

# Terms and Conditions

Fleximake Pty Ltd

ABN 55 146 538 301 ACN 146 538 301

Version.08.2020



These Terms and Conditions (Terms) as amended or replaced from time to time apply to any goods or services supplied or to be supplied to the Purchaser, or any third person on the Purchaser's behalf. Any reference to the Purchaser also includes its respective successors or permitted assigns. The singular includes the plural and the converse. If the Purchaser constitutes more than one person or entity, the Terms bind each of them jointly and severally.

## 1. Interpretation

In these terms and conditions and in any contract to which these conditions apply, unless inconsistent with the context:

- a. the Act means the Competition & Consumer Act 2010 (Cth)
- b. Claim means any claim, demand, action or proceeding;
- c. Collateral has the meaning given under the PPSA and in particular for the purposes of this Contract, the personal property that is not used predominately for personal, domestic or household purposes as identified in clause 6 hereof to which the Security Interest has attached;
- d. Contract means the contract between Fleximake and the Purchaser for or in relation to the sale and purchase of goods or services;
- e. Default means:
  - a. The Purchaser fails to pay when due any moneys owing to Fleximake;
  - b. The Purchaser gives any third party a security interest in accounts as an original collateral in respect of the proceeds of any goods supplied by Fleximake;
  - c. An Insolvency Event occurs or is continuing; or
  - d. The Purchaser breaches any other provision of these Terms.
- f. Electronic communication means a communication of information in the form of data, text or images by or guided or unguided electromagnetic energy and includes a scanned image or other form of digital storage;
- g. Goods means any item of whatsoever nature which is sold or to be sold by Fleximake to the Purchaser together with any ancillary services;
- h. Guarantor means each of the persons or entities who execute this document as Guarantor in which case that person or entity agrees to be liable for the Purchaser's debts whether on a principal debtor basis or who is otherwise surety for the Purchaser;
- i. Insolvency Event means:
  - a. An Administrator is appointed to the Purchaser or any Guarantor;
  - b. Except for the purposes of a solvent reconstruction or amalgamation previously approved by Fleximake
    - a. An application or an order is made, proceedings are commenced, a resolution is passed or proposed in a notice of meeting, an application to a court or other steps are taken for:
      - a. The Purchaser's winding up dissolution or administration or of any Guarantor; or
      - b. The Purchaser or any Guarantor entering into an arrangement, compromise or composition with or assignment for the benefit of creditors or a class of them; or

- b. The Purchaser ceases, suspends or threatens to cease or suspend the conduct of all or a material part of its business or dispose of or threaten to dispose of a material part of its assets.
- c. The Purchaser or any Guarantor is, or under any legislation is presumed to be, insolvent or cease to carry on business.
- d. A receiver, receiver and manager, administrative receiver or similar officer is appointed in respect of the Purchaser or any Guarantor.
- e. Any distress, attachment, execution, or other legal process is levied enforced or sued for against any material part of the Purchaser's assets or of any Guarantor and is not discharged or stayed within 14 business days.
- f. A security becomes enforceable or is enforced.

- j. Interest Rate means the rate prescribed by the Penalty Interest Rates Act 1983 (Vic);
- k. PPSA means the Personal Property Securities Act 2009 (Cth) as amended;
- l. PPS Register means the personal property securities registered established under section 146 of the PPSA;
- m. Prescribed Terms means any terms, conditions, guarantees and warranties which the Act and any other law expressly provides may not in respect of the Contract be excluded, restricted or modified, or may be excluded, restricted or modified only to a limited extent;
- n. Purchaser means the person or corporation who buys or has agreed to buy the goods from Fleximake;
- o. Purchase Monies Securities Interest or PMSI has the meaning given in section 14 of the PPSA as amended from time to time;
- p. Fleximake means Fleximake Pty Limited (ABN 55146538301) or such other company related to Fleximake Pty Limited which accepts the Purchaser's order by the issue of a Sales Confirmation;
- q. Sales Confirmation means the document so titled issued by Fleximake that formally accepts the order for goods from the Purchaser;
- r. Security Interest has the meaning given under the PPSA;
- s. Standard Specifications means Fleximake's standard specification for the goods current at the time the goods are delivered to the Purchaser;
- t. Words importing the singular number shall be deemed to include the plural and vice versa. Words importing the male gender shall be deemed to include the female and neuter gender and vice versa; and
- u. The headings in these terms and conditions are provided for convenience only and do not effect the interpretation thereof.

## 2. General

- a. Subject to any Prescribed Terms and conditions, this document together with the relevant Sales Confirmation embodies the sole terms and conditions of the Contract between Fleximake and the Purchaser and supersedes all other conditions and agreements between the parties, unless expressly amended in writing by Fleximake.
- b. These terms and conditions shall without further notice apply to all future transactions between Fleximake and the

Purchaser in relation to the sale and purchase of goods or services, whether or not this document is delivered or executed in the course of the transaction.

- c. For the avoidance of doubt, none of the terms and conditions contained in any document or other instrument supplied by or on behalf of the Purchaser (including without limiting the foregoing those included in any purchase order or like document from the Purchaser) shall apply to or form part of the Contract, except and to the extent otherwise agreed in writing by Fleximake.
- d. All purchase orders supplied by the Purchaser are offers only subject to acceptance by Fleximake and no Contract between Fleximake and the Purchaser comes into existence until Fleximake issues a Sales Confirmation in relation to the order.
- e. No variation or abrogation of these terms and conditions shall be effective unless it is evidenced in writing signed on behalf of Fleximake.
- f. The Purchaser agree that if a Purchaser's signature or execution is required, the requirement is taken to have been met by an electronic communication. Further, if Fleximake is required to produce a document in the form of paper, the requirement is taken to have been met by an electronic communication.
- g. If any provision in these Terms is unenforceable for any reason, it will not invalidate any other provision which will remain in full force and effect despite that invalidity.
- h. Fleximake may at any time set off any amount that Fleximake or any associated person or entity owes the Purchaser against any amount payable by the Purchaser to Fleximake.

### 3. Payment

- a. Unless otherwise agreed by the parties in writing payment shall be made in advance of the goods being produced or sent by Fleximake.
- b. Time for payment of the price of the goods shall be of the essence of the Contract. and If the Purchaser fails to pay the price when due Fleximake may treat the Contract as repudiated by the Purchaser or may, unless payment in full is made, suspend delivery of the goods or performance of services the subject of the Contract and any goods the subject of any other Contract with the Purchaser without incurring any liability whatsoever to the Purchaser in respect thereof. In addition, without prejudice to such rights of Fleximake, the Purchaser shall (if so required by Fleximake) pay interest to Fleximake on the outstanding amount of the price at the Interest Rate until the price is paid in full.
- c. Notwithstanding any rights of lien to which Fleximake may otherwise be entitled, Fleximake shall have a specific lien (including a right of sale) over the goods the subject of the Contract and any goods the subject of any other contract with the Purchaser until the price of the goods has been paid in full. The Purchaser shall not be entitled to make any deduction from the price of the goods in respect of any offset or counter claims.
- d. If a Default occurs or is continuing, Fleximake may immediately enforce these Terms. Without limitation this includes:
  - a. Retaking possession of any goods not paid for by the Purchaser;
  - b. Suspending delivery of any goods or order and/or refusing to process any unfilled order;
  - c. Enforcing any Security Interest;
  - d. Requiring payment of any proceeds held by the Purchaser in a separate account or otherwise;
  - e. Appointing a receiver and manager of any of the Purchasers real or personal property. The Purchaser agrees that any such receiver and

manager has the powers conferred by the Corporations Act.

- e. The powers exercisable by Fleximake are those given by these Terms including by statute, at law, or in equity.
- f. If a Purchaser has not been paid for the sale of Fleximake's goods by any of its own customers, at Fleximake's option, Fleximake may in addition to the powers in s120 of the PPSA, collect that account on giving to that customer, notice in writing to that effect. Fleximake shall be entitled to issue proceedings in the Purchaser's name against its customer for recovery of that account for Fleximake's benefit. The Purchaser appoints Fleximake or its directors as its attorneys for that purpose. For the purposes of this clause the Purchaser shall keep proper records in respect of unpaid sales, including dates of sale, price, amount and identity of such customer and Fleximake's goods.
- g. Fleximake may at its discretion despite s14(6) of the PPSA apply any monies received in respect of any PMSI obligations of the Purchaser on a pro-rata basis.
- h. The Purchaser shall pay Fleximake for all of its expenses including mercantile agents fees and any fees or commission paid to mercantile agents engaged by Fleximake in relation to the actual or contemplated enforcement of the Contract including legal costs and expenses on a full indemnity basis.

### 4. Delivery

- a. Any time or date named and accepted by Fleximake for completion, delivery, despatch, shipment or arrival of the goods or for tender of any documents is an estimate only and does not constitute a condition of the Contract or part of the description of the goods and is not of the essence of the Contract.
- b. Unless otherwise stated in writing Fleximake may make partial deliveries or deliveries by instalments in any amount it may determine and each such partial delivery or delivery by instalments shall be deemed to be a separate Contract and these conditions shall apply to each partial delivery or delivery by instalments.
- c. Fleximake may deliver up to 5% more or less of the amount specified for delivery, subject only to an appropriate adjustment to the price payable, in full satisfaction of Fleximake's obligations pursuant to the Contract.
- d. The Purchaser shall notify Fleximake within 7 days of delivery of any short fall in or loss or damage to goods delivered. Failure to so notify shall, subject to the requirements of any Prescribed Terms and conditions, disentitle the Purchaser to any remedy in respect to the shortage, loss or damage.
- e. Upon the occurrence of an Insolvency Event the Purchaser irrevocably authorises Fleximake and any of its lawful agents at any reasonable time to enter the Purchaser's premises or any premises occupied by the Purchaser or is agents and re-take any goods and then to re-sell those goods and retain the proceeds of the sale without prejudice to Fleximake's rights to claim the balance of all monies due. The Purchaser indemnifies Fleximake in respect of any such entry. The provisions of this clause survive the termination of any security agreement that arises in respect of these Terms.

### 5. Risk and Title

- a. Except as otherwise provided herein, the goods supplied by Fleximake to the Purchaser shall be at the Purchaser's sole risk immediately on their delivery to the Purchaser.
- b. Property and title in the goods supplied by Fleximake to the Purchaser will not pass to the Purchaser until such time as the goods the subject of the Contract and all other goods supplied by Fleximake to the Purchaser have been paid for in full, unless otherwise agreed to in writing between Fleximake and

the Purchaser. Until that time, the Purchaser shall hold the goods on trust as bailee for Fleximake and safely and securely store the goods, including goods into which the supplied goods have been mixed, in such a manner as to show clearly that they are the property of Fleximake and shall upon Fleximake's demand deliver up such goods to Fleximake. In default of such delivery Fleximake may by its servants and agents enter the Purchaser's premises at any time without notice to repossess the goods.

- c. Subject to the PPSA, until such time as the goods have been paid for in full the Purchaser is at liberty to sell the goods, including goods into which Fleximake's goods have been mixed, in the ordinary course of its business, and the Purchaser shall hold the proceeds thereof in trust for Fleximake and promptly account to Fleximake for those proceeds in payment of the purchase price for the goods.
- d. The Purchaser and Fleximake agree that the provisions of this clause apply notwithstanding any agreement between the parties under which Fleximake grants the Purchaser credit.

## 6. Personal Property Securities Act 2009

- a. The terms "Collateral", "Debtor", "Financing Change Statement", "Financing Statement", "Grantor", "Proceeds", "Secured Party", "Security Agreement" and "Security Interest" have the meanings given in the PPSA.
- b. The Purchaser acknowledges and agrees that by accepting these terms and conditions which form part of the Contract and constitute a Security Agreement that covers the Collateral for the purposes of the PPSA:
  - i. Fleximake holds (as Secured Party) a Security Interest over all of the present and after acquired goods supplied by Fleximake to the Purchaser and any Proceeds of the sale of those goods ("Collateral");
  - ii. Fleximake holds a security interest in all present and future property of the Purchaser including real property. The Purchaser agrees that Fleximake may lodge a caveat against any of its real property and agrees to give Fleximake a mortgage in respect of the relevant property in registrable form if required by Fleximake using memorandum of common provisions AA2785. The security interest given by the Purchaser is given as beneficial owner. If the Purchaser is trustee of any trust, the Purchaser acknowledges that the security interest given by it applies to the assets of the trust and its personal assets. The Purchaser irrevocably appoints any one of Fleximake directors as its attorney by way of security for the purposes of this clause and in respect of any enforcement powers;
  - iii. that any purchase by the Purchaser on credit terms from Fleximake or retention of title supply pursuant to clause 5 hereof will constitute a purchase money security interest as defined under section 14 of the PPSA ("PMSI");
  - iv. the PMSI granted herein will continue to apply to any goods coming into existence or proceeds of sale of goods coming into existence;
  - v. Not used;
  - vi. any Fleximake Security Interest will be a continuing and subsisting interest in the Collateral with priority to the fullest extent permitted by law over all over registered or unregistered Security Interest. The Fleximake Security Interest is not extinguished or in any way diminished even if the goods or any part of them is processed or commingled with or becomes part of a or commingling process;

- vii. Fleximake may register a financing statement including any financing charge statement on the PPSR. The Purchaser shall reimburse Fleximake for any costs and expenses and other charges incurred by Fleximake in registering them. The Purchaser irrevocably waives any rights to receive a copy of any verification statement.

- viii. until title in the goods pass to the Purchaser, it will keep all goods supplied by Fleximake free and ensure all such goods are kept free of any charge, lien or Security Interest and not otherwise deal with the goods in a way that will or may prejudice any rights of Fleximake under the Contract or the PPSA; and

- ix. in addition to any other rights under these terms and conditions or otherwise arising, Fleximake may exercise any and all remedies afforded to it as a Secured Party under Chapter 4 of the PPSA including, without limitation, entry into any building or premises owned, occupied or used by the Buyer, to search for and seize, dispose of or retain those goods in respect to which the Purchaser has granted a Security Interest to Fleximake.

- x. If Chapter 4 of the PPSA applies to these Terms, then the Purchaser contracts out of the enforcement provisions in section 115(1) except sections 120 and 121.

- c. The Purchaser undertakes to:

- i. sign any further documents and provide such information which Fleximake may reasonably require to register, amend or update a Financing Statement or Financing Change Statement in relation to a Security Interest on the PPS Register;

- ii. indemnify and upon demand reimburse Fleximake for all expenses incurred in registering a Financing Statement or Financing Change Statement on the PPS Register or releasing any Security Interests;

- iii. not register or permit to be registered a Financing Change Statement in the Collateral without the prior written consent of Fleximake; and

- iv. provide Fleximake not less than 7 days prior written notice of any proposed change in the Purchaser's name, address, contact numbers, business practice or such other change in the Purchaser's details registered on the PPS Register to enable Fleximake to register a Financing Change Statement if required.

- d. Fleximake and the Purchaser agree that sections 96, 125 and 132(3)(d) and 132(4) of the PPSA do not apply to the Security Agreement created under this Contract.

- e. The Purchaser hereby waives its rights to received notices under sections 95, 118, 121(4), 130, 132(3)(d) and 132(4) of the PPSA.

- f. The Purchaser waives its rights as a Grantor and/or a Debtor under sections 142 and 143 of the PPSA.

- g. Unless otherwise agreed in writing by Fleximake, the Purchaser waives its right to receive a verification statement in accordance with section 157 of the PPSA.

- h. The Purchaser shall unconditionally ratify any actions taken by Fleximake under this clause 6.

- i. This clause 6 will survive the termination of the Contract to the extent permitted by law.

## 7. Warranties and Exclusions of Liability

- a. Fleximake warrants that the goods when delivered to the Purchaser will comply with any description for the goods contained in the relevant Sales Confirmation (if any) and with the Standard Specification for the goods. Fleximake is not required to supply goods with any specification or characteristics that are outside any such description for the goods (if any) or the Standard Specifications.

- b. The Purchaser acknowledges, agrees, represents and warrants that:
1. as the use of the goods is outside the control of Fleximake, the Purchaser is satisfied that the goods when supplied in accordance with clause 7a) will have the condition, characteristics, quality and attributes that will make them suitable or fit for any ordinary or special purpose required for those goods, even if that purpose is made known to Fleximake at any time;
  2. the Purchaser has or will in a timely manner conduct all mandatory or prudent tests and apply all mandatory or prudent quality control checks and procedures to ensure the goods and any product that is produced from them will be without defect and suitable or fit for any purpose required for them; and
  3. the Purchaser has not relied upon any statement, representation, warranty, guarantee, condition, advice, recommendation, information, assistance or service provided or given by Fleximake or anyone on its behalf in respect of the goods, other than those that are expressly contained in the Contract.
  4. The Purchaser releases and indemnifies Fleximake and its officers, employees, consultants and agents from and against all actions, claims, proceedings and demands (including those brought by third parties) which may be brought against it or them, whether on their own or jointly with the Purchaser and whether at common law, under tort (including negligence), in equity, pursuant to statute or otherwise, in respect of any loss, death, injury, illness, cost or damage arising out of any breach by the Purchaser of any warranty provided by it under paragraph b) of this clause.
  5. Except as expressly set out in the Contract and except for liability under any Prescribed Terms, to the full extent permitted by law:
    - i. all conditions, warranties, guarantees, terms and obligations expressed or implied by law or otherwise relating to the Contract or the performance of Fleximake's obligations under the Contract or to any goods or services supplied or to be supplied by Fleximake under the Contract are excluded, except for those conditions and warranties as to title in the goods; and
    - ii. without limiting the generality of the foregoing, Fleximake gives no condition, warranty or guarantee whatsoever as to the suitability, performance or fitness of the goods for their ordinary or any special use or purpose, and the description of the goods in any Contract or any other document shall not import any such condition, warranty or guarantee on the part of Fleximake.
  6. Notwithstanding anything to the contrary herein contained but subject to the provisions of any Prescribed Terms, Fleximake's liability in respect of any Claim arising in any way out of the Contract or its performance or from any failure to perform the Contract including (without limiting the generality of the foregoing) for breach of any condition, warranty or guarantee contained in the Contract or in any Prescribed Term implied into or applying to the Contract and whether that liability arises under contract, tort (including negligence), breach of statutory duty or otherwise, is limited as follows:
    - i. if any guarantee under the Act is applicable to any good or service supplied by Fleximake and Fleximake's liability is due to a failure to comply with the guarantee and such failure cannot be

remedied or is a major failure as defined in the Act (each such failure hereafter referred to as a Relevant Failure), Fleximake's liability is as stated in the Act in respect of that Relevant Failure;

- ii. if the liability is due to a failure to comply with any condition, warranty or guarantee in respect of any good or service supplied by Fleximake under the Contract and such failure is not a Relevant Failure, Fleximake's liability is limited as follows in respect of such failure:
  - A. if the failure is in respect of goods, Fleximake's liability is limited to replacement of the goods or the supply of equivalent goods, the repair of the goods, payment of the cost of replacing the goods or of acquiring equivalent goods, or payment of the cost of having the goods repaired, as determined by Fleximake in its sole discretion; and
  - B. if the failure is in respect of services, Fleximake's liability is limited to the supply of the services again or payment of the cost of having the services supplied again, as determined by Fleximake's in its sole discretion;
  - C. in respect of all other liability (if any), Fleximake's liability is limited in the aggregate to the amount of \$10,000.
  - D. To the extent permitted by law, Fleximake will have no liability to the Purchaser, however arising and under any cause of action or theory of liability, in respect of special, indirect or consequential damages, loss of profit (whether direct or indirect) or loss of business opportunity arising out of or in connection with the Contract or its performance.

## 8. Return of Goods

- a. Goods supplied to the Purchaser are not returnable except as provided in clause 7 above.
- b. If the goods are in accordance with clause 7a) and all Prescribed Terms and are otherwise in compliance with the provisions of the Contract, Fleximake may from time to time under exceptional circumstances choose to accept the return of the goods from the Purchaser. A cancellation fee will apply. Purchaser will also reimburse Fleximake for all costs associated with the delivery and return of the goods.

## 9. Indemnity

- a. The Purchaser shall keep Fleximake indemnified against all costs, claims, demands, expenses and liabilities of whatsoever nature, including, without prejudice to the generality of the foregoing, claims of death, personal injury, damage to property and consequential loss (including loss of profit) which may be made against the Purchaser or which the Purchaser may sustain, pay or incur as a result of or in connection with the manufacture, sale, export, import or use of the goods unless such costs, claim, demand, expense or liability shall be directly and solely attributable to any breach of contract or guarantee by, or negligence of, Fleximake or its duly authorised employee or agent.
- b. Each indemnity and payment obligation of the Purchaser is a continuing obligation, separate and independent from all other obligations and survives the termination of these Terms.
- c. It is not necessary for Fleximake to incur expense or make a payment before enforcing a right of indemnity.

## **10. Licenses, Duties, etc.**

The payment of any taxes and the obtaining and maintenance in full force and effect of any necessary export or import licenses, authorisations or consent in respect of the goods is the sole responsibility of the Purchaser and Fleximake shall be under no liability whatsoever in respect of goods exported or imported without any necessary licenses, authorisations or consent.

## **11. Health and Safety**

It is the Purchaser's responsibility to ensure that all applicable health and safety regulations are observed and other appropriate steps taken in relation to the storage, handling and the use of the goods and, where information is supplied to the Purchaser on potential hazards relating to the goods, to bring such information to the attention of its employees, agents, sub-contractors, visitors and customers. Without prejudice to the foregoing, it is also the Purchaser's responsibility to provide safe facilities for the reception of goods into storage.

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

Goods and Services Tax (GST) will be charged on those products that attract GST at the applicable rate.

## **13. Industrial Property Right**

The Purchaser shall not alter, remove or in any way tamper with any of the trade or other marks or numbers of Fleximake attached to or placed upon the goods.

## **14. Force Majeure**

Fleximake shall not be under any liability whatsoever for the consequences of any failure on its part to perform or delay in performing any obligation under the Contract when due, whilst and to the extent that such failure or delay is due directly or indirectly to any event of force majeure. Without limiting the generality of the foregoing, this includes any liability whatsoever for any delay in completion, delivery, despatch, shipment or arrival of the goods or in the tender of any documents or the like. "event of force majeure" includes any acts of God, war, riots, strikes, lock outs, trade disputes, fires, break downs, mechanical failures, interruptions of transport, Government action or any other cause whatsoever, whether or not of a like nature to those specified above, outside the reasonable control of Fleximake. If there is an event of force majeure, Fleximake will notify the Purchaser of the event and the likely impact on its performance under the Contract. If the event affects the capacity of Fleximake to complete its material obligations under the Contract in a timely manner, Fleximake may by notice to the Purchaser terminate the Contract without any liability whatsoever on its part arising from such termination.

## **15. Notices**

a. Any notice required under these Terms may be given by any party, including any director or authorised person of that party.

b. Any notice may be given at that party's registered address or other address stipulated in any application in connection with these Terms or as notified in writing for the purposes of this clause. Without limitation this includes any electronic address notified to the other party.

c. Where a notice is posted by a party it will be taken as delivered on the second business day following posting unless the contrary is proved.

## **16. Assignment**

The Purchaser may not assign or transfer or purport to assign or transfer any of its rights or obligations under or in connection with the Contract to any other person or corporation whatsoever.

## **17. Sub-contract**

Fleximake reserves the right to sub-contract the performance of any Contract or part thereof to any other party or person or corporation it may determine.

## **18. Proper Law and Jurisdiction**

All Contracts made between Fleximake and the Purchaser shall be governed by and construed in accordance with the laws of Victoria, Australia. The Purchaser agrees to submit to the non-exclusive jurisdiction of the Victorian Courts and courts of appeal there from for all purposes of or in connection with such Contracts.

## **19. Cost Recovery**

Any expenses, costs or disbursements incurred by Fleximake in recovering any outstanding monies owing by the Purchaser including debt collection fees and solicitors costs shall be paid by the Purchaser, providing that those fees do not exceed the scale charges as charged by that debt collection agency or solicitor plus any out of pocket expenses.