



BeA Australia Pty Ltd
Unit 12, 72-80 Percival Road
Smithfield, NSW 2164
ACN: 636 999 543
ABN: 61 636 999 543

BeA Australia Pty Ltd ACN 636 999 543

Terms & Conditions for the Supply of Goods (2020 edition)

1. Definitions

1.1 In these terms and conditions (**Conditions**) the following words and expressions shall have the following meanings:-

Australian Consumer Law	means Schedule 2 of the Competition and Consumer Act 2010 (Cth);
Business Day	means a day that is not a Saturday, a Sunday, a public holiday or a bank holiday in Sydney, Australia;
Claim	means in relation to any person, a claim, action, proceeding, judgment, damage, loss, cost, expense or liability incurred by or to or made or recovered by or against the person, however arising and whether present, unascertained, immediate, future or contingent;
Contract	the contract between you and us for the sale and purchase of the Goods, incorporating these Conditions;
Control	means the beneficial ownership of more than 50% of the issued share capital of a company or the legal power to direct or cause the direction of the general management of the company, and Controls, and the expression 'change of Control' will be construed accordingly;
Corporations Act	means <i>Corporations Act 2001</i> (Cth);
Encumbrance	means any royalty, mortgage, lien, charge, pledge, caveat, contract, assignment by way of security, security interest, title retention, preferential right or trust arrangement, Claim, covenant, profit à prendre, easement or other security arrangement, right of first refusal, option to purchase, lease, pre-emptive right or any other right or interest of any third party or any defect or irregularity of title or obligation or liability to any third party or any other agreement or arrangement having the same effect, and Encumber has a corresponding meaning.
Goods	the goods we agree to supply to you (including any instalment of those goods or part of them) under the terms of the Contract;



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GST	has the meaning given by section 195-1 of the GST Act;
GST Act	means the <i>A New Tax System (Goods and Services Tax) Act 1999</i> (Cth);
Insolvency Event	has the meaning given to that expression in Condition 10.8 ;
Intellectual Property Rights	means all intellectual property rights owned (whether solely or jointly) by or licensed to a party including copyright (and future copyright), trademarks, service marks, logos, domain names, designs, patents, inventions (whether patentable or not), semiconductor and circuit layout rights, moral rights, know-how software, rights in respect of trade secrets and other confidential information, and all other rights generally falling within the scope of the Contract, whether registered or unregistered and whether registrable or not, including applications for the registration or grant of any such rights and any and all forms of protection having equivalent or similar effect anywhere in the world;
Loan Tool Agreement	the Loan Tool Agreement Terms & Conditions, including the contract summary (being the front page of the Loan Tool Agreement);
Order	the order placed by you with us for purchase of the Goods;
Order Acknowledgement	the written acknowledgement/confirmation of the Order (if any) we send you upon acceptance of the Order by us;
Related Body Corporate	has the meaning given to the term in the Corporations Act, and Related Bodies Corporate has the corresponding meaning;
Vienna Convention	means the United Nations Convention on Contracts for the International Sale of Goods.
We/ us / our	means BeA Australia Pty Ltd ACN 636 999 543 whose registered office is at Unit 12, 72-80 Percival Road, Smithfield, New South Wales 2164;
You / your	means you, the company or business purchasing the Goods from us as specified in the Order.

1.2 In these Conditions, the following rules apply:

1.2.1 A person includes a natural person, corporate or unincorporated body (whether or not having separate legal personality).

1.2.2 A reference to a party includes its personal representatives, successors or



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permitted assigns.

1.2.3 A reference to a statute or statutory provision is a reference to such statute or provision as amended or re-enacted. A reference to a statute or statutory provision includes any subordinate legislation made under that statute or statutory provision, as amended or re-enacted.

1.2.4 Any phrase introduced by the terms including, include, in particular or any similar expression shall be construed as illustrative and shall not limit the sense of the words preceding those terms.

1.2.5 A reference to writing or written includes faxes and e-mails.

2. General

2.1 Subject to any variation under Condition 2.3, the Contract will be on these Conditions to the exclusion of all other terms and conditions (including any terms and conditions which you seek to apply under any written Order, confirmation of Order, specification or other document).

2.2 No terms or conditions endorsed upon, delivered with or contained in your written Order, confirmation of Order, specification or other document will form part of the Contract simply as a result of such document being referred to in the Contract.

2.3 If we accept an Order under Condition 2.6, these Conditions and the terms of the Order accepted by us will constitute an agreement between the parties and will govern all sales of Goods by us. You agree that any variation to these Conditions and representations about the Goods shall have no effect unless expressly agreed in writing and signed by one of our directors.

2.4 We are prepared to receive the Order by telephone but will be under no liability whatsoever for any error or omission claimed by you to have arisen in relation to a telephone Order.

2.5 Each Order shall be deemed to be an offer by you to purchase Goods subject to these Conditions.

2.6 No Order will be deemed to be accepted by us until an Order Acknowledgement is issued by us or (if earlier) we deliver the Goods to you. Orders are accepted by us subject to availability of products and supplies from our suppliers required to fulfil the Contract.

2.7 You must ensure that the terms of your Order and any applicable specification are complete and accurate, and you are responsible for giving us any necessary information relating to the Goods within a sufficient time to enable us to perform the Contract in accordance with its terms.

2.8 Any quotation is given on the basis that no contract will come into existence until we despatch an Order Acknowledgement to you. Any quotation is valid for a period of 30 days only from its date, provided that we have not previously withdrawn it.



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- 2.9 An accepted Order may only be cancelled or varied by you with our prior written consent. Upon cancellation by you, we are entitled to invoice you for all work carried out to date by us under the Contract, including any costs and expenses incidental to that work. Nothing in this Condition 2.9 will in any way prejudice our right to recover from you full compensation for any direct or indirect loss or expense arising from such cancellation or variation.
- 2.10 To ensure that any advice or recommendations required by you are given by an appropriate representative on our staff, you acknowledge that any advice or recommendations given by us, our employees or agents to you or your employees or agents as to the storage, application or use of the Goods, which is not confirmed in writing by us, is followed or acted upon entirely at your own risk. Accordingly we will not be liable for any adverse results of any such advice or recommendation which has not been so confirmed in writing.

3. Description

- 3.1 The description of the Goods shall be as set out in our quotation or any specification we supply to you.
- 3.2 All drawings, descriptive matter, specifications and advertising issued by us and any descriptions or illustrations contained in any catalogue, brochure, leaflet or correspondence issued by us are issued or published for the sole purpose of giving an approximate idea of the Goods described in them. They will not form part of the Contract or have any contractual force.
- 3.3 Any samples given by us correspond with the Goods as far as is reasonably possible given the nature of the Goods, but this is not a sale by sample and the samples are not to be treated as forming part of the Contract.
- 3.4 We reserve the right to make any changes in the specification of the Goods which are required to conform with any applicable statutory or regulatory requirements or, where the Goods are to be supplied to our specification, which do not materially affect their quality or performance.

4. Price

- 4.1 The price payable for the Goods shall be the price specified in the Order Acknowledgement, or (if no price is specified or no Order Acknowledgement is submitted to you) the price for the Goods shall be our quoted price or, where no price has been quoted (or a quoted price is no longer valid), the price listed in our published price list current at the date of delivery or deemed delivery (the **Price**).
- 4.2 The Price shall be exclusive of GST and any other similar taxes which you are additionally liable to pay to us.
- 4.3 Unless otherwise specifically stated in the Order Acknowledgement, the Price is exclusive of all costs or charges in relation to loading, unloading, carriage to your premises,



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packaging and insurance and accordingly where it has been expressly agreed that we deliver the Goods to your premises pursuant to Condition 8.1, you will be responsible for payment of all the aforementioned costs and charges when you are due to pay the Price.

- 4.4 We may at any time increase the Price by an amount equal to the increase in our costs in carrying out our obligations under the Contract which is due to any factor beyond our control (including but not limited to any significant increase in raw material, labour or energy costs or other costs of manufacture, any foreign exchange fluctuation, currency regulation or alteration of duties) and a proportionate increase in Price required to preserve our profit margin. Where delivery is by instalments, we may increase the Price as stated in this Condition in respect of any Goods undelivered at that time.
- 4.5 Subject, where applicable, to the terms of the Loan Tool Agreement, in circumstances where we purchase or provide special tooling to manufacture any Goods in accordance with your Order then, unless agreed by us in writing, the cost of purchasing or providing such tooling will be charged to you and paid for by you (in addition to the Price of the Goods) when you are due to pay the Price. Any such tooling paid for by you shall unless otherwise agreed between us and you be used exclusively for the production of your Orders.

5. Additional Costs

- 5.1 You agree to indemnify us on demand against any loss or extra cost we incur as a result of:
- 5.1.1 any variations or additions made to the Goods (including to any specification or drawings relating to the Goods) or any other changes requested by you which affect our manufacturing programme and/or delivery dates;
- 5.1.2 your instructions or lack of instructions; or
- 5.1.3 any act or default by you, your agents, sub-contractors or employees.

6. Intellectual Property

- 6.1 You agree to indemnify us against all loss, costs, Claims, expenses and damages awarded against or incurred by us arising out of any alleged infringement of any Intellectual Property Rights of any other person arising out of the manufacture or sale of Goods which are made to your specification or special requirements (including without limitation the application of any process).
- 6.2 All written information, drawings, artwork, images and diagrams (excluding the Goods themselves) prepared by us in relation to the supply of Goods and the copyright therein and all other items owned by us and used in the production of the Goods shall remain our property and must be returned to us by you on demand. All such information must be treated as confidential and shall not be copied or reproduced or disclosed to any third party without our prior written consent.
- 6.3 You must ensure that your employees, servants and agents and all those under your control and supervision shall comply with the obligations of confidentiality contained at



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Condition 6.2.

- 6.4 We are the owner or authorised licensor of the Intellectual Property Rights in connection with the Goods (**Our IP**). Nothing in this Contract grants any licence or right to Our IP to you and at all times our IP shall remain our property (or that of our licensors).

7. Payment

- 7.1 Unless otherwise stated in the Order Acknowledgement, we are entitled to invoice you for the Price of the Goods on or at any time after delivery of the Goods, unless the Goods are to be collected by you or you wrongfully fails to take delivery of the Goods, in which event we are entitled to invoice you for the Price at any time after we have notified you that the Goods are ready for collection or (as the case may be) we have tendered delivery of the Goods.
- 7.2 Unless otherwise stated in the Order Acknowledgement or otherwise agreed in writing with us, you shall pay the Price on or before the date 30 days after the end of the calendar month in which our invoice in respect thereof is dated provided always that payment shall become due and payable on demand in any event immediately upon the occurrence of any of the events referred to in Condition 10.8. We are entitled to recover the Price notwithstanding that delivery may not have taken place and/or the property in the Goods has not passed to you.
- 7.3 If upon the terms of the Contract monies due are payable in instalments, a default by you of the payment of any instalment due shall cause the whole of the balance of the sums due to become due and payable immediately.
- 7.4 The sums due to us under the Contract shall, save and except for any deductions specifically authorised in writing by us, be due in full to us in accordance with the terms of the Contract and you shall not be entitled to make any deduction whether by way of set-off, counterclaim, discount, abatement or otherwise unless you have a valid court order requiring an amount equal to such deduction to be paid by us to you.
- 7.5 The time of payment of the Price (and any other sums due from you to us pursuant to the Contract or these Conditions) shall be of the essence of the Contract.
- 7.6 If an Event of Default has occurred in relation to you then, without prejudice to any other right or remedy available to us, we are entitled to:
- 7.6.1 terminate the Contract or suspend any further deliveries to you;
 - 7.6.2 appropriate any payment made by you to such of the Goods (or any goods supplied under any other contract between you and us) as we may think fit (notwithstanding any purported appropriation by you);
 - 7.6.3 repossess any Goods already delivered to you (as detailed in Condition 10.7 below);
 - 7.6.4 claim and charge you interest (and reasonable compensation for debt recovery



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costs) at the rate of 4% above the Reserve Bank of Australia's base rate for the time being in force on the amount unpaid from the due date for payment until payment is made in full, whether before or after any judgement; and/or

7.6.5 in relation to any future Order or contract or the balance of any Goods under the Contract, to require you to make payment of the Price in full in advance of delivery.

7.7 For the purpose of the Contract, an Event of Default means any of the following occurrences in relation to you:

7.7.1 you fail to pay any sum due and payable to us under the Contract or any other contract (including amounts due under the Loan Tool Agreement) with us within 14 days of our demanding payment;

7.7.2 an Insolvency Event occurs in relation to you (or if we have reasonable cause to believe that any of these events is likely to occur);

7.7.3 you commit a material breach of any of the terms of the Contract or any other contract with us, which breach irremediable or, if such breach is remediable, you fail to remedy that breach within a period of 10 days after being notified to do so;

7.7.4 you make any statement, representation or warranty under or in relation to the Contract or any other contract with us which is or becomes materially incorrect; or

7.7.5 you are subject to a change of Control of yourself or any holding company which controls you or a material part of your assets and business is transferred to another party; or

7.7.6 you are unable to meet your debts as they fall due; or

7.7.7 you, being a partnership, are dissolved or have a judicial factor appointed to you or become subject to an Insolvency Event.

7.8 We are entitled to withhold an amount equal to any amount due from you to us from any amount due from us to you on any account whatsoever and any term of any contract between you and us that is inconsistent with this Condition will be deemed to have been amended accordingly.

7.9 No payment shall be deemed to have been received until we receive cleared funds.

7.10 Notwithstanding any other provisions in these Conditions, you are entitled to open a trading/credit account with us only with our prior agreement, which agreement shall include us making appropriate enquiries and being satisfied as to your creditworthiness. We are entitled to cancel or amend the level of any credit granted to you in our sole discretion by notifying you. If you do not have a trading/credit account with us, you must pay to us an advance deposit in respect of the Price of the Goods prior to delivery (in such amount as is specified by us), and the balance of the Price (and any other sums due from you to us pursuant to the Contract or these Conditions) must be paid in full on delivery or collection of the Goods.



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- 7.11 In the event that any cheque issued to us by you in payment of any amount due and payable under the Contract is dishonoured, we shall recharge to you all related charges imposed upon us by our bankers.

8. Delivery

- 8.1 Unless specifically agreed in writing between the parties, delivery of the Goods shall take place by you (or your nominated carrier) collecting the Goods at our place of business at any time after we have notified you that the Goods are ready for collection. In circumstances where it is agreed (in accordance with the foregoing) that delivery of the Goods is to be made by us, this shall be effected by us (or our agents) delivering the Goods (by a method of transport we think suitable) to your address specified in the Order Acknowledgement (or such other place agreed in writing by the parties).
- 8.2 The date (or dates) for delivery of the Goods shall be the relevant date (or dates) specified in the Order Acknowledgement or (if no Order Acknowledgement is used, or no date(s) are specified therein) the delivery date (or dates) shall be as otherwise specified by us in writing. If no dates are so specified, delivery will be within a reasonable time. The Goods may be delivered in advance of any quoted delivery date, provided we give you reasonable advance notice.
- 8.3 Where delivery is to be made by us or our agents you will provide safe and proper means of access to your delivery points and for any vehicles used by us or our agents. You are responsible for unloading the Goods from the vehicle, and shall provide all necessary personnel, equipment, means or facilities for the reception and unloading of the Goods (including where reasonably needed the attendance of your representatives at such delivery). If you do not comply with any of your obligations under this Condition 8.3, we are entitled to withhold delivery and/or to charge you for any additional costs and time thereby incurred by us.
- 8.4 We will use reasonable efforts to meet delivery dates, but dates for delivery are estimates only and delivery is subject to performance by our own suppliers and (where applicable) haulage contractors, and the time of delivery is not of the essence. We will not be liable for any delay in delivery of Goods that is caused by a Force Majeure Event (of the kind described in Condition 17) or your failure to provide us with adequate delivery instructions or any other instructions that are relevant to the supply of the Goods. Delays will not entitle you to terminate or rescind the Contract unless such delay exceeds 180 days.
- 8.5 If you fail to collect the Goods within 3 working days of us notifying you that the Goods are ready (where you are collecting the Goods), or if you refuse or fail to take delivery of the Goods within your normal working hours on the date of delivery, or if we are unable to deliver the Goods on time because you have not provided us with adequate delivery instructions or any other instructions that are relevant to the supply of the Goods (where we have agreed to deliver the Goods) then, except where such failure or delay is caused by a Force Majeure Event (of the kind described in Condition 17) or by our failure to comply with our obligations under the Contract:

8.5.1 delivery of the Goods shall be deemed to have been completed; and



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8.5.2 we will store the Goods until collection or delivery takes place (as appropriate), and charge you for all related costs and expenses (including insurance and any additional delivery costs).

8.6 If 10 working days after the day on which we notified you that the Goods were ready for delivery, you have not collected or taken delivery of them (as appropriate), we may resell or otherwise dispose of part or all of the Goods and charge you for any shortfall below the Price of the Goods.

8.7 We may deliver the Goods by instalments, which shall be invoiced and paid for separately. Each instalment shall constitute a separate Contract. Any delay in delivery or defect in an instalment will not entitle you to cancel any other instalment.

9. Return of Goods

Without prejudice to the provisions of Condition 11 below, Goods supplied in accordance with the Contract cannot be returned without our prior written authorisation. Duly authorised returns shall be sent to only such address as we shall notify to you and only at your expense.

10. Passing of Title & Risk

10.1 Risk of damage to or loss of the Goods shall pass to you:

10.1.1 in the case of Goods to be delivered at our premises, at the time when we notified you that the Goods are available for collection; or

10.1.2 in the case of Goods to be delivered otherwise than at our premises, at the time of delivery; or

10.1.3 if you wrongfully refuse or fail to take delivery of the Goods or in any of the other circumstances described in Condition 8.5, at the time when we have tendered delivery of the Goods (or, if appropriate, when the Goods would have been delivered but for your default).

10.2 Notwithstanding delivery and the passing of risk in the Goods, or any other provision of these Conditions, the title in the Goods shall not pass to you (and we therefore retain title to and continue to own the Goods) until we have received payment in full for all sums due under this Contract and all other sums which are or which become due to us from you on any account.

10.3 Until such time as title to the Goods has passed to you pursuant to Condition 10.2 the Goods must be stored separately from any goods belonging to you or any third party (at no cost to us), must be kept clearly marked as being our property and you shall not destroy, deface or obscure any identifying mark or packaging on or relating to the Goods.

10.4 Until title to the Goods has passed to you pursuant to Condition 10.2, if you are a distributor or reseller you are entitled to sell the Goods in the ordinary course of your business (which in the case of a sale must be at the full market value of the Goods) and any such sale will



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be a sale of our property on your own behalf and you shall deal as principal when making such a sale. If you are an end-user of the Goods, then until title to the Goods has passed to you pursuant to Condition 10.2, you may use the Goods in the ordinary course of your business but you are not entitled to sell the Goods.

- 10.5 You must insure the Goods (with our name noted on the policy until title passes pursuant to Condition 10.2, or until we retake possession of them) from the time that risk passes and shall produce the policy to us for inspection on request. Until title to the Goods passes to you as aforesaid, you must hold any proceeds of such insurance on trust for us and not mix them with any other money, nor pay such proceeds into an overdrawn bank account. If you fail to insure the Goods, we may do so and recover the cost from you.
- 10.6 Save as expressly provided in this Condition 10, you must not assign, lease, pledge, charge, create or permit the creation of any Encumbrance or grant rights to third parties over the Goods in any way until they have been paid for in full by you, but if you do so all monies owing by you to us shall (without prejudice to any other right or remedy we may have) forthwith become due and payable.
- 10.7 If an Insolvency Event occurs in relation to you or if you create or permit the creation of any Encumbrance over or in some way charge any of the Goods (or if we have reasonable cause to believe that any of these events is likely to occur), your right to possession of the Goods shall terminate immediately, and we shall have the right, without prejudice to any other remedies:
- 10.7.1 to enter without prior notice any premises where Goods may be and to repossess and dispose of any Goods so as to discharge any sums owed to us by you under the Contract or any other contract; and
- 10.7.2 to require you not to resell or part with possession of any Goods owned by us until you have paid in full sums owed by you to us under the Contract or any other contract; and
- 10.7.3 to cancel the Contract or suspend any further deliveries to you.
- 10.8 For the purposes of the Contract, an Insolvency Event means:
- 10.8.1 in relation to a company, the happening of any one or more of the following events:
- (i) an application is made to a court for an order, or an order is made, for you to be wound up;
 - (ii) a liquidator, provisional liquidator, trustee, administrator, receiver, receiver and manager or controller (as defined in the Corporations Act) is appointed in relation to you or any of your assets or any action is taken for the appointment of such a person;
 - (iii) a meeting is convened or a resolution is passed to appoint an official manager in relation to you;



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- (iv) except to reconstruct or amalgamate while solvent on terms approved in writing by the other party, you:
 - (a) enter into, or resolves to enter into, a scheme of arrangement or composition with, or assignment for the benefit of your creditors or any class of your creditors, or you propose a reorganisation, moratorium or other administration including any of them; or
 - (b) resolve to wind yourself up or otherwise dissolve yourself, or give notice of intention to do so; and
- (v) you are, you state that you are or you become unable to pay your debts when they fall due or you are deemed unable to pay your debts under the Corporations Act or any other applicable legislation.

10.8.2 in relation to a natural person, the happening of any one or more of the following events:

- (i) you become bankrupt or you make any assignment, arrangement or composition with your creditors under the Bankruptcy Act 1966 (Cth) or otherwise;
- (ii) a bankruptcy notice is issued to you unless it is satisfied or withdrawn struck out or dismissed within 14 days of it being issued;
- (iii) a receiver, trustee for creditors or trustee in bankruptcy is appointed to any of your property or assets;
- (iv) a garnishee notice is issued concerning any money that you are said to be owed unless it is satisfied or withdrawn struck out or dismissed within 14 days of it being issued;
- (v) you propose or enter into an arrangement or composition with, or an assignment for the benefit of, any of your creditors;
- (vi) you propose or effect a moratorium involving any of your creditors;
- (vii) you stop or suspend, or threatens to stop or suspend, the payment of all or a class of their debts or the conduct of all or a substantial part of your business;
- (viii) you are unable to pay all of your debts as they fall due or you are presumed to be insolvent under any applicable law;
- (ix) you become an “insolvent under administration” as defined in the Corporations Act;
- (x) anything having a substantially similar effect to any of the events specified in subparagraphs 10.8.2(i) to 10.8.2(ix) of this clause 10.8.2 happens to the Consultant under the law of any jurisdiction.

10.9 Unless we expressly elect otherwise, any contract between you and us for the supply of



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Goods shall remain in existence notwithstanding any exercise by us of our rights under this Condition.

- 10.10 You hereby irrevocably licence us, our agents and employees to enter any premises occupied by you where we reasonably believe Goods are stored at any time to inspect them, or, where your right to possession has terminated, to remove such Goods.
- 10.11 Until such time as property in the Goods passes to you, we are entitled at any time to require you to deliver the Goods to us, and you shall comply with any such request as soon as practicable thereafter.

11. Quality

- 11.1 Subject to the other provisions of these Conditions, we warrant that all Goods will at the time of delivery:
- 11.1.1 correspond in all material respects with their specification;
 - 11.1.2 be free from material defects in design, material and workmanship; and
 - 11.1.3 be fit for any purpose we specify.
- 11.2 In addition to the warranties in Condition 11.1, we warrant that all Goods which are tools manufactured by us (or any of our Related Bodies Corporate) will for a period of 12 months from the time of delivery be free from material defects in design, material and workmanship. (Please note that the warranty in this Condition 11.2 applies to tools only and therefore excludes all consumables such as staples, nails, clips or other fasteners, gas consumables, hot melt adhesives, timber connectors/builders' metals, spare parts and accessories). For the avoidance of doubt, this warranty does not apply to any tools supplied by us that were manufactured by a third party.
- 11.3 We will at our option refund the Price at the *pro rata* contract rate (Loan Tools Agreement) or repair or replace free of charge any Goods which do not conform with the relevant warranty in Conditions 11.1 or 11.2 provided:-
- 11.3.1 you comply with the provisions of Condition 11.5; and
 - 11.3.2 the Goods (or the part of the Goods which are defective) are returned to us at your own expense, as we may request; and
 - 11.3.3 you do not make any further use of such Goods (or the part of the Goods which are defective) after giving notice pursuant to Condition 11.5; and
 - 11.3.4 the defect has not arisen because you failed to follow our oral or written instructions as to the storage, installation, commissioning, use or maintenance of the Goods or any related tools (if there are none) good trade practice regarding the same; and
 - 11.3.5 you have not altered or repaired such Goods without our written consent; and



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- 11.3.6 the defect has not arisen from any drawing, design or specification supplied by you in relation to the Goods; and
- 11.3.7 the Goods do not differ from specification as a result of changes made to ensure they comply with applicable statutory or regulatory requirements.
- 11.4 Except as provided in this Condition 11, we will have no liability to you in respect of the Goods' failure to comply with the warranties set out in Condition 11.1 or 11.2.
- 11.5 We will not be liable for a breach of any warranty in Condition 11.1 or 11.2 unless:
- 11.5.1 (whether or not delivery is refused by you) you give written notice of the defect to us, and (if the defect is as a result of damage in transit) to the carrier, within 7 days from the date of delivery or (where the defect or failure was not apparent on reasonable inspection) within a reasonable time after discovery of the defect or failure; and
- 11.5.2 we are given a reasonable opportunity after receiving the notice to examine the Goods concerned and you (if asked to do so by us) return the Goods (or the part of the Goods which are defective) to our place of business at your cost for the examination to take place there.
- If you do not notify us in accordance with this Condition 11.5, you are not entitled to reject the Goods and we shall have no liability for such defect or failure, and you are bound to pay the Price and any additional costs specified in the Contract or as provided in these Conditions as if the Goods had been delivered in accordance with the Contract.
- 11.6 Nothing in the Contract will affect your statutory rights, including certain protections under the Australian Consumer Law or any rights or warranties that cannot be excluded under applicable law.
- 11.7 Where the Goods are to be delivered by instalments, any defect in any instalment shall not entitle you to cancel the remainder of the instalments.
- 11.8 Where we are not the manufacturer of the Goods, we will endeavour upon request to transfer to you the benefit of any warranty or guarantee given to us by our suppliers.
- 11.9 Where we agree to repair or replace Goods in accordance with this Condition 11, any date or period specified for delivery under the Contract shall be extended by such period as we may reasonably require.
- 11.10 You warrant and represent to us that you have complied with all applicable statutes, Orders or council regulations or directions relevant to the Contract, and in particular that you have lawfully obtained every necessary licence, permit or authority that may be required.

12. Limitation of Liability

- 12.1 Subject to Conditions 8, 11 and 13, and to the maximum extent permitted by law, the



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following provisions set out our maximum aggregate liability (including any liability for the acts or omissions of our employees, agents and sub-contractors) to you in respect of:

- 12.1.1 any breach of these Conditions;
 - 12.1.2 any use made or resale by you of any of the Goods, or of any product incorporating any of the Goods; and
 - 12.1.3 any representation, statement or tortious act or omission including negligence arising under or in connection with the Contract.
- 12.2 Except as expressly contained in the Contract, or warranties that cannot be excluded by applicable law, all warranties, conditions and other terms implied by statute or common law are, to the fullest extent permitted by law, excluded from the Contract.
- 12.3 Nothing in these Conditions excludes or limits our liability:
- 12.3.1 for death or personal injury caused by our negligence, or the negligence of our employees, agents or subcontractors (as applicable); or
 - 12.3.2 for fraud or fraudulent misrepresentation; or
 - 12.3.3 for any matter in respect of which it would be unlawful for the Supplier to exclude or restrict liability.
- 12.4 Without prejudice to Condition 12.3:
- 12.4.1 in no event will we be liable to you in contract, tort (including negligence or breach of statutory duty), misrepresentation (whether innocent or negligent), restitution or otherwise including any liability for negligence for:
 - (i) any loss of profit (whether director or indirect), revenue, business, anticipated savings or any loss of use or value; or
 - (ii) production downtime costs, loss of data or data restoration costs or loss of goodwill, or
 - (iii) for any indirect or consequential loss, costs, damages, charges or expensesin each case, however caused, and even if foreseeable (“**anticipated savings**” denotes any expense which you expected to avoid incurring or to incur in a lesser amount than would otherwise have been the case); and
 - 12.4.2 To the extent permitted by law, our total liability to you in respect of all other losses arising under or in connection with the Contract, whether in contract, tort (including negligence), breach of statutory duty, misrepresentation (whether innocent or negligent), restitution or otherwise, shall in no circumstances exceed the total invoiced Price of the Goods paid by you to us under the Contract.



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13. Non-Delivery

- 13.1 The quantity of any consignment of Goods as recorded by us upon despatch from our place of business shall be conclusive evidence of the quantity received by you on delivery, unless you can provide conclusive evidence proving the contrary.
- 13.2 We will not be liable for any non-delivery of Goods or shortages or discrepancies in the quantity of Goods (even if caused by our negligence) unless written notice is given to us within 7 days of the date when the relevant Goods would in the ordinary course of events have been received.
- 13.3 Any liability for non-delivery of Goods or shortages or discrepancies in the quantity of any Goods shall be limited to replacing any relevant Goods within a reasonable time or issuing a credit note at the *pro rata* Contract rate against any invoice raised for such Goods.

14. Personal Property Securities Act

- 14.1 The following definitions apply to this Condition 14:
- 14.1.1 PPSA means the Personal Property Securities Act 2009 (Cth) and terms defined in the PPSA have the same meaning in this clause (unless otherwise defined in this clause);
- 14.1.2 PPSA Security Interest means any security interest as defined under section 12 of the PPSA; and
- 14.1.3 Security Interest means any interest or power given as security for paying money or performance of obligations. It includes:
- (i) a mortgage, guarantee, pledge or lien;
 - (ii) a security or preferential interest or arrangement (for example, a retention of title arrangement or a deposit of money for security);
 - (iii) an interest in an asset reserved in, created or arising in or over any of the above (for example, a bill of sale, trust or power);
 - (iv) a PPSA Security Interest; and
 - (v) an agreement to grant or create any of the above.
- 14.2 You acknowledge that the Contract constitutes a Security Agreement for the purposes of the PPSA; and (b) grant a PPSA Security Interest to us:
- (i) over all Goods (and the Proceeds) previously supplied by us to you (if any) and in all future Goods (and the Proceeds) supplied by us to you; and



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(ii) over all Goods which are the subject of the Contract.

14.3 You acknowledge that:

14.3.1 we may register our PPSA Security Interest in the Goods (and the Proceeds) as a Purchase Money Security Interest on the Register; and

14.3.2 you must execute any documents and do such further acts and things and provide such further information as may be required by us to enable registration of the Security Interest granted by you on the Register, or to perfect or correct any registration.

14.4 You agree that to the extent permitted by law, we own, and you waive any rights you may have to anything installed in or affixed to the Goods, including any rights you might otherwise have under Part 3.3 of the PPSA.

14.5 If you also acquire a PPSA Security Interest in the Goods (for example, if you sublease them, even without consent), you must take all necessary steps to:

14.5.1 obtain the highest ranking priority possible in respect of that PPSA Security Interest (such as perfecting a Purchase Money Security Interest); and

14.5.2 reduce as far as possible the risk of a third party acquiring an interest in the Goods free of our Security Interest or your Security Interest.

14.6 You acknowledge and agree that where the PPSA applies to action taken by us in relation to the Goods, you:

14.6.1 agree that sections 116(2), 120, 125, 142 and 143 of the PPSA will not apply; and

14.6.2 waive your right to receive any notices we are required to give you under the PPSA (to the extent that the notice can be excluded) and includes any right to receive a notice under sections 95, 118(1)(b), 121(4), 123(2), 130, 132(3)(d), 132(4) and 135 of the PPSA and notice of any Verification Statements.

14.7 Each of the parties agree not to disclose information of the type referred to in section 275(1) of the PPSA, except in circumstances required by section 275(7)(b) to (e) of the PPSA.

14.8 You agree only to authorise the disclosure of information under section 275(7)(c) or request information under section 275(7)(d) if we provide our prior written approval.

15. GST

15.1 Unless expressed to the contrary in the Contract, all consideration to be provided under the Contract (other than an amount payable under clause 15.2) has been calculated without regard to GST and is taken to be exclusive of GST.

15.2 If GST is payable in respect of a supply made under or in relation to the Contract, the recipient must pay to the supplier an amount (GST Amount) equal to the GST payable on



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the supply (except to the extent that the consideration for the supply is expressed to be inclusive of GST). The GST Amount is payable by the recipient in addition to and at the same time as any consideration for the supply, provided the supplier has given the recipient a tax invoice.

- 15.3 Without limiting clause 15.2, if a party (payer) is required to reimburse another party (payee) for a cost (eg, if the payer is obliged to pay the payee's legal costs), or a payer is obliged to make a payment to a payee under an indemnity, the reimbursement or indemnity is for the payee's cost inclusive of GST but excludes any GST component of the cost for which the payee is entitled to claim an input tax credit.
- 15.4 The following provisions apply solely to this clause 15:
- 15.4.1 unless otherwise provided in the Contract, terms used in this clause have the meanings given to those terms by the GST Act;
- 15.4.2 a reference in this clause 15 to a liability of a party to pay GST or an entitlement of a party to input tax credits includes a reference to GST payable by, or an input tax credit entitlement of, the representative member of a GST group to which that party is a member;
- 15.4.3 any part of a supply that is treated as a separate supply for GST purposes (including attributing GST payable to tax periods) is treated as if it were a separate supply; and
- 15.4.4 this clause 15 is subject to any other specific agreement regarding the payment of GST on supplies.
- 15.5 This clause 15 will survive and remain in full force and effect following expiry or termination of the Contract.

16. Communications

- 16.1 All communications between the parties about this Contract must be in writing and delivered by hand or sent by pre-paid post or sent via email:
- 16.1.1 in respect of communications to us:
- (i) if sent by post, to our registered office specified in Condition 1.1 above, or to such changed address as shall be notified to you by us from time to time
 - (ii) if sent by email, to an email address as notified to you by us from time to time; or
- 16.1.2 in respect of the communications to you:
- (i) if sent by post, to your registered office (if you are a company) or (in any other case) to your address set out in any document which forms part of this Contract or such other address as may be notified to us by you from time to



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time; or

- (ii) if sent by email, to an email address as notified to us by you from time to time.

16.2 Communications shall be deemed to have been received:

16.2.1 if sent by pre-paid post, 2 Business Days after posting in Australia or 5 Business Days if posted outside Australia (exclusive of the day of posting);

16.2.2 if delivery by hand, on the day of delivery;

16.2.3 if sent by email on the Business Day prior to 4.00 pm, at the time of transmission and otherwise on the next working day.

17. Force Majeure

Neither party shall be liable for any failure or delay in performing its obligations under the Contract to the extent that such failure or delay is caused by a Force Majeure Event. A **Force Majeure Event** means any event beyond a party's reasonable control, which by its nature could not have been foreseen, or, if it could have been foreseen, was unavoidable, including strikes, lock-outs or other industrial disputes (whether involving its own workforce or a third party's), failure of energy sources or transport network, acts of God, war, terrorism, riot, civil commotion, interference by civil or military authorities, national or international calamity, armed conflict, malicious damage, breakdown of plant or machinery, nuclear, chemical or biological contamination, sonic boom, explosions, collapse of building structures, fires, floods, storms, earthquakes, loss at sea, epidemics or similar events, natural disasters or extreme adverse weather conditions, or default of carriers, suppliers or subcontractors.

18. Sub-Contracting

18.1 You may not assign, transfer, mortgage, charge, subcontract, declare a trust over or deal in any other manner with any or all or any of your rights or obligations under the Contract without our prior written consent.

18.2 We may at any time assign, transfer, mortgage, charge, subcontract or deal in any other manner with all or any of our rights or obligations under the Contract.

19. General

19.1 **Entire Agreement.** This Contract and any Order accepted under Condition 2.6 constitutes the entire agreement between the parties. You acknowledge that you have not relied on any statement, promise or representation made or given by or on behalf of us which is not set out in the Contract. We may also supply to you Tools to be used in connection with the Goods pursuant to the Loan Tools Agreement. If there is any inconsistency between these Conditions and the terms and conditions of the Loan Tools Agreement, then these Conditions prevail to the extent of the inconsistency. **Tool** has the meaning given to that



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term in the Loan Tools Agreement entered into between the parties (if applicable).

- 19.2 **Remedies.** Each right or remedy we may have under the Contract is without prejudice to any other right or remedy we may have whether under the Contract or not.
- 19.3 **Severance.** If any provision of the Contract is found by any court, tribunal or administrative body of competent jurisdiction to be wholly or partly illegal, invalid, void, voidable, unenforceable or unreasonable it shall to the extent of such illegality, invalidity, voidness, voidability, unenforceability or unreasonableness be deemed severable and the remaining provisions of the Contract and the remainder of such provisions shall continue in full force and effect.
- 17.4 **Waiver.** A waiver of any right or remedy under the Contract or law is only effective if given in writing and shall not be deemed a waiver of any subsequent breach or default. No failure or delay by a party to exercise any right or remedy provided under the Contract or by law shall constitute a waiver of that or any other right or remedy, nor shall it prevent or restrict the further exercise of that or any other right or remedy. No single or partial exercise of such right or remedy shall prevent or restrict the further exercise of that or any other right or remedy.
- 17.5 **Third party rights.** A person who is not a party to the Contract shall not have any rights to enforce its terms
- 17.6 **Variation.** Except as set out in these Conditions, no variation of the Contract, including the introduction of any additional terms and conditions, shall be effective unless it is in writing and signed by the Supplier.
- 17.7 **Governing law.** The Contract, and any dispute or Claim arising out of or in connection with it or its subject matter or formation (including non-contractual disputes or Claims), shall be governed by, and construed in accordance with, the laws of New South Wales, Australia.
- 17.8 **Jurisdiction.** Each party irrevocably agrees that the courts of New South Wales, Australia, shall have exclusive jurisdiction to settle any dispute or Claim arising out of or in connection with this Contract or its subject matter or formation (including non-contractual disputes or Claims).
- 17.9 **Relationship:** Nothing in the Contract is intended to or will operate to create a partnership, joint venture or franchise between the parties, or authorise either party to act as agent for the other, and neither party will have the authority to act in the name or on behalf of or otherwise to bind the other in any way.
- 17.10 **Vienna Convention:** The parties acknowledge and agree to exclude the Vienna Convention from the operation of the Contract such that the Vienna Convention shall not apply to the Contract or any issue or matter the subject of the Contract.