

# Terms of Sale

**INTRODUCTION:** OneFortyOne Wood Products Pty Ltd (ACN 621 555 682) operates a sawlog mill in Mount Gambier, South Australia at which it processes various timber products for sale to its customers. This document sets out the terms on which OFO sells its products to its customers.

## 1. DEFINITIONS AND INTERPRETATION

1.1 In the Terms of Sale, unless the context otherwise requires:

**Amount Owning** means, at any point in time, all amounts the Customer is due to pay OFO under or in connection with a Supply Contract.

**Australian Consumer Law** means Schedule 2 of the *Competition and Consumer Act 2010* (Cth).

**Australian Standard** means, in respect of a mark or tag on a Product, the standard referenced by that tag or mark, as published by Standards Australia and current as at the date of manufacture of that Product.

**Business Day** means a day which is not a Saturday, Sunday, public holiday or bank holiday in Mount Gambier, South Australia.

**Chain of Responsibility Law** means any Law related to heavy vehicle safety, accreditation, standards or compliance, including a Law related to the safety of transport activities, chain of responsibility, vehicle speed or fatigue management, and any related codes of practice and standards issued by any person authorised to do so under that Law.

**Claim** includes a claim, notice, demand, action, proceeding, litigation, investigation, judgment or award howsoever arising, whether present, unascertained, immediate, future or contingent, whether based in contract, tort, pursuant to statute or otherwise and whether involving a third party or a Party.

**Contract Documents** means, in respect of the supply of particular Products, the Terms of Sale, the Price List and those parts of the Order Acknowledgement for those Products that relate to those Products.

**Consequential Loss** includes any:

- (a) consequential loss;
- (b) loss of anticipated or actual profits or revenue;
- (c) loss of production or use;
- (d) financial or holding costs;
- (e) loss or failure to realise any anticipated savings;
- (f) loss or denial of business or commercial opportunity;
- (g) loss of or damage to goodwill, business reputation, future reputation or publicity;
- (h) loss or corruption of data;
- (i) downtime costs or wasted overheads; or
- (j) special, punitive or exemplary damages.

**Credit Agreement** means the agreement (if any) between OFO and the Customer in respect of the Credit Facility, formed on OFO's approval of the Customer's application for the Credit Facility.

**Credit Facility** means an account OFO has opened for the Customer on which OFO may, from time to time, extend the Customer additional time to pay for Products and associated charges.

**Customer** means the person who places an order for Products with OFO and is named on the Order Acknowledgement as the person being 'Sold to'.

**Delivery** means the delivery of Products by OFO to the Customer, which occurs at the time specified in clause 4.2 or clause 4.3 (as the case may be).

**Delivery Note** has the meaning given in clause 5.3.

**Event of Default** means the occurrence of any one or more of the following events:

- (a) the Customer is in breach of a Supply Contract and has failed to remedy that breach within 7 days after receipt of notice from OFO requiring the remedy of that breach; or
- (b) any Insolvency Event has occurred in relation to the Customer.

**Force Majeure Event** means any event or circumstance not within the reasonable control of the Party claiming relief from the event or circumstance, excluding the lack of or inability to use funds for any reason.

**GST** means the goods and services tax imposed under GST Legislation.

**GST Legislation** means the *A New Tax System (Goods and Services Tax) Act 1999* (Cth) or any consolidations, amendments, re-enactments or replacements of it, and any related Act imposing such tax or legislation that is enacted to validate, recapture or recoup such tax.

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**Insolvency Event** means, in relation to a Party, that any of the following events or circumstances have occurred:

- (a) the Party has indicated that it is, or may become, insolvent;
- (b) the Party ceases to carry on business;
- (c) the Party comprises an entity which is the subject of the appointment of receivers or managers;
- (d) the Party comprises a natural person who:
  - (i) has committed an act of bankruptcy; or
  - (ii) has been made bankrupt; or
- (e) comprises a corporation which:
  - (i) enters into voluntary administration;
  - (ii) is subject to a deed of company arrangement; or
  - (iii) is subject to the appointment of liquidators or provisional liquidators.

**Law** means legislation (including regulations, by-laws and other subordinate legislation), instruments authorised under legislation and common law.

**OFO** means OneFortyOne Wood Products Pty Ltd ACN 621 555 682.

**Order Acknowledgement** has the meaning given in clause 3.3(a).

**Order Acknowledgement Period** has the meaning given in clause 3.7.

**Ownership** means the property in and legal and beneficial ownership of the Products.

**Party** means OFO or the Customer, and Parties means both of them.

**PPS Act** means the *Personal Property Securities Act 2009* (Cth).

**Price** means, in respect of a Product at any point in time, the price determined in accordance with clause 7.4.

**Price List** means, at any point in time, the price list determined in accordance with clause 7.1 (as amended from time to time in accordance with clause 7.2).

**Product** means a product available for supply by OFO to its customers from time to time, including (but not limited to) timber, roundwood, plywood, laminated veneer lumber, panels, MDF, particle board, mouldings and other building and building related products, together with all associated services and accessories that are at any time supplied with, or attached to, that product.

**Referenced Standard** has the meaning given in clause 6.1.

**Rejection Notice** has the meaning given in clause 3.7.

**Supply Contract** has the meaning given in clause 2.2.

**Terms of Sale** means this document, as updated or replaced from time to time in accordance with clause 17.1.

**WH&S Law** means any health and safety related Law and any related codes of practice and standards issued by any person authorised to do so under that Law.

1.2 In the Terms of Sale, unless the context indicates a contrary intention:

- (a) the expressions 'including', 'includes' and 'include' have the meaning as if followed by 'without limitation';
- (b) a reference to:
  - (i) a party includes that party's agents, executors, administrators, successors and permitted assigns;
  - (ii) a person includes a natural person, partnership, joint venture, government agency, association, corporation, trust or other body corporate;
  - (iii) the Terms of Sale, another Contract Document or any other document includes all amendments or supplements to it;
  - (iv) a statute includes any regulation, ordinances, by-laws or other subordinate legislation made under it, each as amended, consolidated or replaced from time to time; and
  - (v) a monetary amount is in Australian dollars and all amounts payable under or in connection with a Supply Contract are payable in Australian dollars;
- (c) an agreement on the part of two or more persons binds them jointly and each of them severally;
- (d) no rule of contract interpretation applies to the disadvantage of a Party on the basis that it put forward any Contract Document or any part of it;
- (e) words importing the singular include the plural (and vice versa) and words denoting a given gender include all other genders;
- (f) headings are for convenience only and do not affect the interpretation of the Terms of Sale;

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- (g) a reference to a recital, clause or schedule is a reference to a recital, clause or schedule of or to the Terms of Sale; and
- (h) where any word or phrase is given a defined meaning, any other part of speech or other grammatical form of that word or phrase has a corresponding meaning.

## 2. FORMATION OF SUPPLY CONTRACT

- 2.1 The Customer acknowledges and agrees that:
  - (a) OFO has provided the Customer with a copy of the Terms of Sale or made them reasonably accessible to the Customer;
  - (b) the Customer has read and understands the terms of the Terms of Sale;
  - (c) under the terms of the Credit Agreement, the Customer agrees that the Terms of Sale will apply to, and form the basis of the contract that governs, each supply of Products by OFO to the Customer; and
  - (d) OFO does not accept, and will not be bound by, any terms or conditions included in, attached to, or referenced in, any document issued by the Customer in respect of Products, including (without limitation) any issued invoice or purchase order.
- 2.2 Each delivery of Products by OFO to the Customer, in response to an order placed by the Customer, is a separate supply by OFO to the Customer governed by a contract made up of those parts of the relevant Order Acknowledgement that relate to those Products and the other Contract Documents (**Supply Contract**).
- 2.3 The Parties are bound by a Supply Contract on and from the time specified in clause 3.8.
- 2.4 The Parties agree that the terms of a Supply Contract for the supply of Products:
  - (a) are the entire terms and conditions for the supply and purchase of those Products;
  - (b) without limitation to clause 2.1(d), will prevail over any terms and conditions issued by the Customer in respect of those Products; and
  - (c) can only be varied by written agreement signed by both parties.
- 2.5 Despite any other provision to the contrary in the Terms of Sale, if the Parties have negotiated, and agreed in writing signed by both Parties, a separate agreement that applies to the supply of Products by OFO to the Customer (**Alternative Agreement**), then, for any period during which that Alternative Agreement is in force and effect:
  - (a) that Alternative Agreement will govern the supply of Products by OFO to the Customer, not any Supply Contract; and
  - (b) the Parties will not be bound by the terms of any Supply Contract and no Supply Contract will have any force or effect.

## 3. ORDERS

- 3.1 The Customer may place orders for Products with OFO from time to time and must comply with any reasonable instructions provided by OFO in respect of the ordering process.
- 3.2 OFO does not make any guarantee that it will:
  - (a) supply any particular type or volume of Products to the Customer; or
  - (b) accept any order placed by the Customer with OFO,
 and OFO is entitled (without any liability to the Customer of any kind whatsoever) to reject any order at any time and for any reason.
- 3.3 Promptly after receipt of an order for Products from the Customer, OFO will assess that order and provide the Customer with a written acknowledgement either:
  - (a) setting out the details of the Products OFO will supply to the Customer in response to that order (**Order Acknowledgement**); or
  - (b) rejecting that order, in which case no Supply Contract will be formed and neither Party will have any rights, obligations or liability to the other Party of any kind in connection with that order or its rejection by OFO.
- 3.4 OFO may separate the Products specified by OFO in an Order Acknowledgement into different delivery instalments, as specified by OFO in the Delivery Notes provided to the Customer in respect of that Order Acknowledgement, and each delivery instalment will be a separate supply by OFO governed by a separate Supply Contract.
- 3.5 In the case of supply by OFO on the basis of cash payment, the Order Acknowledgement will be in the form of an invoice setting out the details of the Products to be supplied and the Prices payable for those Products.
- 3.6 Any timings for delivery of Products specified in an Order Acknowledgement are an estimate only. If any Products have not been Delivered to the Customer within 30 days after the end of the month nominated by the Customer for Delivery of those Products, then the Customer may terminate the Supply Contract for those Products by written notice to OFO (without any liability to OFO of any kind in respect of that termination).
- 3.7 The Customer must check the details of each Order Acknowledgement on receipt and notify OFO in writing within 2 Business Days after receipt (**Order Acknowledgement Period**) if the Customer rejects the supply of any Products specified in an Order Acknowledgement for any reason (**Rejection Notice**).

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- 3.8 Subject to clause 3.9, a Supply Contract (or multiple Supply Contracts if supply will be in instalments) for the supply by OFO, and purchase by the Customer, of Products specified in an Order Acknowledgement will be formed, and bind both Parties, on and from the earlier to occur of:
- (a) the Customer's written acceptance of the Order Acknowledgement;
  - (b) the end of the Order Acknowledgement Period; or
  - (c) the Customer taking Delivery of the relevant Products.
- 3.9 If the Customer issues a Rejection Notice in respect of the supply of any Products specified in an Order Acknowledgement prior to the time a Supply Contract for those Products is formed under clause 3.8, then no Supply Contract will be formed and neither Party will have any rights, obligations or liability to the other Party of any kind in connection with the supply or purchase of those Products or the issue of the Rejection Notice by the Customer.
- 4. DELIVERY METHOD**
- 4.1 Prior to the Delivery of Products by OFO to the Customer, the Parties will agree the delivery method for those Products, being 'Free into Store' or 'From Plant'.
- 4.2 Where Products are to be delivered 'Free into Store', OFO must deliver those Products to the agreed Customer owned, controlled or nominated store, depot or other site (**Customer Site**) and OFO is responsible for all costs associated with delivery to the Customer Site. Delivery of 'Free into Store' supplied Products occurs at the time the delivery vehicle is ready for unloading at the Customer Site.
- 4.3 Where Products are to be delivered 'From Plant', OFO must make those Products available for collection by the Customer at the agreed OFO owned, controlled or nominated site (**OFO Plant**) and the Customer is responsible for the payment of all costs associated with the transportation of Delivered Products from the OFO Plant. Delivery of 'From Plant' supplied Products occurs at the time the Customer arranged vehicle is ready to load the Products that have been made available for loading by OFO, at the OFO Plant.
- 4.4 In the absence of any specific agreement between the Parties on the delivery method, Products are supplied by OFO 'From Plant' and the terms of clause 4.3 will apply to the delivery of those Products.
- 5. DELIVERY AND RISK**
- 5.1 OFO and the Customer will work together, both acting reasonably, to determine the preferred date and time for each Delivery of Products.
- 5.2 The Customer acknowledges and agrees that:
- (a) each preferred delivery date and time determined in accordance with clause 5.1 is an estimate only and may be changed by OFO (acting reasonably) by notice to the Customer, including (without limitation) where there are delays caused by weather conditions, transport or safety matters or availability of Product; and
  - (b) time in respect of Delivery is not of the essence.
- 5.3 Prior to each Delivery of Products, OFO will provide the Customer with notice of that Delivery (**Delivery Note**) setting out the details of the specific Products to be Delivered.
- 5.4 OFO must Deliver Products to the Customer using the delivery method agreed in accordance with clause 4.1 (or determined in accordance with clause 4.4) on the date and at the time determined in accordance with clause 5.1 (or otherwise notified to the Customer in accordance with clause 5.2(a) or clause 5.3).
- 5.5 Upon Delivery, the Customer (or its representative) must acknowledge Delivery has occurred by signing the relevant delivery docket presented at Delivery by OFO (or its nominated carrier) (**Delivery Docket**) and, unless clearly marked otherwise on the Delivery Docket, a signed Delivery Docket will indicate that the Customer (or its representative) has cross checked and confirmed that the Products Delivered (based on the volume of, and labelling on, the packs) matches the details of the Products specified on the Delivery Docket.
- 5.6 Risk of any loss, damage or deterioration of or to the Products passes to the Customer on Delivery of those Products.
- 5.7 The Customer is responsible, at its cost, for:
- (a) where Delivery is to be made 'Free in Store', ensuring Delivery can be safely made; and
  - (b) loading or unloading (as the case may be) the vehicle at the Delivery point, in accordance with all applicable Laws, including (without limitation) all applicable WH&S Laws and the Chain of Responsibility Laws.
- 5.8 The Customer must not refuse to accept for Delivery and unloading or loading (as the case may be) Product Delivered by OFO unless:
- (a) based on a reasonable visual inspection at the time of Delivery, the Products in a Delivery load clearly don't match the details of the relevant Delivery Note for those Products; and/or
  - (b) the Customer reasonably believes the Delivery cannot be safely made in accordance with applicable Laws, including (without limitation) any applicable WH&S Law or Chain of Responsibility Law.
- 5.9 If OFO is unable to Deliver Products to the Customer due to the Customer's failure to comply with clause 5.7 or clause 5.8, then the Customer is liable for OFO's reasonable costs and expenses relating to the transportation of those Products to and from the Delivery

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point and any storage pending re-delivery, and must pay OFO those costs and expenses within 30 days after written demand by OFO.

## 6. NON-CONFORMING PRODUCT

- 6.1 If the Customer reasonably believes that, at the time of Delivery, any Product Delivered by OFO does not meet the requirements of any Australian Standard referenced by a mark or tag on the Product (**Referenced Standard**) or does not match the details set out in the Order Acknowledgement for the Product (**Non-conforming Product**), then the Customer may, within 7 days after the date of Delivery, notify OFO in writing of the Non-conforming Product and make the Non-conforming Product readily available for inspection by OFO (or its representatives).
- 6.2 The Customer must promptly comply with any reasonable request from OFO to provide OFO (or its representatives) with information, documentation or photographic evidence in respect of any Non-conforming Product to support OFO's assessment of that Non-conforming Product.
- 6.3 OFO will, within 7 days after receiving notice from the Customer under clause 6.1 (or such later date as necessitated by the Customer's delay or failure to comply with clause 6.2), inspect and/or assess the Non-conforming Product and, if OFO agrees (acting reasonably) that the Product did not meet a Referenced Standard or match the details in the relevant Order Acknowledgement at the time of Delivery, OFO will (at OFO's cost and unless otherwise agreed with the Customer) arrange for the prompt removal of that Product from the site at which it was Delivered.
- 6.4 The Customer is not obliged to pay OFO the Price for any Non-conforming Product that has been assessed as non-conforming and removed by OFO in accordance with clause 6.3.

## 7. PRICE

- 7.1 The price list for the Products at any point in time will be, subject to clause 7.2:
- (a) if OFO and the Customer have negotiated and agreed in writing a price list setting out the prices at which OFO will supply Products to the Customer, that price list; and
  - (b) if there is no price list agreed in accordance with clause 7.1(a), OFO's then current standard price list for the supply of Products.
- 7.2 OFO may amend the Price List from time to time by reasonable written notice to the Customer (**Pricing Notice**), with the amended Price List coming into force and effect in respect of the supply of Products by OFO to the Customer on and from the date specified in the Pricing Notice (or if none specified, 14 days after the date of the Pricing Notice) (**New Pricing Date**).
- 7.3 The Customer may, by written notice to OFO, withdraw an order for Products during the period commencing on the receipt of any Pricing Notice and ending at the time a Supply Contract for the supply of those Products has been formed. The Customer will have no liability to OFO of any kind in respect of the withdrawal of any order under this clause 7.3.
- 7.4 The price payable for Products at any point in time, is the price specified for those Products in the Price List current as at the time the Supply Contract for those Products is formed, unless:
- (a) another price for particular Products has been agreed by OFO at the Customer's request and specified in an Order Acknowledgement, in which case that agreed price will be payable for those Products; or
  - (b) the Supply Contract for those Products is formed 14 days or more after OFO has issued a Pricing Notice and the Customer has requested those Products are Delivered after the applicable New Pricing Date, in which case (despite any pricing to the contrary in the Order Acknowledgement) the prices payable for those Products are the prices in the Price List current as at the New Pricing Date.
- 7.5 Unless otherwise expressly stated in a Price List (or Order Acknowledgement) to be GST inclusive, all Prices are GST exclusive.

## 8. PAYMENT AND GST

- 8.1 Subject to clauses 6.4 and 8.2, the Customer must pay OFO the Price for all Delivered Product in accordance with the payment terms set out in the Credit Agreement.
- 8.2 If the Customer doesn't have a Credit Agreement with OFO or the Credit Facility is in default, the Customer must pay for all Product (in cash or cleared funds) prior to dispatch of the Product for Delivery.
- 8.3 The Customer must pay all Amounts Owing and payable to OFO free of any set off or counterclaim and without deduction or withholding.
- 8.4 If the Customer does not pay any Amount Owing by the due date for payment, OFO may charge the Customer default interest on the due but unpaid amount at the rate specified from time to time under section 2 of the *Penalty Interest Rates Act 1983* (Vic), calculated on a daily basis from the due date until payment is received in full.
- 8.5 In addition to any amounts payable by a Party for any supply made by the other Party (**Supplier**) under or in connection with a Supply Contract (**base consideration**), that Party must pay to the Supplier an additional amount of consideration equal to the amount of GST payable on that supply (**GST consideration**). Subject to the receipt of a valid tax invoice from the Supplier, the GST consideration is payable at the same time and subject to the same conditions as the base consideration.
- 8.6 Where any indemnity, reimbursement or similar payment under a Supply Contract is based on any cost, expense or other liability, it will be reduced by any input tax credit entitlement in relation to the relevant cost, expense or other liability and then, if the amount of the payment is consideration or part consideration for a taxable supply, it must be increased on account of GST in accordance with clause 8.5.

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8.7 If an adjustment event occurs in relation to a supply made under or in connection with a Supply Contract, the GST consideration will be recalculated to reflect that adjustment and an appropriate payment will be made between the Parties.

8.8 In this clause 8 and in clause 7, any reference to a term defined or used in the GST Legislation is, unless the context indicates otherwise, a reference to that term as defined or used in the GST Legislation.

## 9. RETENTION OF TITLE

9.1 Ownership in Delivered Products remains with OFO and does not pass to the Customer until the Customer has paid for the Products in full (in cash or cleared funds).

9.2 While Ownership of any Delivered Products remains with OFO, the Customer:

- (a) holds the Products as fiduciary and bailee for OFO and makes sales permitted under clause 9.2(b) as OFO's agent and bailee;
- (b) is authorised by OFO to use the Products, and to sell the Products, in the ordinary course of its business, provided any sale is at arm's length and on market terms;
- (c) undertakes to hold any proceeds derived from the sale of Products on trust for OFO absolutely; and
- (d) must keep full and proper records in respect of all dealings connected with the Products and make those records and/or the Products available to OFO or its representatives for inspection (and, for records, copying) at OFO's reasonable request.

9.3 While the Customer is in possession, custody or control of any Products Owned by OFO, the Customer must:

- (a) not mix the Products with similar goods and must store them in a manner that makes them readily identifiable as OFO's property;
- (b) insure those Products with a reputable insurance company against risk of loss or damage by the hazards a reasonable, prudent person would normally insure against; and
- (c) not do or allow anything to happen that might contribute to a deterioration in the value of those Products or otherwise adversely affect OFO's Ownership interests in those Products.

9.4 For the avoidance of doubt, OFO's interest under this clause 9 constitutes a purchase money security interest for the purposes of the PPS Act.

## 10. SECURITY INTEREST

10.1 Unless the Customer has obtained OFO's prior written and fully informed consent, the Customer undertakes not to:

- (a) register a financing change statement in respect of a security interest in OFO's favour; or
- (b) create, or purport to create, any security interest in the Products (or any proceeds derived from the sale of such Products), nor register, nor permit to be registered, a financing statement or financing change statement in relation to the Products in favour of any third party.

10.2 The Customer:

- (a) waives its right to receive a copy of any verification statement in accordance with section 157 of the PPS Act; and
- (b) agrees that, to the extent permitted by the PPS Act:
  - (i) sections 95, 96, 117, 118, 120, 121(4), 123, 125, 126, 128, 129, 130, 132, 134, 135, 142 and 143 of the PPS Act do not apply and are hereby contracted out of; and
  - (ii) the Customer waives its right to receive notices under sections 95, 118, 121(4), 127, 130, 132(3)(d) and 132(4) of the PPS Act.

10.3 OFO need not disclose information of the kind detailed in section 275(1) of the PPS Act, unless required by Law.

10.4 Where OFO has rights in addition to those under Part 4 of the PPS Act, those rights continue to apply.

## 11. EVENTS OF DEFAULT

11.1 If any Event of Default occurs in respect of the Customer, then (to the fullest extent permitted by law):

- (a) OFO may, by providing written notice to the Customer, with immediate or later effect:
  - (i) revoke the authority referred to in clause 9.2(b); and/or
  - (ii) suspend supply under any Supply Contract; and
- (b) any Amount Owing will immediately become due and payable regardless of the actual due date.

11.2 The Customer must immediately notify OFO in writing if the Customer becomes aware that an Event of Default has occurred or may or is likely to occur in respect of the Customer.

11.3 At any time after an Event of Default occurs in respect of the Customer, OFO and its agents, employees and other representatives (each an **Authorised Person**) are entitled (to the fullest extent permitted by law) to:

- (a) enter any premises where Products are stored, as the Customer's invitee; and
- (b) search for and retake possession of any Products supplied under a Supply Contract that is still Owned by OFO, without liability for trespass or any resulting damage, unless that damage is caused by the negligence of OFO or any Authorised

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Person.

- 11.4 Where OFO has retaken Products into its possession under clause 11.3, OFO has the right to sell or deal with those Products, and (if necessary) sell any Products bearing the Customer's name or trade mark, and the Customer hereby grants OFO an irrevocable licence to do all things necessary to sell those Products.
- 11.5 The Customer's obligation to pay OFO the relevant Price for any Products repossessed by OFO under clause 11.3 is reduced by the 'Release Amount', being the aggregate amount of proceeds obtained by OFO from reselling those Products less OFO's reasonable direct costs of repossessing the Products and transporting them back to OFO's premises. Any amount by which the aggregate Price for the repossessed Products exceeds the Release Amount, remains a debt due and owing by the Customer to OFO.
- 11.6 OFO is entitled to recover from the Customer all costs and expenses that OFO reasonably incurs in connection with the exercise, protection or enforcement of OFO's rights under a Supply Contract, or that are otherwise conferred by law, and must pay OFO those costs and expenses within 30 days after written demand by OFO.
- 11.7 Subject to OFO providing the Customer with no less than 14 days' notice of its intention to bring an action for any Amount Owing in respect of Products but not paid by the due date, OFO may bring that action despite Ownership of those Products not having passed to the Customer. Ownership in any Products the subject of an action contemplated by this clause 11.7, will pass to the Customer once all amounts due and payable by the Customer in respect of those Products has been fully paid to OFO.

## 12. CONFIDENTIALITY

- 12.1 Each Party (**Confidant**) must keep confidential, and not use or disclose, other than as permitted by the Terms of Sale:
- (a) information (in any form) provided by the other Party (**Discloser**) in connection with a Supply Contract that is by its nature, or the circumstances in which it's disclosed, confidential or is otherwise denoted as confidential by the Discloser; and
  - (b) the terms of each Supply Contract, including (without limitation) information relating to Prices, Products or quantities being supplied under the Supply Contract,
- (together **Confidential Information**).
- 12.2 The obligations of confidence in this clause 12 do not apply to Confidential Information:
- (a) to the extent of any prior written consent to a particular use or disclosure given by the Discloser;
  - (b) to the extent reasonably required to be disclosed by applicable law, subject to the Confidant (to the extent permitted by law) giving prior notice to the Discloser of that disclosure;
  - (c) in the public domain otherwise than as a result of a breach of a Supply Contract or other obligation of confidence of the Confidant; or
  - (d) already known, rightfully received or independently developed by the Confidant free of any obligation of confidence.
- 12.3 The Confidant may disclose Confidential Information of the Discloser, on a 'need to know' and confidential basis only, to its:
- (a) personnel (and those of its related bodies corporate), but solely for the exercise of rights, or the performance of obligations, under a Supply Contract; and
  - (b) professional advisors, only to the extent necessary for them to properly advise the Discloser in relation to a Supply Contract.
- 12.4 The Customer and OFO agree that neither of them will disclose information of the kind described in section 275(1) of the PPS Act.

## 13. LIABILITY

- 13.1 Without limitation to clause 13.2, no provision of any Supply Contract (including, without limitation, a provision of clause 6 or this clause 13) is intended to, or does, exclude, restrict or modify any condition, warranty, guarantee or liability which is implied or given by the *Competition and Consumer Act 2010* (Cth), or other applicable Law, where to do is illegal or would render any provision void.
- 13.2 Clauses 13.3 to 13.5 (both inclusive) apply only if (and then only to the extent that) the relevant Supply Contract is a contract with a 'consumer' as that term is defined in section 4B of the *Competition and Consumer Act 2010* (Cth) (**Consumer Contract**).
- 13.3 To the extent that a Supply Contract is a Consumer Contract, no provision of that Supply Contract is intended to, or does:
- (a) exclude any '**Consumer Guarantee**' applicable to that Supply Contract under the Australian Consumer Law; or
  - (b) exclude, restrict or modify (except as set out in clause 13.4) any liability of OFO for failing to comply with any Consumer Guarantee that applies to that Supply Contract under the Australian Consumer Law.
- 13.4 Subject to clause 13.5, unless the Products under a Supply Contract are goods or services 'of a kind ordinarily acquired for personal, domestic or household use or consumption', as that expression is used in the *Competition and Consumer Act 2010* (Cth), the liability of OFO for any loss, damage, cost and expense however caused (including by the negligence of OFO), suffered or incurred by the Customer because of a failure by OFO to comply with a Consumer Guarantee in respect of the Products, is limited to OFO (at its election):
- (a) in respect of Products constituting goods:
    - (i) replacing the goods or supplying equivalent goods;
    - (ii) repairing the goods;

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- (iii) paying the cost of replacing the goods or of acquiring equivalent goods; or
  - (iv) paying the cost of having the goods repaired; or
- (b) in respect of services associated with Products:
  - (i) supplying the services again; or
  - (ii) paying the cost of having the services supplied again.
- 13.5 Clause 13.4 does not apply in relation to a guarantee provided for by any of sections 51, 52 or 53 of the Australian Consumer Law or if it is not 'fair or reasonable' for the purposes of sections 64A or 276A of the Australian Consumer Law for OFO to rely on it.
- 13.6 Subject to clause 13.3, no Party is liable to the other Party for any Consequential Loss (howsoever caused, including by negligence) arising out of or in connection with any Supply Contract.
- 13.7 Subject to clause 13.3 and without limitation to clause 13.6, OFO's maximum liability arising out of any Claim under or in connection with a Supply Contract for Products is limited to the Price of those Products except that any liability OFO has to the Customer in respect of:
  - (a) damage to or destruction of the real or tangible property of the Customer or any third party; or
  - (b) personal injury, disease, illness or death of any person (including the Customer's personnel),
 caused by OFO's breach of a Supply Contract or negligence is instead limited to \$20 million in aggregate for all Claims.
- 13.8 If the Customer acquires Products from OFO under a Supply Contract for the purpose of re-supply, then the Customer:
  - (a) must comply with all applicable Laws (including, without limitation, the Australian Consumer Law) in respect of the supply of those Products to any third party; and
  - (b) without limitation to clause 13.8(a), must not make any false or misleading representation in respect of the standard, quality, grade or composition of any of those Products or in respect of any use or benefit any of those Product have.
- 13.9 The Customer indemnifies OFO for any loss, damage, cost and expense however caused (including by the negligence of the Customer), suffered or incurred by OFO because of a breach of clause 13.8 by the Customer, except to the extent that the loss, damage, cost or expense was caused by any breach of the relevant Supply Contract by OFO or OFO's negligence.
- 13.10 Subject to clauses 13.1 and 13.3, the Customer acknowledges and agrees that, unless the Customer makes known to OFO prior to placing an order for Products that the Customer is acquiring those Products for a particular purpose and obtains a written assurance from OFO expressly warranting that the Products will be fit for that particular purpose, it does not (and will not) rely on OFO's skill or judgment in relation to the suitability of the Products for a particular purpose.
- 14. TERMINATION FOR DEFAULT**
- 14.1 Either Party (**Non-Defaulting Party**) may terminate any one or more Supply Contracts (and, in the case of the Customer, withdraw any order that has been placed with OFO), with immediate or later effect, by giving written notice to the other Party (**Defaulting Party**) if:
  - (a) the Defaulting Party has breached a term of any Supply Contract (other than an obligation to pay any amount) and has failed to remedy that breach within 14 days after receipt of written notice from the Non-Defaulting Party detailing that breach and requiring its remedy;
  - (b) any amount payable remains unpaid 7 or more days after the date it became due and payable by the Defaulting Party; or
  - (c) an Insolvency Event occurs in relation to the Defaulting Party.
- 14.2 If a Supply Contract is terminated by OFO under clause 14.1, any Amount Owing in connection with that Supply Contract will (to the fullest extent permitted by law) become immediately due and payable by the Customer regardless of the actual due date.
- 14.3 The termination of any Supply Contract does not affect any rights of the Parties which accrued before the date of termination.
- 14.4 Clauses 1, 5.6, 6 to 13 (both inclusive), 14.2, 14.3, 15, 18 to 23 (both inclusive), this clause 14.4 and any other clause which expressly or by its nature survives termination or expiry of a Supply Contract, survive termination or expiry of a Supply Contract.
- 15. TRUSTEES**
- 15.1 If the Customer enters into a Supply Contract as trustee for a trust (**Trust**) (whether disclosed to OFO or not), the Customer warrants to OFO that the Customer:
  - (a) enters into that Supply Contract both in its capacity as trustee and in its personal capacity;
  - (b) has the right to be reasonably indemnified out of Trust assets;
  - (c) has the power under the trust deed for the Trust to enter into that Supply Contract; and
  - (d) will not retire as trustee of the Trust, or appoint any new or additional trustee, without first notifying OFO in writing and (if applicable) having the new or additional trustee sign an agreement with OFO on terms substantially the same as the Credit Agreement the Customer has with OFO.
- 15.2 Promptly on request, the Customer must give OFO a true and complete copy of the trust deed for each Trust.



# Terms of Sale

## 16. FORCE MAJEURE

- 16.1 If a Party (**Affected Party**) is unable to perform an obligation under a Supply Contract because of a Force Majeure Event, then:
- (a) as soon as reasonably practicable after that Force Majeure Event arises, the Affected Party must notify the other Party of the nature of the Force Majeure Event and the extent to which the Affected Party is unable to perform that obligation;
  - (b) subject to compliance with clause 16.1(a), the Affected Party's obligation to perform that obligation will be suspended for the duration of the delay arising directly out of the Force Majeure Event (**Direct Delay**); and
  - (c) in all cases, the Parties must use their best endeavours to minimise the impact of any Force Majeure Event.
- 16.2 If any Direct Delay continues for more than 14 consecutive days, either Party may, by written notice to the other Party, terminate the relevant Supply Contract. A Party will have no liability to the other Party of any kind in respect of the termination of a Supply Contract in accordance with this clause 16.2.

## 17. AMENDMENT OF TERMS OF SALE

- 17.1 OFO may amend the Terms of Sale from time to time by reasonable written notice to the Customer (**Amendment Notice**), with the amended Terms of Sale coming into force and effect in respect of all Supply Contracts formed on and from the date specified in the Amendment Notice (or if none specified, 14 days after the date of the Amendment Notice) (**Effective Date**).
- 17.2 The Customer may, by written notice to OFO, withdraw any order for Products during the period commencing on the receipt of any Amendment Notice and ending at the time a Supply Contract for the supply of those Products has been formed. The Customer will have no liability to OFO of any kind in respect of the withdrawal of any order under this clause 17.2.

## 18. WAIVER

- 18.1 No waiver of a right or remedy under a Supply Contract is effective unless it is in writing and signed by the Party granting it. It is only effective in the specific instance and for the specific purpose for which it is granted.
- 18.2 A single or partial exercise of a right or remedy under a Supply Contract does not prevent a further exercise of that or of any other right or remedy.
- 18.3 Failure to exercise or delay in exercising a right or remedy under a Supply Contract does not operate as a waiver or prevent further exercise of that or of any other right or remedy.

## 19. SEVERABILITY

- 19.1 Any term of a Supply Contract which is wholly or partially void or unenforceable is severed to the extent that it is void or unenforceable. The validity or enforceability of the remainder of the Supply Contract is not affected.

## 20. CUMULATIVE RIGHTS

- 20.1 Except as expressly provided in a Supply Contract, the rights of a Party under that Supply Contract are in addition to and do not exclude or limit any other rights or remedies provided by Law.

## 21. NATURE OF RELATIONSHIP

- 21.1 Except as expressly provided in a Supply Contract:
- (a) nothing in that Supply Contract is intended to, or does, constitute a fiduciary relationship, employment relationship or an agency, partnership or trust; and
  - (b) no party has authority to bind the other Party.

## 22. NO ASSIGNMENT

- 22.1 Neither Party may assign its rights under a Supply Contract without the prior written consent of the other Party (such consent not to be unreasonably withheld or delayed).

## 23. GOVERNING LAW

- 23.1 Each Supply Contract is governed by the laws of the State of South Australia and each Party submits to the non-exclusive jurisdiction of the courts of South Australia.