liability whatsoever on its part arising from that termination.

### GOVERNING LAW AND JURISDICTION

All aspects of this Agreement and the provision of the Goods to the Customer are governed by, and construed in accordance with, the laws applicable in the state of Western Australia.

### SEVERABILITY

If any provision in this Agreement is unenforceable, illegal or void or makes this Agreement or any part of it unenforceable, illegal or void, then that provision is severed and the rest of this Agreement remains in force.

### WAIVER

- 1.48 A party's failure or delay to exercise a power or right does not operate as a waiver of that power or right.
- 1.49 The exercise of a power or right does not preclude either its exercise in the future or the exercise of any other power or right.
- 1.50 A waiver is not effective unless it is in writing.
- 1.51 Waiver of a power or right is effective only in respect of the specific instance to which it relates and for the specific purpose for which it is given.

### GENERAL PROVISIONS

- 1.52 The Customer must not assign or otherwise deal with any of its rights or obligations under this Agreement without the prior written consent of Shermac.
- 1.53 Shermac may assign or deal with any of its rights or obligations under this Agreement at any time and without any requirement to notify the Customer. Shermac reserves the right to subcontract the performance of any of its obligations under this Agreement to any other person it so determines.
- 1.54 This Agreement constitutes the entire Agreement between the parties in respect of the sale of Goods and supersedes all previous communications, representations understandings or agreements.