
EMS Sales Pty Ltd – Terms & Conditions of Trade

1. Definitions

- 1.1 “EMS Sales” means EMS Sales Pty Ltd its successors and assigns or any person acting on behalf of and with the authority of EMS Sales Pty Ltd.
- 1.2 “Client” means the person/s buying the Goods as specified in any invoice, document or order, and if there is more than one Client is a reference to each Client jointly and severally (where the context so permits, the term ‘Client’ shall also mean the Client’s duly authorised representative).
- 1.3 “Goods” means all Goods or Services supplied by EMS Sales to the Client at the Client’s request from time to time (where the context so permits the terms ‘Goods’ or ‘Services’ shall be interchangeable for the other).
- 1.4 “Price” means the Price payable (plus any GST where applicable) for the Goods as agreed between EMS Sales and the Client in accordance with clause 6 below.
- 1.5 “GST” means Goods and Services Tax (GST) as defined within the “A New Tax System (Goods and Services Tax) Act 1999” (Cth).

2. Acceptance

- 2.1 The Client is taken to have exclusively accepted and is immediately bound, jointly and severally, by these terms and conditions if the Client places an order for or accepts delivery of the Goods.
- 2.2 These terms and conditions may only be amended with the consent of both parties in writing, and shall prevail to the extent of any inconsistency with any other document or agreement between the Client and EMS Sales.
- 2.3 The Client acknowledges that the supply of Goods on credit shall not take effect until the Client has completed a credit application with EMS Sales and it has been approved with a credit limit established for the account.
- 2.4 In the event that the supply of Goods request exceeds the Clients credit limit and/or the account exceeds the payment terms, EMS Sales reserves the right to refuse delivery.
- 2.5 EMS Sales reserves the right to substitute comparable Goods (or components of the Goods), and in all such cases EMS Sales will notify the Client in advance of any such substitution.
- 2.6 The Client acknowledges and accepts that the supply of Goods for accepted orders may be subject to availability and if, for any reason, Goods are not or cease to be available, EMS Sales reserves the right to vary the Price with alternative Goods as per clause 2.5.
- 2.7 Notwithstanding clause 2.6 EMS Sales also reserves the right at their discretion to introduce additional new Goods as part of the Goods to be supplied.

3. Electronic Transactions Act 2000

- 3.1 Electronic signatures shall be deemed to be accepted by either party providing that the parties have complied with Section 9 of the Electronic Transactions Act 2000 or any other applicable provisions of that Act or any Regulations referred to in that Act.

4. Authorised Representatives

- 4.1 Unless otherwise limited as per clause 4.2 the Client agrees that should the Client introduce any third party to EMS Sales as the Client’s duly authorised representative, that once introduced that person shall have the full authority of the Client to order any Goods or Services on the Client’s behalf and/or to request any variation to the Goods/Services on the Client’s behalf (such authority to continue until all requested Goods/Services have been supplied or the Client otherwise notifies EMS Sales in writing that said person is no longer the Client’s duly authorised representative).
- 4.2 In the event that the Client’s duly authorised representative as per clause 4.1 is to have only limited authority to act on the Client’s behalf, then the Client must specifically and clearly advise EMS Sales in writing of the parameters of the limited authority granted to their representative.
- 4.3 The Client specifically acknowledges and accepts that they will be solely liable to EMS Sales for all additional costs incurred by EMS Sales (including EMS Sales’ profit margin) in providing any Goods/Services or variations requested by the Client’s duly authorised representative (subject always to the limitations imposed under clause 4.2 (if any)).

5. Change in Control

- 5.1 The Client shall give EMS Sales not less than fourteen (14) days prior written notice of any proposed change of ownership of the Client and/or any other change in the Client’s details (including but not limited to, changes in the Client’s name, address, contact phone or fax number/s, or business practice). The Client shall be liable for any loss incurred by EMS Sales as a result of the Client’s failure to comply with this clause.

6. Price and Payment

- 6.1 At EMS Sales’ sole discretion, the Price shall be either:
 - (a) as indicated on any invoice provided by EMS Sales to the Client; or
 - (b) EMS Sales’ quoted price (subject to clause 6.2) which will be valid for the period stated in the quotation or otherwise for a period of thirty (30) days.
- 6.2 EMS Sales reserves the right to change the Price if a variation to EMS Sales’ quotation is requested. Any variation from the specifications of the Goods (including, but not limited to, any variation as a result of fluctuations in currency exchange rates or increases to EMS Sales in the cost of taxes, levies, materials and labour, or due to the unavailability) and any variations will be charged for on the basis of EMS Sales’ quotation, and will be detailed in writing, and shown as variations on EMS Sales’ invoice. The Client shall be required to respond to any variation submitted by EMS Sales within ten (10) working days. Failure to do so will entitle EMS Sales to add the cost of the variation to the Price. Payment for all variations must be made in full at the time of their completion.
- 6.3 Time for payment for the Goods being of the essence, the Price will be payable by the Client on the date/s determined by EMS Sales, which may be:
 - (a) upon delivery of the Goods;
 - (b) thirty (30) days following the end of the month in which a statement is delivered to the Client’s address for notices;
 - (c) the date specified on any invoice or other form as being the date for payment; or

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- (d) failing any notice to the contrary, the date which is seven (7) days following the date of any invoice given to the Client by EMS Sales.
- 6.4 At EMS Sales' sole discretion, a twenty percent deposit may be required.
- 6.5 Payment may be made by cheque, bank cheque, electronic/on-line banking, or by any other method as agreed to between the Client and EMS Sales.
- 6.6 The Client shall not be entitled to set off against, or deduct from the Price, any sums owed or claimed to be owed to the Client by EMS Sales nor to withhold payment of any invoice because part of that invoice is in dispute.
- 6.7 Unless otherwise stated the Price does not include GST. In addition to the Price the Client must pay to EMS Sales an amount equal to any GST EMS Sales must pay for any supply by EMS Sales under this or any other agreement for the sale of the Goods. The Client must pay GST, without deduction or set off of any other amounts, at the same time and on the same basis as the Client pays the Price. In addition, the Client must pay any other taxes and duties that may be applicable in addition to the Price except where they are expressly included in the Price.
- 7. Delivery of Goods**
- 7.1 Delivery ("**Delivery**") of the Goods is taken to occur at the time that either;
- (a) the Client (or the Client's nominated carrier) takes possession of the Goods at EMS Sales' address; or
- (b) EMS Sales (or EMS Sales' nominated carrier) delivers the Goods to the Client's nominated address, even if the Client is not present at the address.
- 7.2 At EMS Sales' sole discretion, the cost of delivery is in addition to the Price.
- 7.3 In the event that EMS Sales is unable to supply the Goods as agreed solely due to any action or inaction of the Client, then EMS Sales shall be entitled to charge the Client a reasonable fee for redelivery and/or storage.
- 7.4 The Client shall ensure that EMS Sales has clear and free access at all times to effect delivery of the Goods. EMS Sales shall not be liable for any loss or damage to the site (including, without limitation, damage to pathways, driveways and concreted or paved or grassed areas) unless due to the negligence of EMS Sales.
- 8. Risk**
- 8.1 Risk of damage to or loss of the Goods passes to the Client on Delivery and the Client must insure the Goods on or before Delivery.
- 8.2 If any of the Goods are damaged or destroyed following delivery but prior to ownership passing to the Client, EMS Sales is entitled to receive all insurance proceeds payable for the Goods. The production of these terms and conditions by EMS Sales is sufficient evidence of EMS Sales' rights to receive the insurance proceeds without the need for any person dealing with EMS Sales to make further enquiries.
- 8.3 If the Client requests EMS Sales to leave Goods outside EMS Sales' premises for collection or to deliver the Goods to an unattended location, then such Goods shall be left at the Client's sole risk.
- 8.4 The Client acknowledges that all descriptive specifications, illustrations, drawings, data, dimensions and weights stated in EMS Sales's fact sheets, price lists or advertising material, are approximate only and are given by way of identification only. The Client shall not be entitled to rely on such information, and any use of such does not constitute a sale by description, and does not form part of the contract, unless expressly stated as such in writing by EMS Sales.
- 8.5 EMS Sales shall not be liable for any defect in the Goods if the Client does not follow the manufacturer's and/or EMS Sales' recommendations.
- 9. Title**
- 9.1 EMS Sales and the Client agree that ownership of the Goods shall not pass until:
- (a) the Client has paid EMS Sales all amounts owing to EMS Sales; and
- (b) the Client has met all of its other obligations to EMS Sales.
- 9.2 Receipt by EMS Sales 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.
- 9.3 It is further agreed that, until ownership of the Goods passes to the Client in accordance with clause 9.1:
- (a) the Client is only a bailee of the Goods and must return the Goods to EMS Sales on request;
- (b) the Client holds the benefit of the Client's insurance of the Goods on trust for EMS Sales and must pay to EMS Sales the proceeds of any insurance in the event of the Goods being lost, damaged or destroyed;
- (c) the Client must not sell, dispose, or otherwise part with possession of the Goods other than in the ordinary course of business and for market value. If the Client sells, disposes or parts with possession of the Goods then the Client must hold the proceeds of any such act on trust for EMS Sales and must pay or deliver the proceeds to EMS Sales on demand;
- (d) the Client should not convert or process the Goods or intermix them with other goods but if the Client does so then the Client holds the resulting product on trust for the benefit of EMS Sales and must sell, dispose of or return the resulting product to EMS Sales as it so directs;
- (e) the Client irrevocably authorises EMS Sales to enter any premises where EMS Sales believes the Goods are kept and recover possession of the Goods;
- (f) EMS Sales may recover possession of any Goods in transit whether or not delivery has occurred;
- (g) the Client shall not charge or grant an encumbrance over the Goods nor grant nor otherwise give away any interest in the Goods while they remain the property of EMS Sales;
- (h) EMS Sales may commence proceedings to recover the Price of the Goods sold notwithstanding that ownership of the Goods has not passed to the Client.
- 10. Compliance**
- 10.1 The Client and EMS Group Pty Ltd shall comply with the provisions of all statutes, regulations and bylaws of government, local and other public authorities that may be applicable to the Goods/Services, including any work health and safety (WHS) laws and any other relevant safety standards or legislation.

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- 10.2 The Client shall obtain (at the expense of the Client) all licenses and approvals that may be required for the Goods/Services.
- 11. Personal Property Securities Act 2009 (“PPSA”)**
- 11.1 In this clause financing statement, financing change statement, security agreement, and security interest has the meaning given to it by the PPSA.
- 11.2 Upon assenting to these terms and conditions in writing the Client acknowledges and agrees that these terms and conditions constitute a security agreement for the purposes of the PPSA and creates a security interest in all Goods and/or collateral (account) – being a monetary obligation of the Client to EMS Sales for Services – that have previously been supplied and that will be supplied in the future by EMS Sales to the Client.
- 11.3 The Client undertakes to:
- (a) promptly sign any further documents and/or provide any further information (such information to be complete, accurate and up-to-date in all respects) which EMS Sales may reasonably require to:
 - (i) register a financing statement or financing change statement in relation to a security interest on the Personal Property Securities Register;
 - (ii) register any other document required to be registered by the PPSA; or
 - (iii) correct a defect in a statement referred to in clause 11.3(a)(i) or 11.3(a)(ii);
 - (b) indemnify, and upon demand reimburse, EMS Sales for all expenses incurred in registering a financing statement or financing change statement on the Personal Property Securities Register established by the PPSA or releasing any Goods charged thereby;
 - (c) not register a financing change statement in respect of a security interest without the prior written consent of EMS Sales;
 - (d) not register, or permit to be registered, a financing statement or a financing change statement in relation to the Goods and/or collateral (account) in favour of a third party without the prior written consent of EMS Sales;
 - (e) immediately advise EMS Sales of any material change in its business practices of selling the Goods which would result in a change in the nature of proceeds derived from such sales.
- 11.4 EMS Sales and the Client agree that sections 96, 115 and 125 of the PPSA do not apply to the security agreement created by these terms and conditions.
- 11.5 The Client waives their rights to receive notices under sections 95, 118, 121(4), 130, 132(3)(d) and 132(4) of the PPSA.
- 11.6 The Client waives their rights as a grantor and/or a debtor under sections 142 and 143 of the PPSA.
- 11.7 Unless otherwise agreed to in writing by EMS Sales, the Client waives their right to receive a verification statement in accordance with section 157 of the PPSA.
- 11.8 The Client must unconditionally ratify any actions taken by EMS Sales under clauses 11.3 to 11.5.
- 11.9 Subject to any express provisions to the contrary (including those contained in this clause 11) nothing in these terms and conditions is intended to have the effect of contracting out of any of the provisions of the PPSA.
- 12. Security and Charge**
- 12.1 In consideration of EMS Sales agreeing to supply the Goods, the Client 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 Client either now or in the future, to secure the performance by the Client of its obligations under these terms and conditions (including, but not limited to, the payment of any money).
- 12.2 The Client indemnifies EMS Sales from and against all EMS Sales’ costs and disbursements including legal costs on a solicitor and own client basis incurred in exercising EMS Sales’ rights under this clause.
- 12.3 The Client irrevocably appoints EMS Sales and each director of EMS Sales as the Client’s true and lawful attorney/s to perform all necessary acts to give effect to the provisions of this clause 12 including, but not limited to, signing any document on the Client’s behalf.
- 13. Defects, Warranties and Returns, Competition and Consumer Act 2010 (CCA)**
- 13.1 The Client must inspect the Goods on delivery and must within seven (7) days of delivery notify EMS Sales in writing of any evident defect/damage, shortage in quantity, or failure to comply with the description or quote. The Client must notify any other alleged defect in the Goods as soon as reasonably possible after any such defect becomes evident. Upon such notification the Client must allow EMS Sales to inspect the Goods.
- 13.2 Under applicable State, Territory and Commonwealth Law (including, without limitation the CCA), certain statutory implied guarantees and warranties (including, without limitation the statutory guarantees under the CCA) may be implied into these terms and conditions (**Non-Excluded Guarantees**).
- 13.3 EMS Sales acknowledges that nothing in these terms and conditions purports to modify or exclude the Non-Excluded Guarantees.
- 13.4 Except as expressly set out in these terms and conditions or in respect of the Non-Excluded Guarantees, EMS Sales makes no warranties or other representations under these terms and conditions including but not limited to the quality or suitability of the Goods. EMS Sales’ liability in respect of these warranties is limited to the fullest extent permitted by law.
- 13.5 If the Client is a consumer within the meaning of the CCA, EMS Sales’ liability is limited to the extent permitted by section 64A of Schedule 2.
- 13.6 If EMS Sales is required to replace the Goods under this clause or the CCA, but is unable to do so, EMS Sales may refund any money the Client has paid for the Goods.
- 13.7 If the Client is not a consumer within the meaning of the CCA, EMS Sales’ 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 Client by EMS Sales at EMS Sales’ sole discretion;
 - (b) limited to any warranty to which EMS Sales is entitled, if EMS Sales did not manufacture the Goods;
 - (c) otherwise negated absolutely.
- 13.8 Subject to this clause 13, returns will only be accepted provided that:
 - (a) the Client has complied with the provisions of clause 13.1; and
 - (b) EMS Sales has agreed that the Goods are defective; and
 - (c) the Goods are returned within a reasonable time at the Client’s cost (if that cost is not significant); and

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- (d) the Goods are returned in as close a condition to that in which they were delivered as is possible.
- 13.9 Notwithstanding clauses 13.1 to 13.8 but subject to the CCA, EMS Sales 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 Client failing to properly maintain or store any Goods;
 - (b) the Client using the Goods for any purpose other than that for which they were designed;
 - (c) the Client continuing the use of any Goods after any defect became apparent or should have become apparent to a reasonably prudent operator or user;
 - (d) the Client failing to follow any instructions or guidelines provided by EMS Sales;
 - (e) fair wear and tear, any accident, or act of God.
- 13.10 In the case of second hand Goods, unless the Client is a consumer under the CCA, the Client acknowledges that it has had full opportunity to inspect the second hand Goods prior to delivery and accepts them with all faults and that to the extent permitted by law no warranty is given by the Seller as to the quality or suitability for any purpose and any implied warranty, statutory or otherwise, is expressly excluded. The Client acknowledges and agrees that the Seller has agreed to provide the Client with the second hand Goods and calculated the Price of the second hand Goods in reliance of this clause 13.10.
- 13.11 Notwithstanding anything contained in this clause if EMS Sales is required by a law to accept a return then EMS Sales will only accept a return on the conditions imposed by that law.

14. Default and Consequences of Default

- 14.1 Interest on overdue invoices shall accrue daily from the date when payment becomes due, until the date of payment, at a rate of two and a half percent (2.5%) per calendar month (and at EMS Sales' sole discretion such interest shall compound monthly at such a rate) after as well as before any judgment.
- 14.2 If the Client owes EMS Sales any money the Client shall indemnify EMS Sales from and against all costs and disbursements incurred by EMS Sales in recovering the debt (including but not limited to internal administration fees, legal costs on a solicitor and own client basis, EMS Sales' contract default fee, and bank dishonour fees).
- 14.3 Further to any other rights or remedies EMS Sales may have under this contract, if a Client has made payment to EMS Sales, and the transaction is subsequently reversed, the Client shall be liable for the amount of the reversed transaction, in addition to any further costs incurred by EMS Sales under this clause 14 where it can be proven that such reversal is found to be illegal, fraudulent or in contravention to the Client's obligations under this agreement.
- 14.4 Without prejudice to EMS Sales' other remedies at law EMS Sales shall be entitled to cancel all or any part of any order of the Client which remains unfulfilled and all amounts owing to EMS Sales shall, whether or not due for payment, become immediately payable if:
- (a) any money payable to EMS Sales becomes overdue, or in EMS Sales' opinion the Client will be unable to make a payment when it falls due;
 - (b) the Client has exceeded any applicable credit limit provided by EMS Sales;
 - (c) the Client 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 Client or any asset of the Client.

15. Cancellation

- 15.1 Without prejudice to any other remedies EMS Sales may have, if at any time the Client is in breach of any obligation (including those relating to payment) under these terms and conditions EMS Sales may suspend or terminate the supply of Goods to the Client. EMS Sales will not be liable to the Client for any loss or damage the Client suffers because EMS Sales has exercised its rights under this clause.
- 15.2 EMS Sales may cancel any contract to which these terms and conditions apply or cancel delivery of Goods at any time before the Goods are delivered by giving written notice to the Client. On giving such notice EMS Sales shall repay to the Client any money paid by the Client for the Goods. EMS Sales shall not be liable for any loss or damage whatsoever arising from such cancellation.
- 15.3 In the event that the Client cancels delivery of Goods the Client shall be liable for any and all loss incurred (whether direct or indirect) by EMS Sales as a direct result of the cancellation (including, but not limited to, any loss of profits).

16. Dispute Resolution

- 16.1 If a dispute arises between the parties to this contract then either party shall send to the other party a notice of dispute in writing adequately identifying and providing details of the dispute. Within fourteen (14) days after service of a notice of dispute, the parties shall confer at least once, to attempt to resolve the dispute. At any such conference each party shall be represented by a person having authority to agree to a resolution of the dispute. In the event that the dispute cannot be so resolved either party may by further notice in writing delivered by hand or sent by certified mail to the other party refer such dispute to arbitration. Any arbitration shall be:
- (a) referred to a single arbitrator to be nominated by the President of the Institute of Arbitrators Australia; and
 - (b) conducted in accordance with the Institute of Arbitrators Australia Rules for the Conduct of Commercial Arbitration.

17. Privacy Act 1988

- 17.1 The Client agrees for EMS Sales to obtain from a credit reporting body (CRB) a credit report containing personal credit information (e.g. name, address, D.O.B, occupation, previous credit applications, credit history) about the Client in relation to credit provided by EMS Sales.
- 17.2 The Client agrees that EMS Sales may exchange information about the Client with those credit providers and with related body corporates for the following purposes:
- (a) to assess an application by the Client; and/or
 - (b) to notify other credit providers of a default by the Client; and/or
 - (c) to exchange information with other credit providers as to the status of this credit account, where the Client is in default with other credit providers; and/or
 - (d) to assess the creditworthiness of the Client including the Client's repayment history in the preceding two (2) years.

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- 17.3 The Client consents to EMS Sales being given a consumer credit report to collect overdue payment on commercial credit.
- 17.4 The Client agrees that personal credit information provided may be used and retained by EMS Sales for the following purposes (and for other agreed purposes or required by):
- (a) the provision of Goods; and/or
 - (b) analysing, verifying and/or checking the Client's credit, payment and/or status in relation to the provision of Goods; and/or
 - (c) processing of any payment instructions, direct debit facilities and/or credit facilities requested by the Client; and/or
 - (d) enabling the collection of amounts outstanding in relation to the Goods.
- 17.5 EMS Sales may give information about the Client to a CRB for the following purposes:
- (a) to obtain a consumer credit report;
 - (b) allow the CRB to create or maintain a credit information file about the Client including credit history.
- 17.6 The information given to the CRB may include:
- (a) personal information as outlined in 17.1 above;
 - (b) name of the credit provider and that EMS Sales is a current credit provider to the Client;
 - (c) whether the credit provider is a licensee;
 - (d) type of consumer credit;
 - (e) details concerning the Client's application for credit or commercial credit (e.g. date of commencement/termination of the credit account and the amount requested);
 - (f) advice of consumer credit defaults, overdue accounts, loan repayments or outstanding monies which are overdue by more than sixty (60) days and for which written notice for request of payment has been made and debt recovery action commenced or alternatively that the Client no longer has any overdue accounts and EMS Sales has been paid or otherwise discharged and all details surrounding that discharge (e.g. dates of payments);
 - (g) information that, in the opinion of EMS Sales, the Client has committed a serious credit infringement;
 - (h) advice that the amount of the Client's overdue payment is equal to or more than one hundred and fifty dollars (\$150).
- 17.7 The Client shall have the right to request (by e-mail) from EMS Sales:
- (a) a copy of the information about the Client retained by EMS Sales and the right to request that EMS Sales correct any incorrect information; and
 - (b) that EMS Sales does not disclose any personal information about the Client for the purpose of direct marketing.
- 17.8 EMS Sales will destroy personal information upon the Client's request (by e-mail) or if it is no longer required unless it is required in order to fulfil the obligations of this agreement or is required to be maintained and/or stored in accordance with the law.
- 17.9 The Client can make a privacy complaint by contacting EMS Sales via e-mail. EMS Sales will respond to that complaint within seven (7) days of receipt and will take all reasonable steps to make a decision as to the complaint within thirty (30) days of receipt of the complaint. In the event that the Client is not satisfied with the resolution provided, the Client can make a complaint to the Information Commissioner at www.oaic.gov.au.
- 18. General**
- 18.1 The failure by either party to enforce any provision of these terms and conditions shall not be treated as a waiver of that provision, nor shall it affect that party's right to subsequently enforce that provision. If any provision of these terms and conditions shall be invalid, void, illegal or unenforceable the validity, existence, legality and enforceability of the remaining provisions shall not be affected, prejudiced or impaired.
- 18.2 These terms and conditions and any contract to which they apply shall be governed by the laws of New South Wales, the state in which EMS Sales has its principal place of business, and are subject to the jurisdiction of the Dubbo Courts in that state.
- 18.3 Subject to clause 13 EMS Sales shall be under no liability whatsoever to the Client for any indirect and/or consequential loss and/or expense (including loss of profit) suffered by the Client arising out of a breach by EMS Sales of these terms and conditions (alternatively EMS Sales' liability shall be limited to damages which under no circumstances shall exceed the Price of the Goods).
- 18.4 EMS Sales may licence and/or assign all or any part of its rights and/or obligations under this contract without the Client's consent.
- 18.5 The Client agrees that EMS Sales may amend these terms and conditions by notifying the Client in writing. These changes shall be deemed to take effect from the date on which the Client accepts such changes, or otherwise at such time as the Client makes a further request for EMS Sales to provide Goods to the Client.
- 18.6 Neither party shall be liable for any default due to any act of God, war, terrorism, strike, lock-out, industrial action, fire, flood, storm or other event beyond the reasonable control of either party.
- 18.7 Both parties warrant that they have the power to enter into this agreement and have obtained all necessary authorisations to allow them to do so, they are not insolvent and that this agreement creates binding and valid legal obligations on them.