

Terms and conditions of trade

(sale on purchase order)

1. Application of terms and conditions

- 1.1 Goods and Services are quoted, sold and supplied by Kempe on the following terms and conditions of trade unless varied in accordance with these terms and conditions. The only terms which are binding on Kempe are those set out in the Contract or otherwise notified to the Purchaser under clause 1.3 and those if any which are imposed by law and which cannot be excluded, modified or restricted.
- 1.2 These terms and conditions of trade (which may only be waived or amended in writing signed by Kempe) shall prevail over all terms and conditions of the Purchaser. A Contract is not subject to, and does not include, any terms or conditions put forward by the Purchaser unless Kempe expressly accepts those terms and conditions in writing.
- 1.3 Kempe may vary these terms and conditions of trade from time to time by giving at least 7 days' notice to the Purchaser in writing, specifying the variation to the terms and conditions of trade. The varied terms and conditions of trade apply to future dealings between the Purchaser and Kempe from the expiry of the notice period.
- 1.4 Once a Contract is formed between Kempe and the Purchaser, the terms and conditions of that Contract can only be amended or varied by written agreement between Kempe and the Purchaser.
- 1.5 The Purchaser is deemed to have read and agreed to these terms and conditions of trade prior to submitting any order for Goods or Services to Kempe.

2. Definitions and interpretation

Contract means the contract comprising the Purchase Order and these terms and conditions of trade;

Contract Works means, where clause 22 applies, the Goods and the erection and/or installation or other works (if any) to be carried out by Kempe at the Site;

Collateral has the meaning given under the PPSA and in particular for the purposes of the Contract, the personal property that is not used predominately for personal, domestic or household purposes as identified in clause 12 to which the Security Interest has attached;

Goods includes goods, materials, equipment, parts and any other ancillary items supplied by Kempe to the Purchaser as identified or referred to in the Contract or any other goods supplied to the Purchaser by Kempe;

Intellectual Property means any subject matter, whether tangible or intangible, that attracts, or is susceptible to protection by intellectual property rights, including copyright, trade mark, design, and patent;

Insolvency Event means any of the following events:

- (a) the Purchaser commits an act of bankruptcy;
- (b) a receiver is appointed to the Purchaser;
- (c) the Purchaser goes into liquidation, administration, or some other form of insolvency administration whether formal or informal or takes any steps towards the same;
- (d) the Purchaser ceases to carry on business; or
- (e) the Purchaser enters into a scheme or compromises with its creditors.

Kempe means Kempe Engineering Pty Ltd ABN 61 089 801 516 and includes any related body corporate or related entity of Kempe within the meaning of the *Corporations Act 2001* if such related party is designated as the seller on the Purchase Order;

Manufactured Product means the product of a manufacturing or construction process of its own or a third party in which the Purchaser uses any of the Goods;

PPSA means the *Personal Property Securities Act 2009* as amended;

PPS Register means the personal property securities register established under section 146 of the PPSA;

Purchase Order means the Purchaser's order for Goods and/or Services that is accepted by Kempe thereby giving rise to a Contract;

Purchaser means the person or company designated as the purchaser of the Goods and/or Services specified in the Purchase Order and includes its legal representatives, administrators, successors and permitted assigns;

Security Interest has the meaning given under the PPSA;

Services include all services provided or to be provided by Kempe under the Contract; and

Site means, if clause 22 applies, the location notified by the Purchaser where Kempe is required to carry out the Contract Works.

Words importing the singular shall be deemed to include the plural and vice versa. The headings in these terms and conditions of trade are provided for convenience only and do not affect the interpretation thereof.

3. Quotations & Prices

- 3.1 Kempe may withdraw a quotation at any time prior to a Contract arising. Unless otherwise withdrawn, Kempe's quotations are open for acceptance for the period stated within the quotation, or if no period is stated, for a period of 30 days from the date of quotation. Specifying anything after the word "include" or similar words does not limit what else is included.

- 3.2 Quotations and Kempe's price list do not constitute an offer to sell but are an invitation to treat only. Kempe reserves the right to accept or reject in its absolute discretion any order or offer to purchase Goods and/or Services that Kempe may receive. An order or offer to purchase from the Purchaser is subject to acceptance by Kempe and must be expressly accepted by Kempe in writing to constitute a Purchase Order and thereby form a Contract.
- 3.3 The prices shown in any price list or catalogues provided by Kempe are subject to alteration without notice.
- 3.4 Subject to clause 3.5, if Kempe accepts an order it will supply Goods at the price shown in the price list current when Kempe accepts the order, unless otherwise agreed in writing. All applicable taxes, duties or levies on the sale or export of Goods and/or Services will be to the Purchaser's account.
- 3.5 Where specifications, drawings or other particulars are supplied to Kempe by the Purchaser for the purpose of Kempe preparing a quotation, Kempe's quotation is based on its estimates of quantities of materials required. If for any reason an adjustment in materials is required above or below the quotation estimate any such adjustment will be made on a unit rate basis at the price current at the date of the adjustment.
- 3.6 The descriptions, illustrations and particulars of weights and dimensions contained in catalogues, price lists and other advertising materials do not form part of the Contract. Performance figures given by Kempe are figures that Kempe expects to obtain on testing. Kempe has no liability whatsoever for failure to attain performance figures.
- 4. Description of Goods or Services**
- 4.1 All Goods and Services to be supplied are described on the Purchase Order as may be modified and agreed between the parties in writing. In the event of any dispute arising in relation to scope of supply, the description in the Purchase Order will prevail over all other descriptions.
- 5. Cancellation**
- 5.1 The Purchaser may not cancel a Purchase Order unless the Purchaser:
- (a) obtains Kempe's written consent to do so; and
 - (b) indemnifies Kempe for all costs incurred or damages suffered by Kempe in connection with the cancellation, including any loss of profit, overhead, tax, design, financing or purchasing costs or any other outgoing incurred by Kempe.
- 5.2 All costs and damages referred to in clause 5.1(b) must be paid in full by the Purchaser within 30 days from the date of Kempe's invoice.
- 6. Packing, delivery and storage**
- 6.1 All costs associated with any special packing requirements including export requirements that are in addition to Kempe's standard packaging must be paid by the Purchaser notwithstanding that such cost may have been omitted from a quotation.
- 6.2 Kempe will make every reasonable effort to deliver Goods and/or Services within the times set out in the Contract but delivery times quoted are an estimate only. Any time or date for completion, delivery, despatch, shipment or arrival or for tender of any documents is an estimate only and does not constitute a condition of the Contract or part of the description of the Goods and/or Services and is not of the essence of the Contract. Kempe will not be liable for any loss or damage howsoever arising (including negligence) as a result or consequence of any delay in delivery or any failure to deliver. The Purchaser will not be relieved of any obligation to accept or pay for Goods and/or Services by reason of any delay in delivery. The Purchaser shall not be entitled to cancel, rescind or to terminate the Contract in the event of late or non-delivery of Goods and/or Services.
- 6.3 Delivery of Goods will occur when the Goods are first left with the Purchaser or at the premises of the Purchaser or at any other place nominated by the Purchaser and agreed by Kempe. Kempe will not be required to obtain the Purchaser's signature as proof of delivery. Costs of delivery will be to the Purchaser's account unless the Contract expressly provides otherwise.
- 6.4 Unless the Contract otherwise specifies, Kempe may in its sole discretion deliver Goods in any number of instalments and each instalment delivery is deemed to be a separate Contract.
- 6.5 If Kempe is unable to supply the Purchaser's total order for Goods under a Contract these terms and conditions of trade apply to any Goods partially supplied.
- 6.6 If Kempe requests delivery instructions for Goods from the Purchaser and those instructions are not promptly provided by the Purchaser, Kempe may charge the Purchaser a reasonable daily storage fee in relation to the Goods from the first day after instructions have been requested.
- 7. Acceptance**
- 7.1 The Purchaser must inspect Goods and/or Services immediately upon delivery and must within 7 days after the date of inspection give written notice to Kempe, with particulars, of any claim for short delivery, loss or damage of Goods and/or Services delivered. If the Purchaser fails to give such notice then:
- (a) to the extent permitted by statute the Goods and/or Services must be treated as having been accepted by the Purchaser;
 - (b) the Purchaser must pay for the Goods and/or Services in accordance with the provisions of the Contract; and
 - (c) to the fullest extent permitted by law Kempe will be discharged from any liability in respect of the Goods and/or Services being short delivered, lost or damaged.
- 8. Payment**
- 8.1 Payment for Goods and/or Services supplied by Kempe to the Purchaser must be made in full within 30 days from end of month of invoice date unless the Contract specifies otherwise. The Purchaser shall not be entitled to make any deduction from the price on account of any set-off or counter claim.
- 8.2 Payment must be treated as made:

- (a) if cash is tendered – on the date it is tendered; and
 - (b) if a cheque (bank or otherwise) or other negotiable instrument is tendered – on the date upon which the cheque or other negotiable instrument is negotiated and cleared by Kempe's bankers.
- 8.3 Time is of the essence in respect of the Purchaser's obligation to make payment for Goods sold by Kempe to the Purchaser.
- 8.4 If the Purchaser defaults in making payment to Kempe in accordance with the Contract Kempe may in its absolute discretion (in addition to any other remedies it may have):
- (a) suspend supply or work and any Contract period shall be extended by the period of the suspension;
 - (b) refuse to make further supply to the Purchaser;
 - (c) terminate the Contract;
 - (d) from the date on which the default arose, charge the Purchaser interest calculated on the portion of the Purchaser's account overdue at the rate which is 4% higher than the rate prescribed from time to time under the *Penalty Interest Rates Act 1983* (Vic); and/or
 - (e) require the Purchaser to reimburse Kempe for all collection costs including legal costs incurred by Kempe calculated on a solicitor and client basis as a consequence of advice received by Kempe in connection with the default and/or to institute such recovery process as Kempe in its discretion decides.

An election to apply any of the above remedies shall not preclude Kempe from subsequently electing to apply another of them.

- 8.5 Kempe may exercise any of the rights in clause 8.4 if any related company or related entity of the Purchaser defaults in payment or otherwise under any other agreement with Kempe or any of its related companies or related entities.
- 8.6 Notwithstanding any rights of lien to which Kempe may otherwise be entitled, Kempe shall have a specific lien (including a right of sale) over Goods the subject of the Contract and any Goods the subject of any other contract with the Purchaser until the price of the Goods has been paid in full.

9. Returns

- 9.1 The Purchaser must not return any Goods unless:
- (a) Kempe has first given its written approval to the return including the terms and conditions of return; and
 - (b) the Purchaser has agreed in writing to the terms and conditions of approval.

9.2 The Purchaser must prepay freight and cartage on any returns under clause 9.1.

9.3 Risk in Goods returned reverts to Kempe upon delivery of the Goods to Kempe.

10. Risk and insurance

- 10.1 Goods supplied by Kempe to the Purchaser are at the Purchaser's risk immediately on delivery to the Purchaser or into the Purchaser's custody, whichever is the sooner.
- 10.2 The Purchaser must insure the Goods at its cost from delivery to the Purchaser or into its custody until paid for in full against such risks as it reasonably thinks appropriate and must note Kempe's interest on the policy and produce a certificate to this effect to Kempe on request.
- 10.3 Any property belonging to the Purchaser that is in Kempe's custody is held at the Purchaser's risk and Kempe will not be liable for any loss or damage caused to or by such property.

11. Retention of title

- 11.1 Property in Goods supplied by Kempe to the Purchaser does not pass to the Purchaser until the money owing for those Goods and any other money owing by the Purchaser to Kempe has been paid. In the meantime the Purchaser takes custody of Goods and retains them as the fiduciary agent and bailee of Kempe.
- 11.2 Where the Purchaser does not make payment in respect of specific Goods payment must be treated as having been made:
- (a) first in respect of Goods which have passed out of the possession of the Purchaser; and
 - (b) then in respect of whatever Goods are still in the possession of the Purchaser, such Goods as Kempe elects.
- 11.3 Until the Goods have been paid for in full, the Purchaser:
- (a) must properly store, protect and insure the Goods including storing them in a manner that shows clearly that they are the property of Kempe;
 - (b) must not remove, deface or obliterate any identifying plate, mark or number on any of the Goods;
 - (c) may with the written authority of Kempe sell the Goods in the ordinary course of its business but only as fiduciary agent of Kempe; and
 - (d) agrees not to sell, assign, grant any Security Interest or otherwise encumber (other than to Kempe), or grant any other interest over any obligations which any third party may owe to the Purchaser as a result of the use, manufacture or resale of the Goods.

The Purchaser has no authority to bind Kempe to any liability by contract or otherwise and must not purport to do so. The Purchaser receives all proceeds whether tangible or intangible, direct or indirect of any dealing with the Goods (including any

proceeds from insurance claims) in trust for Kempe and must keep the proceeds in a separate bank account until the liability to Kempe is discharged.

- 11.4 If the Purchaser sells Manufactured Product then it holds such part of the proceeds of sale as relates to any Goods sold by Kempe to the Purchaser and used to produce Manufactured Product in trust for Kempe. That part must be treated, for the purpose of quantifying how much the Purchaser holds in trust for Kempe but for no other purpose, as being equal in dollar terms to the amount owing by the Purchaser to Kempe for all Goods sold by Kempe to the Purchaser at the time of the receipt by the Purchaser of the proceeds of sale.
- 11.5 If the amount owing by the Purchaser to Kempe is greater than the proceeds of sale of the Manufactured Product the balance remains owing by the Purchaser to Kempe.
- 11.6 If the sale price of all Goods sold by Kempe to the Purchaser is greater than the sum of:
- (a) the proceeds actually received by Kempe in respect of all dealings by the Purchaser with the Goods including the sale of Manufactured Product; and
 - (b) all other payments received by Kempe in respect of the Goods,
- the difference remains a debt owing by the Purchaser to Kempe.
- 11.7 Without prejudice to any other rights Kempe is entitled to reclaim possession of the Goods even if they have been paid for in full in satisfaction of all debts owing by the Purchaser to Kempe if the Purchaser breaches a Contract or an Insolvency Event occurs.
- 11.8 The Purchaser irrevocably authorises Kempe and its representatives and agents at any time to enter any premises:
- (a) upon which Kempe's Goods are stored to enable Kempe:
 - (i) to inspect the Goods ; and/or
 - (ii) if the Purchaser has breached a Contract (or has committed an Insolvency Event to reclaim possession of the Goods; or
 - (b) upon which the Purchaser's records pertaining to the Goods are held to inspect and copy the records pertaining to the Goods.
- 11.9 In addition to its rights under clauses 11.7 and 11.8, if the Purchaser has breached a Contract or has committed an Insolvency Event Kempe may demand the return of the Goods and the Purchaser must deliver the Goods to the address specified by Kempe in such demand at the Purchaser's expense.
- 11.10 Kempe's property in the Goods is not affected by the fact that the Goods become fixtures attached to premises of the Purchaser or a third party and if Kempe enters those premises for the purpose of reclaiming possession of the Goods, and incurs any liability to any person in connection with the entry or reclamation, the Purchaser indemnifies Kempe against that liability.
- 11.11 The provisions of this clause 11 apply despite any arrangement between the parties under which Kempe grants the Purchaser credit. Where Kempe grants the Purchaser credit for a specific period the credit period is for that period or until the resale of the Goods by the Purchaser or their use by the Purchaser to produce Manufactured Goods, whichever is the earlier.
- 11.12 Kempe may commence legal action against the Purchaser if Goods are not paid for within Kempe's usual credit terms or any separate arrangement for credit made by Kempe with the Purchaser although property in the Goods has not passed to the Purchaser.

12. Personal Property Securities Act 2009

- 12.1 The terms "Collateral", "Debtor", "Financing Change Statement", "Financing Statement", "Grantor", "Proceeds", "Secured Party", "Security Agreement" and "Security Interest" have the meanings given in the PPSA.
- 12.2 The Purchaser acknowledges and agrees that these terms and conditions of trade which form part of the Contract between Kempe and the Purchaser constitute a Security Agreement that covers the Collateral for the purposes of the PPSA and that:
- (a) Kempe holds (as Secured Party) a Security Interest over all of the present and future goods supplied by Kempe to the Purchaser and any Proceeds of the sale of those goods ("Collateral");
 - (b) that any purchase by the Purchaser on credit terms from Kempe or retention of title supply pursuant to these terms and conditions of trade will give rise to a purchase money security interest as defined under section 14 of the PPSA ("PMSI");
 - (c) the PMSI granted herein will continue to apply to any Goods coming into existence supplied by Kempe to the Purchaser or Proceeds of sale of such goods;
 - (d) Kempe will continue to hold a Security Interest in the Goods in accordance with and subject to the PPSA, notwithstanding that the Goods may be processed, commingled or become an accession with other goods;
 - (e) any Kempe Security Interest will be a continuing and subsisting interest in the Collateral with priority to the fullest extent permitted by law over all other registered or unregistered Security Interests;
 - (f) until title in the goods passes to the Purchaser, it will keep all goods supplied by Kempe free and ensure all such goods are kept free of any charge, lien or Security Interest (other than any granted to Kempe) and not otherwise deal with the goods in a way that will or may prejudice any rights of Kempe under the Contract or the PPSA;
 - (g) Goods supplied or to be supplied to the Purchaser by Kempe fall within the PPSA classification of "Other Goods"; and
 - (h) in addition to any other rights under these terms and conditions of trade or otherwise howsoever arising, Kempe may exercise any and all remedies afforded to it as a Secured Party under Chapter 4 of the PPSA including entry into any building or premises owned, occupied or used by the Purchaser to search for and seize, dispose of or retain those Goods in respect to which the Purchaser has granted a Security Interest to Kempe.

- 12.3 The Purchaser undertakes to:
- (a) sign any further documents, do such further acts and provide such information which Kempe may reasonably require to register, amend or update a Financing Statement or Financing Change Statement in relation to a Security Interest on the PPS Register or otherwise perfect Kempe's Security Interest or keep it perfected;
 - (b) indemnify and upon demand reimburse Kempe for all expenses incurred in registering a Financing Statement or Financing Change Statement on the PPS Register or releasing any Security Interests;
 - (c) not register or permit to be registered a Financing Change Statement in the Collateral without the prior written consent of Kempe; and
 - (d) provide Kempe with not less than 7 days' prior written notice of any proposed change in the Purchaser's name, address, contact numbers, business practice or such other change in the Purchaser's details registered on the PPS Register to enable Kempe to register a Financing Change Statement if required.
- 12.4 Kempe and the Purchaser agree that sections 96, 125, 132(3)(d) and 132(4) of the PPSA do not apply to the Security Agreement created under the Contract.
- 12.5 The Purchaser waives its rights, and with Kempe's agreement, contracts out of the Purchaser's rights to receive notices under sections 95, 118, 121(4), 130, 132(3)(d) and 132(4) of the PPSA.
- 12.6 The Purchaser waives, and with Kempe's agreement, contracts out of its rights as a Grantor and/or a Debtor under sections 142 and 143 of the PPSA.
- 12.7 Unless otherwise agreed in writing by Kempe, the Purchaser waives its right to receive a verification statement in accordance with section 157 of the PPSA.
- 12.8 The Purchaser agrees that Kempe may apply to register its Security Interest in the Collateral at any time before or after delivery of Goods. Until title in the Goods passes to the Purchaser, the Purchaser must not give to Kempe a written demand or allow any other person to give Kempe a written demand requiring Kempe to register a Financing Statement or Financing Change Statement.
- 12.9 The Purchaser agrees that it has received value as at the date of the first delivery of Goods by Kempe and that Kempe has not agreed to postpone the time for attachment of its Security Interest.
- 12.10 The Purchaser shall unconditionally ratify any actions taken by Kempe under this clause 12.
- 12.11 The Purchaser agrees, at Kempe's request, to pay any or all of Kempe's costs and expenses on an indemnity basis related to the enforcement of Kempe's Security Interest.
- 12.12 Kempe and the Purchaser agree not to disclose information of the kind mentioned in section 275(1) of the PPSA, except in circumstances required by sections 275(7)(b) to (e) inclusive of the PPSA.
- 12.13 Money that Kempe receives from or on account of the Purchaser may be applied by Kempe in any order that Kempe may determine in its absolute discretion.
- 12.14 This clause 12 will survive the termination of the Contract to the extent permitted by law.
- 13. Warranty**
- 13.1 The only conditions and warranties, whether express or implied by law or otherwise, which are binding on Kempe in respect of:
- (a) the state, quality or condition of Goods or Services supplied by Kempe to the Purchaser; or
 - (b) advice, recommendations, information or like services supplied by it, its employees, servants or agents to the Purchaser regarding Goods or Services or their use and application;
- are those imposed and required to be binding by statute (including the *Competition & Consumer Act 2010* and *Australian Consumer Law*) and which cannot be lawfully excluded, restricted or modified or otherwise as expressly set out in these terms and conditions of trade.
- 13.2 If the Purchaser purchases Goods or Services as a consumer as defined under the *Australian Consumer Law*, to the extent permitted by statute, the liability, if any, of Kempe arising from the breach of any actual or implied guarantee, condition or warranty that cannot be lawfully excluded, restricted or modified will be limited to and completely discharged by, at the election of Kempe, by:
- (a) in the case of Goods:
 - (i) replacement of the Goods or the supply of equivalent Goods;
 - (ii) the repair of the 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) in the case of Services:
 - (i) supplying the Services again; or
 - (ii) the payment of the cost of having the Services supplied again.
- 13.3 If the Purchaser is not a consumer as defined under the *Australian Consumer Law*, Kempe warrants that Goods and/or Services shall be free from defects due to faulty workmanship, materials and design except as regards defects:
- (a) specifically drawn to the Purchaser's attention before any Contract is formed; or

(b) which, if the Purchaser examines the Goods before the Contract is formed, that examination ought to reveal.

13.4 If it is proven to Kempe's reasonable satisfaction that Goods and/or Services are not free from defects due to faulty workmanship, materials and design (except as revealed by examination referred to in clause 13.3(b)) then Kempe shall, at no cost and at its option, either:

- (a) replace such Goods with the same or equivalent Goods at the point of delivery applicable to the Contract;
- (b) repair such Goods;
- (c) re-perform the Services or pay the cost of having the Services supplied again; or
- (d) refund to the Purchaser the Contract price of such Goods and/or Services.

Any removal, reinstallation and other consequential costs will be for the Purchaser's account. The warranty cover for repaired or replaced items will expire on the same date as the warranty for the rest of the Goods and/or Services.

13.5 The warranty under clause 13.3 does not apply in respect of defects due to or arising from:

- (a) incorrect or negligent handling, disregard of operating or maintenance instructions, overloading, unsuitable operating conditions, defective civil or building work, lightning, accident, neglect, faulty erection or installation (carried out other than by Kempe), acts of God, causes beyond Kempe's control or whilst unauthorised repairs or alterations have been carried out or non-compliance with applicable Goods' specification;
- (b) the use of goods of a consumable nature; or
- (c) fair wear and tear.

13.6 The warranty under clause 13.3 does not apply unless:

- (a) the Goods have been properly handled, located, used, maintained and stored;
- (b) defects occur within 12 calendar months after the Goods have been delivered to the Purchaser or, if delivery is delayed for reasons beyond Kempe's control, then within 12 calendar months of deliveries or within 18 calendar months after Kempe first notified the Purchaser that Kempe was ready to deliver the Goods (whichever period expires first);
- (c) defects occur within 6 calendar months after Services have been performed;
- (d) Kempe is notified in writing within 7 days of the alleged defect first coming to the notice of the Purchaser;
- (e) the Purchaser returns the defective Goods to Kempe, or if necessary, at Kempe's absolute discretion, to the works where the Goods were manufactured or assembled, free of charge; and
- (f) the Purchaser has fulfilled all of its obligations under the Contract.

13.7 The parties agree that the Purchaser shall not make a claim against Kempe and Kempe shall have no further liability for or in connection with the Goods and/or Services upon the expiry of a period of 2 years from the date of the end of the defect liability period in clauses 13.6(b) and 13.6(c), and claims made after that period will be time barred absolutely.

13.8 The benefit of the warranty under clause 13.3 is personal to the Purchaser and is not assignable or transferable without Kempe's prior written consent.

14. Limitation of Liability

14.1 The Purchaser acknowledges and warrants to Kempe that:

- (a) unless Kempe has specifically agreed otherwise in writing, it has no knowledge of the use to which the Purchaser proposes to put any Goods and/or Services supplied by Kempe to the Purchaser and Kempe makes no representation nor gives any warranty in respect of such particular use;
- (b) the Purchaser does not rely and it is unreasonable for the Purchaser to rely on the skill or judgment of Kempe as to whether the Goods and/or Services supplied are reasonably fit for any purpose for which they are being acquired, and that the sale is not a sale of Goods by description or sample; and
- (c) any description of the Goods is given by way of identification only and the used of such description will not constitute a contract of sale by description.

14.2 Notwithstanding anything otherwise contained in the Contract, and except to the extent that the Contract applies to a consumer as defined under the *Australian Consumer Law*, Kempe shall not be liable (to the fullest extent permitted by law) whether by way of indemnity, guarantee, or by reason of any breach of contract, or of statutory duty or by reason of tort (including negligence) or any other legal principle or doctrine for:

- (a) any loss of profits, loss of use or production, loss of revenue or loss of anticipated savings, loss of goodwill, loss of contract, loss of opportunity, loss of anticipated benefit or saving, loss arising from increased operating costs or for any financial or economic loss (whether direct or indirect) or for any consequential or indirect loss or damage whatsoever; or
- (b) any other amount which in aggregate with any other liability (being any past, present or future liability) to which this clause applies, that exceeds the aggregate value of all payments of the Contract price made under the Contract except in relation to a consumer contract as defined under the *Australian Consumer Law*.

Otherwise, where it is permitted under the *Australian Consumer Law* or otherwise at law to do so the remedies in clause 13.4 shall apply.

15. Indemnity

15.1 To the fullest extent permitted by law, the Purchaser indemnifies, and agrees to keep indemnified, Kempe regardless of any negligence on the part of Kempe, against:

- (a) all losses incurred by Kempe;
- (b) all liabilities incurred by Kempe; and
- (c) all costs actually payable by Kempe to its own legal representatives (whether or not under a costs agreement) and other expenses incurred by Kempe in connection with a demand, action, arbitration or other proceeding (including mediation, compromise, out of court settlement or appeal),

arising directly or indirectly as a result of or in connection with the supply of Goods by Kempe to the Purchaser:

- (d) except to the extent that such losses, liabilities and/or costs are incurred by Kempe as a result of Kempe breaching a condition or warranty which cannot be lawfully excluded, modified or restricted under clause 13.1; or
- (e) unless such losses, liabilities and/or costs are incurred by Kempe due to wilful misconduct on the part of Kempe or any of its employees or agents acting within the scope of their employment.

15.2 The Purchaser must pay to Kempe all liabilities, costs and other expenses referred to in clause 15.1, whether or not Kempe has paid or satisfied them.

16. Default & Insolvency

16.1 If the Purchaser makes any default under the Contract or any other Contract between Kempe and the Purchaser or an Insolvency Event occurs then Kempe may at its sole discretion and without prejudice to any other rights it may have under contract or at law give notice in writing to the Purchaser and after 14 days from the date of such notice may, unless otherwise prevented by law:

- (a) suspend the Contract and any Contract period shall be extended by the period of the suspension;
- (b) terminate the Contract;
- (c) require payments in cash before or on delivery of Goods and/or Services notwithstanding the terms of payment specific to the Contract; or
- (d) cancel any undelivered or uncompleted Goods and/or Services then outstanding under the Contract.

17. Goods and services tax

17.1 In this clause, **GST** means GST as defined in A New Tax System (Goods and Services Tax) Act 1999 as amended (**GST Act**) or any replacement or other relevant legislation and regulations.

17.2 Capitalised expressions set out in this clause bear the same meaning as those expressions in the GST Act.

17.3 Except where express provision is made to the contrary, and subject to this clause, any amount that may be payable under this Agreement is exclusive of any GST. If a party makes a Taxable Supply in connection with this Agreement for a Consideration which represents its Value, then the Recipient of the Taxable Supply must also pay, at the same time and in the same manner as the Value is otherwise payable, the amount of any GST payable in respect of the Taxable Supply. A party's right to payment under this clause is subject to a valid Tax Invoice being delivered to the Recipient of the Taxable Supply.

17.4 To the extent that one party is required to reimburse another party for costs incurred by the other party, those costs do not include any amount in respect of GST for which the other party is entitled to claim an Input Tax Credit.

18. Confidentiality

18.1 Both parties acknowledge that information disclosed to it by the other party under this Agreement may be proprietary, confidential or a trade secret of the other.

18.2 Except as stated in the Contract, a party must not and must not permit any of their respective officers, employees, agents, contractors or related companies to use or to disclose to any person any information disclosed to it by the other party without the prior written consent of that party.

18.3 This clause 18 does not apply to any information which:

- (a) is generally available to the public (other than as a result of the wrongful disclosure by the Purchaser); or
- (b) is required to be disclosed by any law.

19. Vienna Sales Convention

19.1 The application of the United Nations Convention on Contracts for the International Sale of Goods (known as the Vienna Sales Convention 1980) is excluded.

20. Intellectual Property

20.1 Each party will retain the rights to any of its own background Intellectual Property that was in existence prior to the Contract. To the extent that it relates to the Contract, each party grants to the other a royalty free, non-transferable, non-exclusive right to use the background Intellectual Property. Subject to anything to the contrary contained in the Contract, any Intellectual Property created during the performance of and in relation to the Contract shall become Kempe property.

20.2 Any new Intellectual Property that has been jointly created during the performance and in relation to the Contract shall become the property of Kempe and the Purchaser will have a revocable, non-exclusive and royalty free right to use of it for the purposes of the Contract only. Neither party will do anything, whether by act or omission which may prejudice or infringe the other party's background Intellectual Property.

21. Force majeure

21.1 If a party is prevented from or delayed in complying with an obligation (other than to pay money) by an event beyond its reasonable control, performance by it of that obligation is suspended during the time, but only to the extent that, compliance is prevented or delayed.

22. Site installation & erection

22.1 The following provisions of this clause 22 apply where Kempe is responsible for site installation or erection under the terms of the Contract.

22.2 The Purchaser must provide timely and suitable access to and possession of the Site for such periods as are reasonably required to perform the Contract Works, proper foundations to receive the Goods as and when delivered, adequate craneage, lifting tackle and scaffolding and suitable protection for the Goods from the time of delivery until the time of taking over.

22.3 The Purchaser will be responsible for providing and maintaining:

- (a) proper fencing, lighting, guarding and watching of all the Contract Works until taking over; and
- (b) proper provision during a like period of temporary roadways, footways, guards and fences as far as they may be necessary by reason of the Contract Works for the accommodation and protection of the owners and occupiers of adjacent property, public or otherwise.

22.4 The Purchaser must provide at no cost to Kempe such supplies of electricity, water and gas as may be necessary for the purposes of the Contract Works on Site.

22.5 Unless Kempe otherwise agrees in writing, the Purchaser must insure the Contract Works (with Kempe's interest noted) and keep each part insured for its full value against damage or destruction by fire, explosion, lightning, earthquake, theft, storm (including cyclone weather conditions), tempest, impact and aircraft damage from the date of despatch in accordance with the Contract or the date on which it becomes the Purchaser's property, whichever is the earlier until it is taken over or deemed taken over by the Purchaser under the Contract and shall from time to time, when so required by Kempe produce proof of insurance cover. All money received under any such policy shall be applied in or towards (in order of precedence):

- (a) the replacement or repair of the Goods lost, damaged or destroyed including re-performance of Services;
- (b) reimbursement to Kempe of its costs, liabilities, expenses and accounts in relation to such replacement or repair work; and
- (c) the remainder (if any) shall be paid to the Purchaser,

but this provision shall not affect liabilities or obligations under the Contract.

22.6 If the Contract requires Kempe to carry out tests on Site the Purchaser must provide when requested and free of charge such labour, materials, electricity, gas, fuel, water, stores, apparatus, instruments or other items as may be required by Kempe from time to time in order to carry out such tests in accordance with the Contract.

22.7 Site tests shall be carried out within 1 month after completion of erection and/or installation. Kempe will give the Purchaser 24 hours' notice of the date on which tests will be carried out. If the Purchaser fails to attend on that date, unless otherwise arranged, Kempe will proceed with the tests which shall be deemed to have taken place in the Purchaser's presence such that the outcome of the test will be deemed to be accepted by the Purchaser. Where the results of tests do not fall within any guarantees specified under the Contract, Kempe reserves the right to repeat the tests within 14 days after the Contract Works are ready for retest and are able to be retested.

22.8 The Contract Works shall be deemed to have been taken over by the Purchaser on the earlier of:

- (a) erection and/or installation being completed by Kempe;
- (b) completion of tests on Site when these are included under the Contract; or
- (c) one calendar month after it shall have been put into commercial use,

provided that the Contract Works shall be deemed to have been taken over at the expiration of 2 calendar months after Kempe gives the Purchaser written notice that erection and/or installation is complete. The time of taking over shall not be delayed on account of additions, minor omissions or defects which do not materially affect the commercial use of the Contract Works.

22.9 Any agreement by Kempe to undertake Contract Works is based on the assumption that all civil or other relevant mechanical work or other preparatory work for which the Purchaser is responsible has been completed and that the erection and/or installation can be carried out with continuity during normal working hours. Should Kempe incur extra costs or other expenses including reasonable overheads because of prevention, interruptions, delays, overtime, unusual hours, mistakes or work for which Kempe is not responsible under the Contract, such extra cost, expense or overhead will be added to the Contract price. It is agreed that overtime or unusual hours will not be worked except with the prior approval of the Purchaser.

22.10 For Contracts including erection and/or installation the delivery date shall include the addition of the period of time set out in the Contract for erection and/or installation or any agreed extension thereof.

22.11 The Purchaser shall be responsible to obtain all permits, consents or approvals required by law or otherwise for or in connection with the execution of the Contract Works and must pay all applicable fees.

23. Miscellaneous

23.1 The Contract:

- (a) represents the entire agreement and understanding between Kempe and the Purchaser on everything connected with the subject matter of the Contract except to the extent that any terms are imposed by law and cannot be excluded, modified or restricted; and

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- (b) excludes and supersedes any prior discussion, representation, agreement or understanding on anything connected with that subject matter.
- 23.2 Kempe and the Purchaser enter into the Contract without relying on any representation by the other or any person purporting to represent the other.
- 23.3 The Purchaser must not assign, novate or otherwise deal with the Contract or any of its terms without the consent of Kempe which Kempe may give or withhold at its absolute discretion. Kempe may assign, novate or otherwise deal with the Contractor any of its rights under or in connection with the Contract without the consent of the Purchaser.
- 23.4 If the Purchaser is acting as the trustee of any trust (whether disclosed or not), then the Purchaser declares that it is entering into the Contract both in its own capacity and as trustee of the trust with the ability to bind and the intention of binding both.
- 23.5 If anything in the Contract is unenforceable, illegal or void then it is severed and the rest of the Contract remains in force.
- 23.6 The law of Victoria governs the Contract and the parties submit to the non-exclusive jurisdiction of the courts of Victoria and of the Commonwealth of Australia.
- 23.7 All of the rights and obligations of each party to the Contract which are expressed as surviving termination and/or expiry of the Contract, or which by their nature or context must survive termination and/or expiry of the Contract, will survive the termination and/or expiry of the Contract.