

## **Terms & Agreement**

Unless otherwise agreed in writing with FMA Hire Pty Ltd (ABN 64 652 329 578) trading as FMA, its agents or assigns or related entities, the Credit Application, this Master Hire Agreement and any quotations or invoices (collectively, the Terms) apply to the supply of goods and/or services to the Customer and constitute the entire agreement between FMA and the Customer.

### **1. DEFINITIONS**

In the Terms:

- (a) ACL means the Australian Consumer Law, being Schedule 2 of the CCA.
- (b) CCA means the Competition and Consumer Act 2010 (Cth).
- (c) Costs means all moneys payable by the Customer to FMA on relation to FMA' supply of the Goods.
- (d) Credit Application means a credit application submitted to FMA by the Customer.
- (e) Credit Account means the credit facility/account provided by FMA in accordance with an accepted Credit Application.
- (f) Customer means the individual, business, partnership, trust, or corporate entity (jointly and severally if there is more than one) and their agents or assigns or related entities who hire and/or purchase the Goods.
- (g) De-Hire Number means the number provided by FMA to the Customer when Customer advises FMA that the Goods are no longer required or that it wishes to end the Hire Period.
- (h) FMA means FMA Hire Pty Ltd (ABN 64 652 329 578) trading as FMA Hire and includes its agents or assigns or related entities.
- (i) Goods means all goods or services supplied by FMA to the Customer, whether by sale or by hire, at the Customer's request. For the purposes of these Terms, goods include any services such as the erection and/or dismantling of the Goods and any Guidance Devices, Vehicles, Wear Items, parts, accessories and/or consumables supplied by FMA to the Customer.
- (j) Guidance Device means any device designed to guide the operation of the Goods, including but not limited to cross slope, laser, universal tracking systems, global positioning systems or compaction meters.
- (k) Hire Period means the period which the Customer has hired the Goods for, as set out in an Invoice or in the Terms or otherwise as agreed by FMA.
- (l) Invoice means an invoice issued to the Customer by FMA.
- (m) Location means the location of the Goods at any one time.

(n) PPSA means the Personal Properties Securities Act 2009 (Cth).

(o) Price means the amount payable for the hire or purchase of the Goods, as set out in an invoice, these Terms or otherwise as agreed by FMA (which, unless otherwise stated, does not include GST); and

(p) Wear Items includes ground engaging tools, and wear on blades/buckets/rippers, tyres, track gear and fuel lubricants.

## **2. ACCEPCANCE OF THE TERMS**

2.1. The Customer is taken to have accepted and is immediately bound by the Terms if the Customer places an order for or accepts delivery or provision of any Goods.

2.2. Once accepted, the Terms apply to the exclusion of all other terms, conditions or other agreements, including any of the Customer's own terms.

## **SECTION A – HIRE OF GOODS**

The following provisions apply specifically to the hire of Goods by the Customer.

### **3. HIRE OF GOODS**

3.1. The Customer agrees to hire the Goods for the duration of the Hire Period, subject to earlier termination under these Terms or extension by agreement with FMA.

3.2. Additional charges apply if the Hire Period is extended or if the Goods are used for more than 8 hours per day.

3.3. The Hire Period will commence from the time the Goods depart from the premises of FMA (or any other location deemed by FMA) and will continue until the return of the Goods to the FMA premises, and/or until the expiry of the Minimum Hire Period, whichever occurs later. Additional charges will apply if the Customer requests an extension of the Hire Period.

3.4. Unless otherwise specified by FMA, all Goods are subject to a one (1) day minimum hire period.

3.5. The Customer agrees to pay for the hire of the Goods for the full Hire Period, regardless of use or early return, and will continue to pay hire charges if the Goods are not returned at the end of the Hire Period.

### **4. CUSTOMER OBLIGATIONS**

4.1. The Customer must:

(a) maintain the Goods as required by FMA.

(b) notify FMA immediately of the full circumstances of any mechanical malfunction, damage, loss, destruction, or accident in connection with the Goods (and the Customer is not absolved from the requirements to safeguard the Goods by giving such notification).

(c) ensure the Goods are kept securely and in their own possession and control and not assign the benefit of these Terms.

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(c) ensure the Goods are kept securely and in their own possession and control and not assign the benefit of these Terms.

(d) not alter or make any additions to the Goods (including, but without limitation, altering, make any additions to, defacing or erasing any identifying mark, plate, or number on the Goods), or in any other manner interfere with the Goods.

(e) employ the Goods solely in their own work and not permit the Goods (or any part thereof) to be used by any other party for any other work without prior notification and permission of FMA.

(f) not exceed the recommended or legal load and capacity limits of the Goods.

(g) not use or place any illegal, prohibited, or dangerous substance on the Goods.

(h) not fix the Goods (or any part thereof) in such a manner as to make them fixtures.

(i) once the Hire Period has ended, deliver up the Goods, complete with all parts and accessories, clean and in good order, as delivered, fair wear and tear accepted, to FMA.

(j) unless otherwise agreed by FMA, return the Goods to the location specified by FMA on or before the last date of the Hire Period.

4.2. The Customer's rights to the Goods hired are as a bailee only, and the Customer must not sell, assign, let, sub-let, lend, pledge, mortgage, hire or otherwise encumber, part with possession of, alter, attempt to repair or deal with the Goods unless otherwise agreed with FMA.

## **5. USE, OPERATION AND MAINTENANCE OF EQUIPMENT**

5.1. The Customer acknowledges that use of the Goods may involve risk of injury or damage to property, and the Customer accepts all such dangers and risks.

5.2. The Customer must not, and must not allow any of its officers, employees, agents, or contractors to tamper with, damage or alter the Goods.

5.3. The Customer may, with express permission only by FMA, repair or attempt to repair the Goods.

## **6. TITLE AND RISK**

6.1. The Customer assumes all risks and liabilities in relation to the Goods from the start of the Hire Period until the Goods are returned to FMA in an acceptable state.

6.2. FMA retains title to all Goods always hired by the Customer.

6.3. The Customer's right to possession of the Goods ceases if:

(a) the Customer commits an act of bankruptcy or insolvency.

(b) the Customer fails to comply with any demand by FMA for payment of the Costs.

(c) circumstances arise where a receiver, manager, administrator, or controller becomes entitled to take possession of any of the Customer's assets, any proceedings are instituted for winding up, or the Customer enters a Deed of Company Arrangement; or

(d) the Customer ceases or threatens to cease conducting business in the normal manner or applied for deregistration or receives a deregistration notice; or

(e) the Customer is in breach of any of the Terms.

6.4. If the Customer's right to possession of the Goods ceases or the Terms are terminated, FMA may take all steps necessary (including legal action) to recover the Goods, including entering the Customer's premises and the Customer provides its express consent to this.

6.5. The Customer irrevocably authorises FMA to enter the Location to repossess the Goods under these Terms, including if the Customer receives a De-Hire Number, and indemnifies FMA against any loss FMA may suffer in exercising such rights.

## **7. DAMAGE WAIVER**

7.1. The damage waiver, which covers loss, theft, and damage (Waiver) is not insurance, but is a limit on the Customer's liability in certain circumstances for loss, theft or damage to the Goods to an amount known as the Waiver Excess.

7.2. Subject to clause 7.3, FMA will automatically charge the Customer a fee (Waiver Fee) in addition to the Price.

7.3. The Customer is not required to pay the Waiver Fee if the Customer provides FMA with a certificate of currency for an appropriate insurance policy covering loss, theft, or damage to the Goods during the Hire Period for an amount not less than the replacement value of the Goods (Insurance).

7.4. The Customer acknowledges it is liable for any excess or other costs associated with the Insurance, including the shortfall in repair or replacement costs following payment of any amount received under the Insurance.

7.5. If the Customer has paid the Waiver Fee, FMA waives its right to claim against the Customer for loss, theft, or damage to the Goods, provided that:

- (a) if the Goods are stolen, the Customer immediately reports the theft to the police and provides FMA with a copy of the relevant police report(s).
- b) the Customer cooperates with FMA in relation to the relevant incident, including providing any document, evidence, or other material FMA requires; and
- (c) the loss, theft or damage does not fall under clause

7.6. The Waiver Fee for each item of Goods is the greater of:

- (a) \$500.00 or, if the replacement cost of the Goods is less than \$500.00, the replacement cost of the Goods; and
- (b) 15% of the cost of the repairs (if the Goods is partially damaged and can be repaired) or 15% of the full new replacement cost of the Goods (if the Goods are lost, stolen, or damaged beyond repair).

7.7. Despite clause 7.5, and even if the Customer has paid the Waiver Fee, FMA does not waive its rights if the loss, theft, or damage:

- (a) arises because of the Customer's breach of the Terms.

(b) is caused by the Customer's negligent act or omission.

(c) occurs while the Goods are located, used, loaded, unloaded, transported on or over water, wharves, bridges, or vessels of any kind.

(d) is caused by a lack of lubrication or a failure to properly service or maintain the Goods.

(e) is caused by collision with a bridge, carpark, awning, gutter, tree or any other overhead structure or object due to insufficient clearance.

(f) is to motors or other electrical Goods or components within the Goods caused by electrical overload, a surge in electrical current or the use of under-rated or excessive lengths of extension leads with the electrical Goods.

(g) is caused by exposure to any corrosive or caustic substance.

(h) is caused by vandalism.

(i) is to tools, accessories, parts, grease guns, hoses or similar electrical cords, welding cables, gas cylinders, pneumatic tools, light globes and other similar accessories, ground engaging tools, tracks, tyres, windscreens, or glass.

## **8. LONG DISTANCE MAINTENANCE**

8.1. This clause 8 applies if the Goods are used at a location more than 50km from FMA's premises (Distance Location).

8.2. Any maintenance conducted on the Goods at a Distance Location is subject to a per-kilometre fee both to and from the relevant Distance Location (however, no charge applies for the first 50km travelled either way).

8.3. The Customer remains responsible for regular maintenance and care of all Goods, including checking all fluid levels (fuel, oil, water, etc.), checking all hoses and connections (e.g. loose nuts, bolts, belts, or fittings) and lubricating all grease points.

8.4. If the Goods break down at a Distance Location, the Customer also agrees to pay FMA the costs associated with attending the Distance Location.

## **9. STAND DOWN CONDITIONS**

9.1. A stand down rate may apply, subject to:

(a) machine availability.

(b) a stand down number being issued to the Customer by FMA; and

(c) the Customer's compliance with clause 9.2.

9.2. Stand downs may apply to Goods hired, provided that:

(a) any stand down request must be made by 9.00am on the day of the stand down (stand downs cannot be applied retrospectively).

(b) the Customer remains responsible for the security of the Goods and all loss or damage while it is stood down.

(c) unless otherwise agreed in writing, stand downs are to be only available for: break down of the Goods, inclement weather, public holidays, industry rostered days off (RDOs) and the Christmas/Easter periods.

(d) If the Goods are used during a stand down (which may be determined by remote monitoring), full hire charges for that period will be applied.

9.3. Regardless of any indication to the contrary in the Terms, stand down will apply at FMA' sole and absolute discretion stand down rates are not available for Goods hired at monthly rates or on a rental/purchase basis.

## **10. NON-RETURN OF EQUIPMENT/CONDITION OF RETURN OF GOODS**

10.1. Immediately on request by FMA the Customer will pay:

(a) the new list price of any Goods (or any part thereof) that are, for whatever reason, destroyed, irrecoverable, or not returned to FMA.

(b) all costs of repairing any damage to the Goods caused by:

(i) the negligence of the Customer or the Customer's agent.

(ii) caused by vandalism, or (in FMA' reasonable opinion) in any way whatsoever other than by the ordinary use of the Goods by the Customer.

(c) any lost hire charges FMA would have otherwise been entitled to for Goods, under these Terms; and

(d) all costs incurred in cleaning the Goods (including removing plaster, mortar, cement and/or concrete from the Goods) if the Goods are deemed by FMA (at their sole discretion) to be excessively dirty.

(e) the cost of fuels and consumables beyond reasonable wear & tear, in FMA' own opinion, provided by FMA and used by the Customer.

## **11. INDEMNITY**

11.1. The Customer indemnifies FMA for all loss, theft, or damage to the Goods howsoever caused and without limiting the generality of the foregoing whether or not such loss, theft, or damage is attributable to any negligence, failure, or omission of the Customer.

11.2. The Customer agrees to keep FMA indemnified against all liability in respect of all actions, proceedings, claims, damages, costs, and expenses in respect of any injury to persons, damage to property, or otherwise arising out of the use of the Goods during the Hire Period and whether or not arising from any negligence, failure or omission of the Customer or any other persons.

## **12. INSURANCE (DAMAGE)**

The Customer must insure FMA' interest in the Goods against physical loss or damage including, but not limited to, the perils of accident, fire, theft and burglary and all other usual risks and will take out and maintain adequate Public Liability Insurance (of not less than \$10 million) covering any loss, damage or injury to property arising out of the Goods. Further the Customer will not use the Goods nor permit them to be used in such a manner as would permit an insurer to decline any claim.

## **13. ADDITIONAL HIRE TERMS**

13.1. The Customer is not authorised to pledge FMA' credit for repairs to the Goods or to create a lien over the Goods in respect of any repairs.

13.2. In the event of "wet" hire of the Goods the operator of the Goods remains an employee of FMA and operates the Goods in accordance with the Customer's instructions. FMA is not liable for any actions of the operator where the operator has followed the Customer's directions.

13.3. The Customer agrees that the Price may include the cost of any consumables, fuel or trade materials supplied by FMA.

13.4. This clause 13.4 applies if the Goods includes any excavators, multi-terrain loaders, skid steer loader or any other similar vehicle (Vehicle):

(a) If a Vehicle is lost, stolen, or damaged during the Hire Period, the applicable Waiver Fee for each Vehicle is:

(i) the first \$2,500 of the cost of any damage if the driver is 25 years or over; or

(ii) the first \$3,500 of the cost of any damage if the driver is under 25 years.

(b) For the avoidance of doubt, the Waiver Fee will not cover the Customer's liability in respect of any 3rd party claim arising out of the Vehicle being lost, stolen or damaged during the Hire Period.

(c) The Customer warrants that it will not permit a person to drive any Vehicle if the person:

(i) is a learner driver.

(ii) does not hold an appropriate licence to drive the relevant type of Vehicle.

(iii) is under the age of 18 years; or

(iv) is affected by, or under the influence of, drugs and/ or alcohol.

(d) FMA reserve the right to demand the Customer provide any information required under relevant legislation for those persons who will operate the Vehicle, including details of the licences of any drivers during the Hire Period.

(e) The Customer must:

(i) keep a record of all relevant details of any driver of a Vehicle, including name, licence details, date and time that the driver used the Vehicle.

(ii) pay all tolls, fines, penalties and other statutory or Government charges arising out of the Customer's use of the Vehicle during the Hire Period.

(iii) if the Vehicle is involved in any incident or collision, thoroughly record the details of the accident, and fully co-operate with FMA or FMA's insurer.

(iv) pay a charge for the number of kilometres travelled using the Vehicle during the Hire Period.

(v) not load the Vehicle in excess of the Vehicle's gross vehicle mass at any time during the Hire Period; and

(vi) return the Vehicle with a full tank of fuel (otherwise the Customer agrees to pay a charge, including labour fee, for refilling the tank).

(f) The Customer acknowledges that FMA has provided the manufacturer's operating and safety instructions in respect of any Vehicle.

(g) The Customer agrees to be liable for the cost of repairing or replacing flat or damaged tyres and all wear and tear and damage to tyres, track gear and Wear Items which is caused by use of the tyres, track gear and Wear Items in conditions which FMA considers abnormal or inappropriate.

(h) The Customer is responsible for verifying the accuracy of any Guidance Device during the Hire Period.

## **SECTION B – GENERAL**

The following provisions apply regardless of whether the Goods are hired or purchased by the Customer.

### **17. DELIVERY**

17.1. For the purposes of these Terms, delivery is taken to occur:

(a) when the Customer collects the Goods from FMA's premises or is provided with the Goods (including any related services); or

(b) when FMA (or its nominated carrier) delivers or provides the Goods to the Customer's nominated address.

17.2. FMA reserves the right to charge an additional amount for delivery to a location other than FMA's premises.

17.3. FMA will not be liable for any loss or damage incurred by the Customer as a result of late delivery.

17.4. If the Customer is unable to take delivery, FMA reserves the right to charge a reasonable fee for re-delivery and/or storage of the Goods.

17.5. If FMA is unable to supply the Goods (including any installation and/or removal thereof) as agreed solely due to any action or inaction of the Customer, then FMA shall be entitled to charge a reasonable fee (to cover mileage and lost time hours) for re-supplying the Goods.

17.6. The Customer must ensure that FMA has clear and free access to the nominated address at all times to enable delivery. FMA shall not be liable for any loss or damage to the property (including, without limitation, damage to pathways, driveways and concreted or paved or grassed areas), unless due to the negligence of FMA.

17.7. If the Customer requires FMA deliver, collect, or install the Goods, the Customer agrees to pay the FMAs' reasonable costs of delivery, collection or installation (including a waiting fee if the nominated time for delivery, collection or installation is delayed by the Customer).

## **18. PAYMENT**

18.1. The Customer agrees to pay FMA the Price for the Goods (plus any GST applicable).

18.2. Any Price specified in a FMA quotation is binding, provided that the Customer accepted the quote in writing within 30 days.

18.3. FMA reserves the right to require a non-refundable deposit on any hire or purchase of Goods.

18.4. FMA reserves the right to alter the Price:

(a) if a variation to the Goods which are to be supplied is requested; or

(b) if other Goods or variations are required (e.g. extended hire periods); or

(c) in the event of increases to FMA on the cost of labour or materials, fluctuations in currency exchange rates or any Government or regulatory body imposing or increasing fees, etc.), which are beyond FMA's control.

18.5. Payment may be made by any means agreed with FMA, and FMA reserves the right to charge the Customer a fee for accepting payment by credit or debit card.

18.6. Subject to clause 18.7, the relevant Invoice or as otherwise notified by FMA, the Price must be paid prior to delivery of the Goods or the start of the Hire Period.

18.7. If the Customer has a Credit Account, the Customer must pay the Price in accordance with the agreed credit terms.

18.8. If the Customer fails to pay the Price by the due date, FMA may:

(a) suspend or cancel any Credit Account.

(b) terminate these Terms; and

(c) charge the Customer interest at the rate of 2.5% per calendar month, calculated daily and compounded weekly from the due date until the date of payment in full.

18.9. The Customer must pay all reasonable costs incurred by FMA in recovering any outstanding amounts including but not limited to debt collection or legal costs.

18.10. Any late return of hired Goods will incur the late. Any late return of hired Goods will incur the late return charges referred to on the relevant Invoice.

18.11. The Customer agrees to accurately complete and sign a Credit Card Authorisation Form, the contents of which shall form part of these Terms. If the Customer defaults on payment for any reason, then FMA reserves the right to automatically debit the Customer's credit card for the full Price.

## **19. CUSTOMER'S OBLIGATIONS**

The Customer agrees to:

(a) satisfy itself that the Goods are suitable for the purpose for which it is used.

(b) operate or use the Goods only for their intended use.

(c) comply with all manufacturer's instructions and recommendations relating to the use and operation of the Goods.

(d) ensure that all persons operating the Goods are suitably qualified, and properly instructed in its safe and proper use.

(e) comply with all laws relating to the use of the Goods, including, but not limited to, holding any operating licence or permit required by law.

(f) supply, at its own expense, all fuel necessary for the operation of the Goods; and

(g) notify FMA immediately if any Goods (or parts) is lost, stolen, or involved in an incident.

## **20. URGENCY**

Where the Customer requests FMA provide any Goods urgently and which requires FMA's staff to work outside normal business hours (including but not limited to working, through lunch breaks, weekends and/or public holidays) then FMA reserves the right to charge the Customer additional labour costs (penalty rates will apply), unless otherwise agreed between FMA and the Customer.

## **21. INTELLECTUAL PROPERTY**

21.1. Where FMA has designed, drawn, or developed Goods for the Customer, then the copy right in any designs and drawings and documents shall remain the property of FMA.

21.2. The Customer warrants that all designs, specifications, or instructions given to FMA will not cause FMA to infringe any patent, registered design, trademark or other intellectual property right of any third-party, and the Customer indemnifies FMA against any action taken by a third party against FMA in respect of any such infringement.

21.3. The Customer agrees that FMA may (at no cost), for the purposes of marketing or entry into any competition, use any documents, designs, drawings or Goods which FMA has created for the Customer.

## **22. GENERAL SECURITY**

22.1. In consideration of FMA agreeing to supply Goods, the Customer charges all of its rights, title and interest (whether joint or several) in any land, realty or other assets capable of being charged, owned by the Customer either now or in the future, to secure the performance by the Customer of its obligations under these Terms (including, but not limited to, the payment of any money).

22.2. The Customer indemnifies FMA from and against all FMAs' costs and disbursements including legal costs on a solicitor and own client basis incurred in exercising FMA's rights under this clause.

22.3. The Customer irrevocably appoints FMA and each director of FMA as the Customer's attorney(s) to perform all necessary acts to give effect to the provisions of this clause including, but not limited to, signing any document on the Customer's behalf.

22.4. To the extent that FMA is required to enter the premises of any 3rd party to enforce any of its rights under the Terms, the Customer indemnifies and holds FMA harmless from any loss FMA suffers in relation to such entry.

## **23. PERSONAL PROPERTY SECURITIES ACT**

23.1. Unless the context requires otherwise, terms used in this clause 23 have the meaning given to them by the PPSA.

23.2. The Customer acknowledges and agrees that the Terms create an accepted and ongoing security agreement in relation to each supply of Goods to the Customer by FMA.

23.3. The Customer grants FMA a security interest on the following collateral:

(a) all present and after acquired property of the Customer.

(b) all Goods previously supplied by FMA to the Customer and any proceeds derived from those Goods; and

(c) all Goods to be supplied in the future by FMA to the Customer and any proceeds derived from those FMA.

23.4. The security interest granted under clause 23.3 secures all moneys owing by the Customer to FMA (whether under the Terms or otherwise), and may, at FMA's option, constitute a PMSI.

23.5. The Customer acknowledges and agrees that the security interest(s) granted are continuing and subsisting interests over collateral.

23.6. The Customer consents to FMA registering multiple registrations in relation to the Goods.

23.7. The Customer will do everything reasonably required of it by FMA to enable FMA to register the registrations, with the priority FMA requires, including:

(a) signing any documents and/or providing any information which FMA reasonably requires to register a financing statement or a financing change statement on the PPSR in relation to a security interest; and

(b) correcting a defect in a financing statement or registration.

23.8. The security interests arising between FMA, and the Customer are perfected prior to, on delivery or within a time contemporaneous with delivery of the Goods.

23.9. The Customer waives any notice requirements in respect of the PPSA, to the extent permitted by the PPSA.

23.10. Any time the Customer makes a payment to FMA, FMA may apply that payment:

(a) first to satisfy an obligation that is not secured.

(b) second, to satisfy an obligation that is secured, but not by a PMSI.

(c) third, to satisfy an obligation that is secured by a PMSI for that obligation and using proceeds from the sale of the collateral subject to that PMSI; (d) fourth, to satisfy an obligation that is secured by a PMSI using funds or proceeds from any source; or

(e) despite the above, in any manner FMA sees fit.

23.11. If Chapter 4 of the PPSA would otherwise apply to the enforcement of the security interests created under these Terms, the Customer agrees that sections 95, 120, 121(4), 125, 128, 129, 130, 132, 134, 135, 142, 143 and 157 of the PPSA will not apply to the enforcement of those security interests.

23.12. The Customer agrees not to disclose to an 'interested person' (as defined in section 275(9) of the PPSA) or any other person, any Information of the kind described in section 275(1) of the PPSA including the Terms as a security agreement between the Customer and FMA.

23.13. The Customer irrevocably grants FMA the right to enter any premises or property of the Customer without notice, and without being in any way liable to the Customer or any other

person, if FMA has a use to exercise any of its rights under the PPSA, and in particular under section 123, and the Customer agrees to indemnify FMA against any such liability whatsoever.

23.14. The Customer agrees that repossession of the Goods pursuant to the PPSA will only satisfy so much of the monies which may still be payable to FMA by the Customer and is equivalent to FMA's estimation of the market value of the Goods as it is at the date of repossession. On repossession of the Goods, any rights the Customer may have to the Goods will immediately extinguish.

## **24. APPOINTMENT OF RECEIVER**

24.1. In addition to and without prejudice to any of its other rights FMA may appoint any one or more persons as a receiver to any part of the Goods:

- (a) if the Customer requests FMA do so.
- (b) at any time after an event of default occurs under the Terms; or
- (c) if FMA believes that any collateral is at risk of being seized, becoming subject to a security interest or otherwise being dealt with in a manner inconsistent with the terms of the Terms.

24.2. In exercising the power to appoint a receiver, FMA may:

- (a) appoint a receiver either before or after it has taken possession of the collateral and either before or after any order has been made or a resolution passed for the winding up of the Customer;
- (b) appoint a different receiver for different parts of the collateral.
- (c) if more than one person is appointed as receiver of any part of the collateral, empower them to act jointly or jointly and separately: or
- (d) remove the receiver, appoint another in substitution if the Receiver is removed, retires, or dies.

## **25. CUSTOMER TRADING THROUGH TRUST**

25.1. The Customer agrees that even though it enters the Terms as trustee of a trust, the Customer will also be liable personally for the performance and observance of every term or covenant to be observed and performed by the Customer, whether express or implied in these Terms.

25.2. The Customer warrants that it has complete, valid and unfettered power to enter into these Terms pursuant to the provisions of a trust where applicable and warrants that the Customer's entry into these Terms is in the due administration of the trust.

25.3. The Customer covenants it has an unrestricted and unlimited right of indemnity against the property of the trust.

25.4. The Customer warrants that all information provided to FMA is true and correct and acknowledges that FMA has relied on and has been induced on this basis to grant credit and or deal with the Customer.

25.5. The Customer indemnifies and will keep FMA indemnified against all loss incurred by FMA as a result of the failure to disclose the existence of any trust or trustee relationship, including any loss incurred as a result of registering a PPS registration against the wrong entity or with the wrong identifiers.

## **26. DISPUTE RESOLUTION**

26.1. This clause 26 applies if the Customer has a Credit Account.

26.2. Before instituting legal proceedings, any dispute between FMA and the Customer in relation to the Terms will be referred to mediation administered by the Australian Commercial Disputes Centre (ACDC) and held in Melbourne, Victoria.

26.3. If the dispute has not been resolved within 28 days of the appointment of a mediator, FMA or the Customer may commence legal proceedings.

26.4. Nothing prevents either FMA or the Customer from seeking urgent injunctive relief from a court of appropriate jurisdiction.

## **27. DEFECTS, WARRANTIES, RETURNS AND THE CCA**

27.1. The Customer must inspect the Goods on delivery and must within two (2) days of such time notify FMA in writing of any evident defect/damage, error or omission, shortage in quantity, or failure to comply with the description or quote. The Customer must notify any other alleged defect in the Goods as soon as reasonably possible after any such defect becomes evident. Upon such notification the Customer must allow FMA to inspect/review the Goods.

27.2. Under Australian legislation, certain statutory implied guarantees, and warranties (including, without limitation the statutory guarantees under the CCA) may be implied into these Terms (Non-Excludable Guarantees).

27.3. FMA acknowledges that nothing in these Terms may modify or exclude the Non-Excludable Guarantees.

27.4. Except as expressly set out in these Terms or in respect of the Non-Excludable Guarantees, FMA makes no warranties or other representations.

27.5. If FMA is required to replace the Goods under these Terms, but is unable to do so, FMA may refund any money the Customer has paid for the Goods.

27.6. If the Customer is not a consumer within the meaning of the CCA, FMA liability for any defect or damage in the Goods is:

(a) limited to the value of any express warranty or warranty card provided to the Customer by FMA at FMA' sole discretion; or

(b) limited to any warranty to which FMA is entitled, if FMA did not manufacture the Goods.

## **26. DISPUTE RESOLUTION**

26.1. This clause 26 applies if the Customer has a Credit Account.

26.2. Before instituting legal proceedings, any dispute between FMA and the Customer in relation to the Terms will be referred to mediation administered by the Australian Commercial Disputes Centre (ACDC) and held in Melbourne, Victoria.

26.3. If the dispute has not been resolved within 28 days of the appointment of a mediator, FMA or the Customer may commence legal proceedings.

26.4. Nothing prevents either FMA or the Customer from seeking urgent injunctive relief from a court of appropriate jurisdiction.

## **27. DEFECTS, WARRANTIES, RETURNS AND THE CCA**

27.1. The Customer must inspect the Goods on delivery and must within two (2) days of such time notify FMA in writing of any evident defect/damage, error or omission, shortage in quantity, or failure to comply with the description or quote. The Customer must notify any other alleged defect in the Goods as soon as reasonably possible after any such defect becomes evident. Upon such notification the Customer must allow FMA to inspect/review the Goods.

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27.3. FMA acknowledges that nothing in these Terms may modify or exclude the Non-Excludable Guarantees.

27.4. Except as expressly set out in these Terms or in respect of the Non-Excludable Guarantees, FMA makes no warranties or other representations.

27.5. If FMA is required to replace the Goods under these Terms, but is unable to do so, FMA may refund any money the Customer has paid for the Goods.

27.6. If the Customer is not a consumer within the meaning of the CCA, FMA's liability for any defect or damage in the Goods is:

(a) limited to the value of any express warranty or warranty card provided to the Customer by FMA at FMA's sole discretion; or

(b) limited to any warranty to which FMA is entitled, if FMA did not manufacture the Goods.

27.7. Subject to this clause 27, returns will only be accepted provided that:

- (a) the Customer has complied with the provisions of clause 27.1.
- (b) FMA has agreed that the Goods are defective.
- (c) the Goods are returned within a reasonable time at the Customer's cost (if that cost is not significant); and
- (d) the Goods are returned in as close a condition to that in which they were delivered as is possible.

27.8. Notwithstanding clauses 27.1 to 27.7 but subject to the CCA, FMA shall not be liable for any defect or damage which may be caused or partly caused by or arise as a result of:

- (a) the Customer failing to properly maintain or store the Goods.
- (b) the Customer using the Goods for any purpose other than that for which they were designed.
- (c) the Customer continuing the use of the Goods after any defect became apparent or should have become apparent to a reasonably prudent operator or user.
- (d) the Customer failing to follow any instructions or guidelines provided by FMA; or
- (e) fair wear and tear, any accident, or act of God.

27.9. FMA may in its absolute discretion accept non-defective Goods for return in which case FMA may require the Customer to pay handling fees of up to ten percent (10%) of the value of the returned Goods plus any freight costs.

## **28. COMPLIANCE WITH LAWS**

28.1. The Customer and FMA shall comply with the provisions of all statutes, regulations and by laws of government, local and other public authorities that may be applicable to the works, including any work health and safety (WHS) laws relating to building construction sites and any other relevant safety standards or legislation, particularly those in relation to asbestos and/or other hazardous materials (and the safe removal and disposal of the same). The Customer agrees to indemnify FMA against all claims arising from health issues related to exposure to asbestos at the site.

28.2. The Customer shall be liable for any costs incurred by FMA due to the Customer's failure to comply with clause 28.1, including any associated clean-up costs related to asbestos.

## **29. DEFAULT**

29.1. Without prejudice to any other remedies FMA may have, if at any time the Customer is in breach of any obligation under these Terms, FMA may suspend or terminate the supply of Goods to the Customer (including repossessing the Goods) (in which case FMA will not be liable to the Customer for any loss or damage the Customer suffers because FMA has exercised its rights under this clause 29.1).

29.2. FMA may cancel all or any part of any order of the Customer which remains unfulfilled (in which case all amounts owing to FMA shall, whether due for payment or not, become immediately payable if:

(a) any money payable to FMA becomes overdue.

b) in FMA's opinion the Customer will be unable to make a payment when it falls due.

(c) the Customer becomes insolvent, convenes a meeting with its creditors or proposes or enters into an arrangement with creditors, or makes an assignment for the benefit of its creditors; or

d) a receiver, manager, liquidator (provisional or otherwise) or similar person is appointed in respect of the Customer or any asset of the Customer.

### **30. CANCELLATION**

30.1. FMA may cancel any supply to which these Terms or cancel delivery at any time before the Goods are delivered by giving written notice to the Customer. On giving such notice FMA shall repay to the Customer any money paid by the Customer for the Goods. FMA shall not be liable for any loss or damage whatsoever arising from such cancellation.

30.2. If the Customer cancels delivery, the Customer shall be liable for any and all loss incurred (whether direct or indirect) by FMA as a direct result of the cancellation (including, but not limited to, any loss of profits).

30.3. Cancellation of orders for Goods made to the Customer's specifications, or for non-stocklist items, will not be accepted once an order has been placed.

### **31. SECURITY OF PAYMENTS**

At FMA sole discretion, these Terms may constitute a claim for payment under the Building and Construction Industry Security of Payment Act 2002 (VIC) and/or the equivalent legislation in the other Australian jurisdictions (as applicable).

### **32. GENERAL**

32.1. The failure by FMA to enforce any provision of these Terms shall not be treated as a waiver of that provision, nor shall it affect FMA's right to subsequently enforce that provision.

32.2. None of FMA's agents or representatives are authorised to make any representations, statements, conditions or agreements not expressed by the manager of FMA in writing, nor is FMA bound by any such unauthorised statements.

32.3. The Customer must give FMA at least fourteen (14) days prior written notice of any proposed change of ownership of the Customer and/or any other change in the Customer's details (including but not limited to, changes in the Customer's name, address, contact phone or fax number/s, or business practice). The Customer shall be liable for any loss incurred by FMA as a result of the Customer's failure to comply with this obligation.

32.4. If any provision of the Terms is unenforceable, it will be read down to be enforceable or, if it cannot be read down, the term will be severed from the Terms without affecting the enforceability of the remaining Terms.

32.5. A notice must be in writing and handed personally or sent by fax, email, or prepaid mail to the addressee. Notices sent by mail are deemed to be received 5 days after posting. Notices sent by fax or email are deemed received on confirmation of transmission.

32.6. Where a person uses or authorises the use of his or her signature in whatever form, including approving an authorised person (including any employee) to apply his or her signature to a document, leaving an authorised person with his or her email address and password, that person agrees that they:

(a) have full knowledge of the Terms and all material circumstances related to or as stated in the relevant document.

b) have provided the requisite authority in whatever form for the use of their signature for the express purpose of entering into legally binding arrangements.

c) acknowledge that FMA relied on this clause 32.6 and any signature as being applied with full and complete authority (express, implied or ostensible) by person whose signature is used; and

d) understand the nature and effect of the Terms.

32.7. FMA and the Customer consent to the Terms being produced, signed, and retained solely in an electronic form, provided that the production, signing and retention complies with the requirements of the relevant Electronic Transactions Acts.

32.8. The Customer is not entitled to set off against, or deduct from the Price, any sums owed or claimed to be owed to the Customer by FMA nor to withhold payment of any invoice because part of that invoice is in dispute.

32.9. The Customer agrees that FMA may amend these Terms at any time, in which case the change will take effect from the date on which FMA notifies the Customer of such change. The Customer will be taken to have accepted such changes if the Customer makes a further request for FMA to provide Goods.

32.10. FMA is not liable for any default due to any act of God, war, terrorism, or other event beyond the reasonable control of FMA.

32.11. The Customer warrants that it has the power to enter into these Terms and has obtained all necessary authorisations to allow it to do so, it is not insolvent and that these Terms create binding and valid legal obligations on it.

32.12. The rights and obligations of FMA and the Customer under the Terms will be binding on and will be of benefit to, each of the party's successors, permitted assigns, heirs, executors and administrators.

32.13. The Terms are governed by the laws of Victoria. FMA and the Customer submit to the exclusive jurisdiction of the courts of that State.