1 Definitions and Interpretation

1.1 “Act of God” means any act of nature (including, fire, flood, earthquake, storm, hurricane or other natural disaster), war, invasion, act of foreign enemies, hostilities (whether war is declared or not), civil war, rebellion, revolution, insurrection, or usurped power or confiscation, terrorist activities, government sanction, blockade, embargo, labour dispute, strike, lockout or interruption or failure of electricity or a telecommunications service and any other event which is beyond the reasonable control of a party, (a) an obligation upon two or more persons is borne by them jointly and severally; and (b) an expression is defined, another part of speech or grammatical form of that expression has a corresponding meaning.

2 Acceptance

2.1 Without limiting the way in which the Buyer may become bound by this Agreement, the Buyer will become bound by this Agreement by placing an order with the Seller for the supply of Goods or Services or by the Buyer signing a copy of this Agreement.

2.2 Where more than one Buyer has entered into this agreement, the Buyers shall be jointly and severally liable for their obligations under this Agreement.

2.3 Notice of the Seller’s rights to terminate the Agreement shall be delivered by way of representations, statements, conditions or agreements not expressed by a senior manager of the Seller in writing nor is the Seller bound by any undertakings that the Seller makes with respect to the obligations of the Buyer as guarantor.

2.4 The Buyer undertakes to give the Seller not less than fourteen (14) days advance written notice of any proposed change in the Buyer’s name and/or any change to the Buyer’s details (including but not limited to, changes in the Buyer’s address, facsimile number, or business practice).

3 Ordered Goods

3.1 The Goods and Services to be supplied by the Seller are as described on the invoice, quotation or order form or any other work commencement forms as provided by the Seller to the Buyer.

3.2 The Seller may in its sole discretion refuse to supply part or all of any order of Goods which is placed by the Buyer, for any reason it sees fit, without prejudice to any of the Seller’s other rights or remedies under this Agreement.

3.3 Orders can only be supplied in multiples of the “minimum order” quantity shown in the Seller’s price list. Orders which fail to meet the minimum order value specified by Seller from time to time will be subject to the Seller’s then current handling charges. Minimum order value will be made Free Into Store in designated major centres.

3.4 Export orders which fail to meet the minimum export order value specified by the Buyer has to time will be subject to the Seller’s then current administration fee.

4 Price and Payment

4.1 At the Seller’s sole discretion the Price shall be either: (a) indicated on invoices provided by the Seller to the Buyer in respect of Goods or Services supplied; or (b) the Seller’s current Price, at the date of delivery of the Goods or Services, as agreed to between the Seller and the Buyer; or (c) the Seller’s quoted Price (subject to clause 4.2) which shall be binding upon the Seller provided that the Buyer shall accept in writing the Seller’s quotation within thirty (30) days of the quotation being made by the Seller. If the Buyer fails to provide such cancellation notice then the Buyer is deemed to have accepted the Price increase.

4.2 The Seller may by written notice to the Buyer at any time up to thirty (30) days before delivery increase the Price of the Goods or Services to reflect any increase in the cost to the Seller beyond the reasonable control of the Seller (including, without limitation, foreign exchange fluctuations, taxes and duties and the cost of labour, materials and other manufacturing costs). The Buyer will have 3 Business Days from the receipt of such notice to cancel the order or the Goods or Services supplied by written notice to the Seller. If the Buyer fails to provide such cancellation notice then the Buyer is deemed to have accepted the Price increase.

4.3 The Seller for payment of the Goods and Services shall be of the essence and will be stated on the invoice, quotation or in any other order forms. If any credit is granted by the Seller then payment will be as specified in the terms of the grant of credit. If no time is stated then payment shall be on delivery of the Goods or Services. If any of the foregoing may impede the Supplier’s due date on a payment on the Buyer, then the earliest due date will prevail.

4.4 The Seller may in its discretion withhold delivery of the Goods or Services until the Buyer has paid for them, in which event payment shall be made before the delivery date.

4.5 At the Seller’s sole discretion, payment may be due at the date of this Agreement.

4.6 Payment will be made by cheque, bank cheque, E.F.T. or credit card (subject to a 1% surcharge for payments greater than $1,000) or by any other method agreed in writing by the Buyer and the Seller.

4.7 Unless specified to the contrary on any quote, invoice or order form, the Price shall be deemed to be exclusive of any GST and any other taxes, duties, levies or withholdings which the Seller is required to pay or is interest payable by Seller in respect of the supply of the Goods or Services (“Taxes’). The Buyer will indemnify the Seller in respect of such Taxes and will waive the same name as paying the Price to the Seller, pay the Seller the amount of such Taxes.

5 Delivery Of Goods / Services

5.1 Delivery of the Goods shall be made to the Buyer’s address as indicated by the Buyer to the Seller at the time of delivery or as otherwise agreed. If the Buyer fails to make such arrangements the Seller reserves the right, without prejudice to any of its other rights or remedies under this Agreement, to deliver the Goods to a third party nominated by the Buyer.

5.2 Delivery of the Goods to a carrier, either named by the Buyer or failing such naming to a carrier at the discretion of the Seller for the purpose of transportation to the Buyer, is deemed to be a delivery of the Goods to the Buyer.

5.3 The Seller may deliver the Goods and Services by separate instalments (in accordance with the agreed delivery schedule). Each separate instalment shall be invoiced and paid for in accordance with the provisions of this Agreement.

5.4 Delivery of the Goods or Services to a third party nominated by the Buyer is deemed to be delivery to the Buyer for the purposes of this Agreement.

5.5 The failure of the Seller to deliver shall not entitle either party to treat this Agreement as repudiated by the Seller.

5.6 The Seller shall not be liable for any loss or damage whatsoever due to failure by the Seller to deliver the Goods or Services (or any of them) promptly or at all.

5.7 The Buyer shall be responsible for insuring the Goods whilst they are in transit from the Seller to the Buyer until the time that the Seller delivers the Goods to the Buyer as determined under this clause.

6 Liability and representations

6.1 All risk for the Goods passes to the Buyer on delivery as determined under this clause.

6.2 If any of the Goods are damaged or destroyed prior to property in them passing to the Buyer (as determined under clause 12), the Seller is entitled, without prejudice to any of its other rights or remedies under this Agreement to give the Buyer credit equal to the full price of the Goods (or the Price for the Goods), to receive all insurance proceeds payable for the Goods. This applies whether or not the Price has become payable under this Agreement. The Buyer undertakes to give the Seller such information about the Goods and the Buyer’s insurance as the Seller requires to enable the Seller to assert its rights under this clause.

6.3 The Seller’s rights under this clause are cumulative and shall not prejudice any of the Seller’s rights to receive the insurance proceeds without the need for any person dealing with the Seller to make further enquiries.

6.4 In the event that the Trade Practices Act 1974 (Cth) (or analogous legislation) applies to this Agreement this Agreement and any term that would be implied into this Agreement, including without limitation any condition or warranty, is hereby excluded.

6.5 The Buyer agrees that the Seller shall not be liable in respect of any claim by the Buyer (whether contractual, tortious, statutory or otherwise) for any special, incidental, indirect or consequential damages or injury including, but not limited to, any loss of profits, contracts, revenue or data arising out of or in connection with the provision of the Goods, Services and/or any other goods or services under this Agreement and whether as a result of any breach, default, negligence or otherwise by the Seller.

6.6 Subject to clauses 7.6 and 7.7, the maximum liability of the Buyer for any and all breaches of this Agreement will be capped at the Price for the Goods previously paid by the Buyer to the Seller under this Agreement.

6.7 In the event that the Trade Practices Act 1974 (Cth) (or analogous legislation) applies to this Agreement this Agreement and any term that would be implied into this Agreement, the liability of the Seller is limited, at the option of the Seller, to: (a) the case of goods (including the Goods), any one or more of the following: (i) the 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; and (iv) the payment of the cost of having the goods repaired.

6.8 In the case of services (including the Services), the Seller’s liability is limited, at the option of the Seller, to: (i) the supplying of the services again; or (ii) the payment of the cost of having the services supplied again.

7 Any of the terms and conditions contained herein which limit or exclude any term, condition or warranty, express or implied, or the liability of the Seller shall apply only to the extent permitted by law and shall not be construed as excluding, qualifying or limiting the Buyer’s statutory rights or remedies arising by virtue of the breach of any implied term of this Agreement where such exclusion, qualification or limitation would be prohibited by statute.
8 Defects / Returns
8.1 The Buyer shall inspect the Goods on delivery and shall within seven (7) days of delivery notify the Seller of any alleged defect, shortage in quantity, damage or failure to comply with the description, or any invoice. If the Buyer affords the Seller the opportunity to inspect the Goods within a reasonable time following delivery if the Buyer believes the Goods are defective in any way. If the Buyer shall fail to comply with these provisions, the Goods shall be completely paid for and delivered in accordance with this Agreement and free from any defect or damage.

8.2 For defective Goods, which the Seller has agreed in writing that the Buyer is entitled to reject the Seller’s liability. If the Buyer to any limitation under clause 7, is limited to either (at the Seller’s discretion) replacing the Goods or repairing the Goods provided that:

(a) the Buyer has complied with the provisions of clause 8.1;
(b) the Goods are returned in accordance with procedures specified by the Seller from time to time;
(c) the Seller will not be liable for Goods which have not been stored or used in a proper manner;
(d) the Goods are returned in the condition in which they were delivered and with all packaging material, brochures and instruction material in its new condition as is reasonably possible in the circumstances.

8.3 In the event that the Seller accepts or rejects the Goods for a credit or return. Any credit or return agreed to by the Seller may incur a restocking fee of $50 or 15% of the value of the returned Goods whichever is the greater plus returns freight if the Goods are returned to its special order, Buyer specification or Goods which are non-catalogue items.

9 Liability
9.1 Subject to the conditions set out in clause 9.2, the Seller warrants that if any defect in any workmanship of the Seller becomes apparent and is reported to the Seller within the warranty period as stipulated by the Seller at the time of sale, the Seller will either attend at the Seller’s sole discretion repair the defect or remedy the workmanship.

9.2 The conditions applicable to the warranty given by clause 9.1 are:

(a) the warranty shall cover any defect or damage which may be caused or partly caused by or arise through;

(i) failure on the part of the Buyer to properly maintain any Goods;
(ii) failure on the part of the Buyer to follow any instructions or guidelines provided by the Buyer;

(b) the warranty shall cover any Goods after it becomes apparent or would have become apparent to a reasonably prudent operator or user;

(c) fair wear and tear, any accident or Act of God.

9.3 For Goods not manufactured by the Seller, the warranty shall be the current warranty provided by the manufacturer of the Goods. The Seller shall not be bound by nor responsible for any term, condition, representation or warranty given by the manufacturer of the Goods.

10 Intellectual Property
10.1 While this Agreement is in existence or for any period of time thereafter, the Seller shall not be required to obtain any licence or other forms required by the Seller under which it will consent, consents or other forms required by the Seller under which it will consent, consents or other forms required by the Seller under which it will consent, consents or other forms required by the Seller under which it will consent, consents or other forms required by the Seller under which it will consent, consents or other forms required by the Seller under which it will consent, consents or other forms required by the Seller under which it will consent, consents or other forms required by the Seller under which it will consent.

11 Default & Consequences Of Default
11.1 Interest on overdue amounts shall accrue daily from the date when payment became due until the date of payment at a rate of 2.5% compounding per calendar month.

11.2 If the Buyer defaults in payment of any amounts when due, the Buyer shall indemnify the Seller from and against all of the Seller’s costs and disbursements arising from such default including legal costs on a solicitor and own client basis and in addition all of the Seller’s nominees costs of collection.

11.3 Without prejudice to any other remedies the Seller may have, if at any time the Buyer is in breach of any obligation (including those relating to payment), the Seller may suspend or terminate the supply of Goods and Services to the Buyer and any outstanding obligations under this Agreement. The Seller shall not be liable to the Buyer for any loss or damage the Buyer suffers because the Seller exercised its rights under this clause.

11.4 If any account remains unpaid at the end of the second month after supply of the Goods or Services an immediate amount of the greater of $20.00 or 10.00% of the amount overdue shall be levied on the Buyer for administration fees which sum shall become immediately due and payable.

11.5 In the event that:

(a) any money payable to the Seller becomes overdue, or in the Seller’s opinion the Buyer will be unable to meet its payments as they fall due; or
(b) the Buyer is about to become, or is becoming, solvent (as the case may be), by way of becoming bankrupt, entering into a convenzio meeting with its creditors or entering into an arrangement with creditors, or makes an assignment for the benefit of its creditors; or
(c) a receiver, manager, administrator, liquidator (provisional or otherwise) or similar person is appointed in respect of the Buyer or any asset of the Buyer, then without prejudice to the Seller’s other remedies at law:

(i) the Seller shall be entitled to cancel all or any part of any order of the Buyer whether already performed in addition to and without prejudice to any other remedies; and

(ii) all amounts owing to the Seller shall, whether or not due for payment, immediately become payable in addition to the interest payable under clause 11.1 hereof.

12 Title
12.1 Property in the Goods shall not pass from the Seller to the Buyer until:

(a) the Buyer has paid to the Seller all amounts owing for the particular Goods under this Agreement; and
(b) the Buyer has met all other obligations due by the Buyer to the Seller in respect of all agreements between the Seller and the Buyer, and that where practicable the Goods shall be kept separate until the Seller shall have received payment in full and all other obligations of the Buyer are met.

12.2 Receipt by the Buyer of any form of payment other than cash shall not be deemed to be payment until that form of payment has been honoured, cleared or recognised and until then the Seller’s ownership of rights in respect of the Goods shall remain.

12.3 It is further agreed that until such time as property in the Goods pass to the Seller from the Buyer:

(a) the Seller may give notice in writing to the Buyer to return the Goods or any of them to the Seller. Upon such notice the rights of the Buyer to obtain ownership or any other interest in the Goods shall cease.

(b) the Seller shall have the right of stopping the Goods in transit whether or not delivery has been made.

(c) if the Buyer fails to return the Goods to the Seller then the Seller or the Seller’s agent may enter upon and into and take possession of the Goods where the Goods are situated and take possession of the Goods.

13 Unpaid Seller’s Rights To Dispose Of Goods
13.1 In the event that:

(a) the Buyer retains or regains possession or control of the Goods; and
(b) payment of the Price is due to the Seller; and
(c) the Seller has made demand in writing of the Buyer for payment of the Price in terms of this Agreement;

(d) the Seller has not received the Price of the Goods, then, irrespective of whether the property in the Goods has passed to the Buyer or has remained with the Seller, the Seller may dispose of the Goods and may claim from the Buyer the loss to the Seller on such disposal.

14 Cancellation
14.1 The Seller may terminate this Agreement or cancel delivery of Goods to the Buyer at any time before the Goods are delivered by giving written notice.

The Seller shall not be liable for any loss or damage whatever arising from such cancellation.

15 Guarantee
15.1 The Buyer agrees to procure that the Guarantor(s) specified by the Seller provide a guarantee and indemnity in favour of the Seller, for the purposes of securing the performance by the Buyer of its obligations hereunder on such terms as are specified by the Seller.

16 Credit reporting
16.1 The Buyer agrees to sign, and to procure any Guarantor(s) to sign, any consents or other forms required by the Seller under which it will consent, consents or other forms required by the Seller under which it will consent, consents or other forms required by the Seller under which it will consent, consents or other forms required by the Seller under which it will consent, consents or other forms required by the Seller under which it will consent, consents or other forms required by the Seller under which it will consent, consents or other forms required by the Seller under which it will consent, consents or other forms required by the Seller under which it will consent.

17 General
17.1 If any provision of this Agreement is found to be invalid, void or unenforceable the validity, existence, legality and enforceability of the remaining provisions shall not be affected, prejudiced or impaired.

17.2 This Agreement shall be governed by the laws of the State of Victoria and the parties consent to the jurisdiction of the Courts of the State of Victoria and their Courts of appeal.

17.3 The Buyer shall not set off against the Price amounts due from the Seller to the Buyer any amounts of any kind however will not relieve or postpone any obligation to pay moneys due in writing by the party granting the waiver.

17.4 The Seller may license or sub-contract all or any part of its rights and obligations under this Agreement without the Buyer’s consent.

17.5 The Seller reserves the right to review the terms and conditions of this Agreement at any time and from time to time. If following any such review, there is to be any change in such terms and conditions, that change will take effect from the date on which the Seller notifies the Buyer of such change.

17.6 The Buyer shall be liable to indemnify the Seller in respect of any claim by the Buyer that an Act of God however will not relieve or postpone any obligation to pay moneys due hereunder.

17.7 The Buyer shall not transfer, assign or mortgage any right or power under this Agreement which will only be valid if given in writing by the party granting the waiver.

17.8 This Agreement supersedes all prior representations, arrangements and agreements between the parties in relation to its subject matter and forms the entire agreement between the parties.

17.9 Each provision of this Agreement capable of having effect after termination shall survive termination of this Agreement and shall not merge on such termination.