

## **PDS Terms and Conditions of Trade**

About this agreement

THIS AGREEMENT is made between:

Productivity Development Solutions Pty Limited (**PDS**)

AND

the person(s) or company named in the associated proposal (**the Principal**)

AND

if the Principal is a corporation, the directors of the Principal who have signed or otherwise agreed to these terms (**the Guarantor**).

THE PARTIES AGREE as follows:

### **1. Agreement to Buy and Sell**

- 1.1. The parties acknowledge that PDS will sell and the Customer will purchase goods and services as invoiced from time to time on the terms and conditions of this Agreement.
- 1.2. In the event any credit, account or facility is granted pursuant to the terms of this Agreement, PDS may extend, increase or reduce such credit or facility by serving written notice.
- 1.3. In the event that PDS serves notice in accordance with clause 1.2 then, apart from any extension, increase or reduction set out in the notice, this Agreement and any supporting guarantee will continue to operate in its amended form.

### **2. Placement of Orders and Variations**

- 2.1. The Customer must order goods and services from PDS in writing, email or other electronic communication acceptable to PDS (which includes without limitation the acceptance by the Customer of a quotation, proposal or variation prepared by PDS).
- 2.2. PDS will not be bound by any terms or conditions expressed in orders or acceptances generated by the Customer except to the extent that such terms have been expressly agreed upon between the parties in writing and signed by PDS.
- 2.3. PDS may decline to accept any order without providing a reason in its absolute discretion.
- 2.4. If the Customer requests or PDS deems there to be a variation in the scope of the goods or services to be provided by PDS, then PDS may (but is not obliged to) notify the Customer in writing of the variation, the price variation, associated delays and any other information PDS deems relevant.
- 2.5. PDS is not obliged to commence any works associated with any variation identified in accordance with clause 2.4 unless and until the Customer acknowledges and accepts in writing the variations contained in that notice.

### **3. Delivery of Orders**

- 3.1. The Customer acknowledges that goods delivered to a courier are outside PDS's control and PDS will not be liable for any loss, damage, delay or non-delivery of goods to the extent permitted by law.

### **4. Supply of Services**

- 4.1. PDS will, subject to complying with its obligations under this Agreement, exercise its independent discretion as to the most appropriate and effective manner of providing the services it is contracted to provide.
- 4.2. The Customer must notify PDS of any incomplete services or any damage caused by or during the provision of services (**the Faulty Services**) within 30 days from the completion of the Service. In the absence of such notice, to the extent permitted by law, the Customer waives all of its rights under this Agreement in respect of those Services.

4.3. In addition to those obligations under **clause 4.2**, the Customer must allow PDS or its nominee to inspect the Faulty Services and perform any additional Services PDS or its nominee thinks fit.

## **5. Payment**

5.1. The Customer must pay to PDS the price in relation to each order placed at such place and by such date as may be notified in any invoice issued by PDS from time to time or otherwise as shall have been agreed in writing.

5.2. The Customer agrees to pay to PDS an account service fee of 10 per cent per annum or any part thereof in relation to any invoices which are not paid strictly in terms of this Agreement.

5.3. For better securing payment of the price plus any costs or charges, the Customer and Guarantor hereby jointly and severally charge all their real and personal property in favour of PDS and appoint PDS as their attorney with authority to execute a caveat, charge, encumbrance or other instrument over the property and lodge for registration at the appropriate office. The Customer and Guarantor must pay on an indemnity basis all costs of and incidental to the preparation, execution and registration of any instrument which is executed for the purposes of giving effect to this clause and must also pay all costs incidental to the withdrawal, discharge or release of such instrument.

## **6. Passing of Title and Risk**

6.1. PDS reserves the following rights in relation to all goods until all outstanding amounts owed by the Customer to PDS are paid in full:

- a) title of all goods; and
- b) entry into the Customer's premises (or the premises of any associated company or agent where goods are located) without liability for trespass or any resulting damage to retake possession of the goods; and
- c) to keep or resell any goods repossessed pursuant to clause 6.1(b).

6.2. If the Customer:

- a) resells the goods; or
- b) sells products manufactured using the goods; then

the Customer must hold an amount of the proceeds of the sale reflective of the invoice price of the goods sold or used in the manufacture of the goods sold in a separate identifiable account as the beneficial property of PDS. The Customer must pay such amount to PDS upon request.

6.3. Notwithstanding **clauses 6.1** and **6.2**, PDS may take action against the Customer for the purchase price and all risk regarding the goods will pass to the Customer upon delivery.

6.4. In the event that the Customer is in default of **clause 5** or in the event that an administrator, liquidator or trustee in bankruptcy is appointed to the Customer or the Guarantor, the Customer will appoint PDS as the Customer's attorney to secure performance of the Customer's obligations under this Agreement.

6.5. Risk in all goods supplied to the Customer will pass to the Customer on delivery.

6.6. Subject to **clause 8**, the Customer acknowledges PDS will not be liable for any claim, loss, damage, destruction, cost or expense where goods are damaged or destroyed (including from theft, water, malfunction or misuse by the Customer) on and from delivery.

6.7. The Customer grants and agrees to provide PDS with reasonable access (including remote access where applicable) to goods supplied by PDS for the purpose of installing system updates required for the proper function of the services provided by PDS or where troubleshooting is requested by the client. Where the Customer does not provide such access, PDS shall not be held liable for any non or under performance of the goods or services.

## **7. Security and PPSA**

- 7.1. For the purposes of this clause, “PPSA” means the Personal Property Securities Act 2009 (Cth) as amended from time to time. Where a particular section or term from the PPSA is used in this Agreement, it is deemed to be that section or term as defined or used in the PPSA as amended, renumbered or replaced from time to time.
- 7.2. The Customer acknowledges and agrees that this Agreement constitutes a security agreement in relation to PDS’s security interest in all present and after-acquired goods in accordance with the PPSA. The Purchaser agrees to grant a “Purchase Money Security Interest” to PDS.
- 7.3. For the avoidance of doubt, the Customer acknowledges and agrees that it grants to PDS a security interest in all goods supplied by PDS to the Customer (whether now or in the future) and in any proceeds from the sale of those goods.
- 7.4. To the extent permitted by law, the following provisions of the PPSA do not apply, and for the purposes of section 115 of the PPSA are contracted out of this Agreement:
- a) sections 95 (notice of removal of accession), to the extent that it requires PDS to give a notice to the Customer, 96 (retain of accession) and 125 (obligation to dispose of or retain collateral);
  - b) section 130 (notice of disposal), to the extent that it requires PDS to give a notice to the Customer;
  - c) section 132(3)(d) (contents of statement of account after disposal);
  - d) section 132(4) (statement of account if no disposal);
  - e) section 135 (notice of retention);
  - f) section 142 (redemption of collateral);
  - g) section 143 (reinstatement of security agreement).
- 7.5. For the purposes of section 14(6) of the PPSA, the Customer (and PDS) agree that any payments received from the Customer by PDS pursuant to or in any way connected with this Agreement, will be applied in such order as PDS deems fit in its absolute discretion.
- 7.6. The Customer consents to:
- a) and agrees to execute any other document or instrument required to give effect to the security interests created by this Agreement; and
  - b) the registration with the relevant authority or public register of any security interest created by this Agreement or any other document required to give effect to a security interest created by this Agreement, including without limitation the registration of a financing statement or financing change statement on the Personal Property Securities Register.
- 7.7. The Customer must pay all costs of and incidental to the preparation, execution and registration of any instrument which is executed for the purposes of giving effect to this clause and must also pay all costs incidental to the withdrawal, discharge or release of such instrument.
- 7.8. To the extent permissible at law the Customer waives its right to receive notification of or a copy of any Verification Statement confirming registration of a Financing Statement or a Financing Change Statement in relation to a Security Interest granted by the Purchaser, as Grantor to PDS as supplier.

## **8. Warranties and Liability**

- 8.1. To the extent permitted by law and unless otherwise expressly agreed, PDS does not provide and expressly excludes all warranties in respect of any goods or services.
- 8.2. The Customer acknowledges and agrees that to the extent permitted by law, PDS will not be liable for, and the Customer releases PDS in respect of, any claim, loss, cost, damage or expense (**Claim**) arising out of any act or omission of PDS or its employees, officers or agents unless that Claim is a direct result of the negligence or breach of this Agreement by PDS.

- 8.3. The parties agree that any liability for a Claim against PDS will be limited to the lesser of:
- (a) the re-supply of the goods or services in question (if applicable);
  - (b) the cost of the re-supply of the goods or services in question (if applicable); or
  - (c) the contract price of the original supply of the goods or services.
- 8.4. Notwithstanding any of the above, the parties agree that PDS will under no circumstances be liable to the Customer for any indirect or consequential loss (including but not limited to loss of income).
- 8.5. The Customer acknowledges that PDS may, as part of its supply of goods and services, on supply goods, systems or processes manufactured by a third party. In such circumstances, PDS is not liable for any defect, breakdown, loss, damage or cost arising out that supply. The extent of PDS's liability with respect to third party goods, systems or processes, is for PDS to use its reasonable endeavours to pass on to the Customer any warranty granted to PDS by the third party manufacturer. The Customer will be liable for any administrative, freight, postage or related costs incurred by PDS arising from or relating to PDS's compliance with this **clause 8.5**.
- 8.6. The Customer acknowledges that PDS may engage and use contracted personnel based in the Philippines and India (**External Personnel**) to fulfill its obligations to supply good and services to the Customer in accordance with this Agreement. The External Personnel may have access to the same information about the Customer that PDS has access to for the purposes of supplying goods and services to the Customer. The Customer accepts the use of the External Personnel by PDS for this purpose and agrees not to take any action against PDS in relation to the location of the External Personnel.

## **9. Term and Amendment**

- 9.1. This Agreement will commence on the day it is made and may be terminated by either party giving written notice to the other.
- 9.2. Notwithstanding **clause 8.1**, PDS may terminate the Agreement without notice if the Customer is in default under **this Agreement** or commits an act of insolvency and an external administrator or controller, liquidator or trustee in bankruptcy is appointed to the Customer or the Guarantor.
- 9.3. PDS may assign or otherwise transfer any of its rights under this Agreement.
- 9.4. The Customer may not without the prior written consent of PDS assign or otherwise transfer any of its rights or obligations under this Agreement.
- 9.5. PDS may amend the terms of this Agreement at any time by giving notice by mail, facsimile or email. The Customer, by placing any further order, will be deemed to have accepted the terms as amended.

## **10. Defaults and Rights**

- 10.1. In the event of a default under this Agreement by the Customer, the whole of any outstanding balance will become immediately due and payable by the Customer to PDS together with all legal costs and expenses associated with recovery of the outstanding balance on an indemnity basis.
- 10.2. The certificate of a Director or the Credit Manager of PDS will, in the absence of evidence to the contrary, be conclusive as to the amount of the outstanding balance.
- 10.3. No failure or delay of PDS to exercise any right or obligation of the Customer of any obligation hereunder and no custom or practice of the parties which is at variance with the terms hereof and no waiver by PDS of any particular default by the Customer shall affect or prejudice PDS's rights in respect of any subsequent default and no indulgence or forbearance by PDS of its rights under this Agreement shall adversely affect or prejudice its rights in relation to such default or any subsequent default.

## **11. Employees**

- 11.1. The Customer agrees and acknowledges that it is an essential condition of this Agreement that for the duration of the Agreement and for a period of 12 months after termination of this Agreement, the

Customer must not engage or attempt to engage, entice away, solicit or induce the engagement of any employees of PDS (or attempt to do any of these things) either for the Customer itself or any third party.

- 11.2. For the purposes of this clause 10, “**engagement**” means: The engagement, employment, contracting (including through a company or other vehicle owned or controlled by the relevant employee) or use (directly or indirectly) by the Customer of the relevant employee whether for a definite or indefinite period (except as employee of PDS), or the introduction of the employee to other employers with a resulting engagement, employment, contracting or use (including through a company or other vehicle owned or controlled by the employee). “**Engages**” has a like meaning.

## **12. Intellectual Property**

- 12.1. For the purposes of this Agreement, “Intellectual Property Rights” means copyright, trademark, design, patent, semiconductor or circuit layout rights and any other rights whether or not they are registered or registrable, relevant to, among other things, the textual, graphical, audio and other information, content, data or material used by PDS in respect to this Agreement.
- 12.2. Any pre-existing Intellectual Property Rights owned by PDS before the commencement of this Agreement, will remain vested in PDS.
- 12.3. Any pre-existing Intellectual Property Rights owned by the Customer before the commencement of this Agreement, will remain vested in the Customer.
- 12.4. The Customer agrees to grant to PDS a non-exclusive, transferable, royalty free licence to use the Customer’s pre-existing Intellectual Property Rights to the extent that use relates to:
- 12.4.1. any material created by PDS pursuant to this Agreement; or
  - 12.4.2. PDS displaying the Customer’s pre-existing Intellectual Property Rights on PDS’ website.
- 12.5. Subject to any Intellectual Property Rights existing in any third party materials, all Intellectual Property Rights, created by PDS on or after the commencement of this Agreement will remain vested in PDS.

## **13. Applicable Law**

- 13.1. The parties expressly agree that this Agreement will be governed by and interpreted in accordance with the laws of the State of New South Wales.
- 13.2. The courts of New South Wales, Australia have exclusive jurisdiction to settle any dispute arising out of or in connection with this Deed (including a dispute regarding the existence, validity or termination of this Deed) (a "Dispute").
- 13.3. The Parties agree that the courts of New South Wales, Australia are the most appropriate and the most convenient courts to settle Disputes and accordingly no Party will argue to the contrary.
- 13.4. Clauses 13.2 and 13.3 are for the benefit of PDS only. As a result PDS shall not be prevented from taking proceedings related to a Dispute in any other courts in [insert other jurisdiction]. To the extent allowed by law PDS may take concurrent proceedings in New South Wales, Australia, and [insert other jurisdiction].

## **14. Guarantor and Customer’s Warranties**

- 14.1. The Guarantor and Customer (and each director and office bearer if the Customer is a company) separately warrants that:
- a) In the case of a natural person, he/she has never been a bankrupt or entered into a deed of arrangement or compromise or any other arrangement under Part X of the *Bankruptcy Act* or otherwise assigned his/her assets for the benefit of creditors.
  - b) It has never been under external administration or subject to the appointment of an external receiver or controller or entered into a deed of company arrangement and that it is solvent and able to pay its debts as and when they fall due.

- c) They are not executing this Agreement as a result of or by reason of or in reliance upon any promise, representation, statement or information of any kind whatever given or offered to them by or on behalf of PDS whether in answer to an enquiry or otherwise.
- d) Prior to the placement of any order, they have made their own independent enquiries and satisfied themselves as to the quality and fitness for purpose of the goods and/or services and, to the extent permitted by law, PDS makes no warranty, promise or representation in relation to the goods and/or services, either expressly or impliedly and any warranties, terms and conditions in relation to the state, quality or fitness of the goods for any purpose, whether implied by use, statute or otherwise is, to the extent permitted by law, hereby excluded.

#### **15. PDS Relies on Guarantor and Customer's Warranties**

- 15.1. In entering into this Agreement, PDS relies upon the warranties provided above and upon the information supplied by the Customer in the Account Application which accompanies this Agreement.
- 15.2. PDS relies upon the representation that the person signing this Agreement has authority to execute it on behalf of the Customer described in the Schedule.

#### **16. Goods and Services Tax (GST)**

- 16.1. GST will be charged to all relevant goods and services and will be payable by the Customer at the time of payment, including but not limited to all stock, services, costs, fees, freight charges and any other amounts that become payable by operation of this Agreement.

#### **17. Dispute Resolution**

- 17.1. Except in cases of proceedings seeking injunctive relief restraining conduct in breach of this Agreement, any dispute, controversy or claim arising out of or relating to this Agreement, or the breach, termination or invalidity thereof, shall be settled by arbitration in accordance with the UNCITRAL Arbitration Rules as at present in force. The appointing authority shall be the Australian Centre for International Commercial Arbitration. The number of arbitrators shall be one. The place of arbitration shall be Sydney, Australia. The language to be used in the arbitral proceedings shall be English.

#### **18. Guarantee and Indemnity by Director(s), Trustee(s) and Guarantor**

- 18.1. In consideration of PDS agreeing to supply goods and/or services:
  - a) The Guarantors unconditionally guarantee to PDS the due and punctual performance by the Customer of all the Customer's obligations under each and every Agreement including, without limiting the generality of the foregoing, the payment by the Customer of all moneys, which term includes, without limitation, principal, fees, interest and costs) payable or repayable (whether presently or in the future, actually or contingently) under each and every Agreement and the Guarantors promise to pay to PDS on demand all moneys which the Customer defaults in paying under any Agreement including all moneys arising by way of costs, expenses, bank charges, losses or damages incurred by PDS arising from any default by the Customer under or relating to any Agreement.
  - b) I/We also acknowledge and agree in my/our capacity as Guarantor that the Guarantee and Indemnity that I/we may have previously given continues to secure any and all liabilities and obligations of the Customer/debtor.