

TERMS AND CONDITIONS OF SALE

THESE TERMS AND CONDITIONS GOVERN THE SUPPLY OF GOODS AND SERVICES BY BYGEN TO THE CUSTOMER, AS FURTHER DESCRIBED BELOW.

1. DEFINITIONS

In these Terms and Conditions capitalised terms have the meaning given to them below:

Agreement means these Terms and Conditions, including any annexure, read together with each Purchase Order.

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

Customer means the Customer identified in the Purchase Order, Customer Credit Application and/or any other document or agreement between the parties in writing.

Customer Credit Application means any agreement between Bygen and the Customer that provides for the supply of the Goods and/or Services on credit, and any other document executed by the Customer or its agent, representative, officer, or director in connection with that agreement.

Customer Background IP means any Intellectual Property Rights which the Customer is the legal owner of and which Customer provides to Bygen for inclusion as part of any Works.

Commencement Date means the date on which a Customer Credit Application is executed or the date on which the first Purchase Order is agreed between the parties, whichever is earlier.

Defect means, as the context requires: (a) a failure to deliver Goods or Services in accordance with the requirements of a Purchase Order; or (b) a defect or error in the Goods or Services that means they do not comply with a Purchase Order or any Warranty because of faulty material or workmanship, but does not include anything disclosed by Bygen as a feature or limitation of the Goods or Services prior to acceptance of a Purchase Order, or anything immaterial, trivial, insubstantial, or otherwise caused by the Customer.

Event of Default means a circumstance where a party: is unable to pay its debts when they are due; is bankrupt or insolvent; has a liquidator or any similar insolvency official appointed over it or any of its assets; has an order or resolution passed for its winding up, bankruptcy or dissolution; ceases to trade or exist, or is subject to any similar event.

Fees means the fees and charges payable by the Customer under this Agreement, including but not limited to the fees and charges set out in any Purchase Order.

Goods means any goods or Works agreed to be supplied by Bygen to the Customer from time to time, as described in a Purchase Order.

GST has the meaning given in the GST Law.

GST Law means A New Tax System (Goods and Goods Tax) Act 1999 (Cth).

Intellectual Property Rights means all intellectual property rights (including all rights resulting from intellectual activity and includes copyright, inventions, patent rights, registered and unregistered trademarks, design rights, circuit layouts and all rights and interests of a like nature).

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

Purchase Order means the document agreed between the parties in writing which describes the Goods and/or Services to be supplied by Bygen and the Fees to be paid by the Customer as consideration for those Goods and/or Services.

Quote means a written quote provided by Bygen to the Customer.

Services means, generally, any services provided by Bygen to the Customer under an Agreement.

Service Request means a written request for delivery of specific Good or Services.

Special Condition means any special condition agreed in writing between the parties under a Purchase Order, which is expressly stated to modify or override a provision of these Terms and Conditions.

Term means, in respect of a Purchase Order, the period from the acceptance of that Purchase Order to its completion or termination in accordance with these Terms and Conditions and, in respect of the entire

Agreement between the parties, the period from the first Commencement Date to termination under clause 10 of these Terms and Conditions.

Warranty means an express warranty stated by Bygen in a Quote (if any) in relation to any Goods or Services.

Warranty Conditions means any express terms and conditions which Bygen imposes in relation to a Warranty (in addition to those set out in these Terms and Conditions).

Warranty Period means the warranty period which Bygen expressly specifies from time to time which applies to a Warranty.

Works means any works specified in the Purchase Order.

2. APPOINTMENT

2.1 The Customer appoints Bygen to provide the Goods and Services during the Term. Subject to payment of the Fees, Bygen agrees to provide the Goods and Services in accordance with this Agreement.

2.2 The particulars of the Goods and Services that Bygen will provide are as described in a Purchase Order. The parties may have any number of Purchase Orders in place at the same time, and each Purchase Order will be read with these Terms and Conditions, together forming this Agreement. A Purchase Order will take effect when agreed in writing by the parties. The Customer agrees that Bygen may refuse to agree to a Purchase Order and may refuse to provide any requested Goods or Services in its absolute discretion.

2.3 The Customer may raise a Service Request with Bygen to request the supply of specific Goods and/or Services contemplated by a Purchase Order at any time during the term of this Agreement.

A Service Request will not be binding until accepted in writing by Bygen. Bygen will respond to a Service Request promptly and in accordance with any time frame otherwise agreed between the parties.

2.4 The Customer acknowledges and agrees that the appointment is non-exclusive and that Bygen may be engaged by other Customers to provide goods or services (including goods or

services similar to the Goods and Services) during the period of this Agreement.

3. PAYMENT

3.1 The terms of payment are as specified by the Quote.

3.2 Bygen may incur expenses that are directly attributable to providing the Services (including without limitation travel, accommodation, equipment or other administrative expenses) (Expenses). If the Fees are agreed in the Purchase Order to exclude Expenses, the Client agrees to pay all properly incurred Expenses subject to the terms of the Purchase Order.

3.3 The Customer agrees to provide Bygen with all necessary information to enable the issuing of an invoice and/or taking of payment, and to inform Bygen promptly of any change to the customer's information.

3.4 Bygen may increase the Fees or alter or terminate a Customer's credit limit from time to time on notice to and by written agreement of the Customer (**Fee Notice**). The Fee Notice will apply to future Purchase Orders agreed with the Customer.

3.5 The Customer agrees that all Fees not paid in full on the due date are debts due and payable immediately. The Customer agrees to pay all of Bygen's costs of recovering such debts on a full indemnity basis (including debt collection and legal fees). Bygen reserves the right to charge, and the Customer agrees to pay, interest on any overdue debt owed by the Customer under this Agreement, at a rate of 2% above the Commonwealth Bank of Australia's commercial unsecured lending rate at the time of charging.

4. GST

4.1 Except where this Agreement states otherwise, each amount payable by a party under this Agreement in respect of a taxable supply by the other party is expressed as a GST exclusive amount and the recipient of the supply must, in addition to that amount, and at the same time, pay to the supplier the GST payable in respect of the supply.

4.2 A party's obligation to pay an amount under this clause 4 is subject to a valid tax invoice being delivered by the other party.

4.3 Terms used in this clause 4 have the same meaning as under the GST Law.

5. TITLE AND RISK

5.1 Risk in the Goods will pass to the Customer on delivery unless otherwise agreed in writing between the parties.

5.2 Title in the Goods will remain with Bygen and pass to the Customer only on payment of the Fees, as well as all other amounts owing to Bygen by the Customer (under this Agreement or otherwise), in full. The Customer shall hold the Goods (including where they have been converted or changed by any process) as bailee and agent

for Bygen only before payment of the Fees in full.

5.3 Until title to the Goods passes to the Customer upon payment in full of all Fees owing to Bygen for all Goods supplied, the Customer must:

(a) store the Goods separately and in such a manner that they are clearly identified as the property of Bygen; and

(b) ensure that the Goods are properly stored, protected, readily identifiable and insured.

5.4 In addition to any rights Bygen may have under Chapter 4 of the PPSA, Bygen is entitled at any time until title in and to the Goods passes to the Customer, to demand the return of the Goods and shall be entitled without notice to the Customer and without liability to the Customer to enter, or cause Bygen's agent to enter, any premises occupied by the Customer (or any other premises where the Customer is holding the Goods) in order to search for and remove the Goods.

5.5 For the purpose of clause 5.4 above, the Customer:

(a) irrevocably grants a license to Bygen to enter such premises (including via an agent); and

(b) indemnifies Bygen from and against all loss, cost, damage, or claim suffered or incurred by Bygen as a result of exercising its rights under this clause 5.

5.6 In addition to the rights outlined in clause 5.4, and without prejudice to any rights Bygen may have under the Chapter 4 of the PPSA, Bygen shall be entitled to immediate possession of the Goods, and may enter the

Customer's premises or any other location where the Goods are situated, without prior notice and without liability to the Customer, to recover the Goods if:

(a) the Customer fails to make any payment due under this Agreement by the due date;

(b) the Customer commits any other breach of this Agreement; or

(c) Bygen reasonably believes that the Customer is about to become subject to an Event of Default.**6. PPSA**

6.1 The Customer acknowledges and agrees that this Agreement is an accepted and adopted security agreement between the parties.

Unless otherwise stated, a term contained in clauses 5 and 6 of this Agreement that is defined in the PPSA (but not otherwise defined in this Agreement) has the meaning given to it in the PPSA.

6.2 The Customer acknowledges and agrees that this Agreement creates a security interest to Bygen's benefit for the purposes of the PPSA in all Goods (and any proceeds) supplied by Bygen to the Customer.

6.3 The Customer acknowledges and agrees that this security interest is registrable in the personal property securities register and this security interest secures all moneys owing by the Customer to Bygen under this Agreement or otherwise.

6.4 The Customer grants to Bygen where and when applicable, a purchase money security interest (PMSI) to the extent that it secures payment of the amounts owing in relation to the relevant Goods.

6.5 The Customer acknowledges and agrees the security interest is a continuing and subsisting interest in the Goods with priority over any subsequent registered or unregistered general (or other) security interest and any unsecured creditor.

6.6 The Customer will do everything reasonably required of it by Bygen to enable Bygen to register its security interest with the highest possible priority permitted by law and to maintain those registrations including:

(a) signing any documents and/or providing any information which Bygen may reasonably require to register a financing statement or a

financing change statement in relation to a security interest; or

(b) correcting a defect in a statement referred to in paragraph (a).

The Customer agrees to cooperate fully with Bygen to do the foregoing.

6.7 The Customer waives any notice requirements under the PPSA (including notice of the financing statement or verification statement) unless the notice is required by the PPSA and that requirement cannot be excluded.

6.8 If Chapter 4 of the PPSA would otherwise apply to the enforcement of the security interests created under this Agreement, the Customer agrees that sections 95, 96, 120, 121(4), 123, 125, 128, 129, 130, 132(3)(d), 132(4), 134(1), 135, 142 and 143 of the PPSA (or their successor sections in any amended version of the PPSA)

will not apply to the enforcement of the security interest(s).

6.9 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 security agreement between Bygen and the Customer.

6.10 The Customer agrees to keep and maintain all Goods free of any charge, lien, or security interest except as created under this Agreement and not otherwise to deal with the Goods in a way that will, or may, prejudice the rights of Bygen under this Agreement or the PPSA.

6.11 The Customer must notify Bygen immediately in writing if the Customer changes its name and address for service, contact details or if there are any changes to data required to register a financing statement under the PPSA in respect of this Agreement.

7. SERVICES AND WORKS

7.1 If a Purchase Order requires Bygen to provide Services, then Bygen will use all reasonable endeavours to deliver those Services:

(a) subject to clause 8, by the dates and times specified in the Purchase Order; and

(b) in accordance with the requirements specified in the Purchase Order.

7.2 Bygen may specify additional conditions which apply to the delivery of Services as part of a Purchase Order, including any assistance required from the Customer or required access to the Customer's premises.

7.3 Bygen shall remain the owner at all times of all Intellectual

Property Rights in the Works. The Customer shall make no claim on such Intellectual Property Rights.

7.4 As between the parties, the Customer shall retain all Intellectual Property Rights in the Customer Background IP and nothing in clause 7.5 shall effect an assignment of such Intellectual Property Rights to Bygen.

8. DELIVERY

8.1 Any time quoted for delivery in a Purchase Order is an estimate only, unless expressly stated otherwise. The Customer is not relieved of any obligation to accept or pay for Goods or Services because of any delay in delivery.

8.2 Bygen will make all reasonable efforts to deliver the Goods to the Customer's nominated delivery address at the time and on the date agreed. However, time is not of the essence under this Agreement and, except where Bygen has an obligation under the Australian Consumer Law, Bygen is not liable for any failure to deliver, any failure to deliver within the time quoted for delivery in a Purchase Order or delay in delivery for any reason, including without limitation, where an incorrect delivery address has been provided to Bygen, or where an event beyond Bygen's reasonable control occurs in accordance with clause 8.3.

8.3 If for any reason beyond the control of Bygen (including without limitation as a result of any strike, trade dispute, fire, tempest, theft, breakdown, shortage of stock, a failure of a third party to fulfil their related obligations to Bygen, or similar) a Purchase Order cannot be completed at the time stipulated by the Customer or quoted for delivery, Bygen shall be entitled to delay or cancel delivery and fulfilment of the Purchase Order, and the Customer agrees that Bygen will not be liable to the Customer for any costs, expenses, losses or damages arising out of such cancellation.

9. DEFECTS

9.1 On delivery of Goods, if the Customer considers the Goods have a shortage in quantity or fail to meet the requirements of a Purchase Order, then the Customer has 5 business days to notify Bygen in writing of the alleged Defect and the Customer must preserve the Goods as delivered and either return them to Bygen or (if agreed by Bygen) allow Bygen (or a nominated agent) access to the Customer's premises for the purpose of inspecting the Goods. If, upon inspection, Bygen agrees that the Goods have a Defect, the remedies set out in clause 11.3(a) will be provided. If no notice of Defect is given by the Customer within 5 business days of the delivery of Goods, the Customer is deemed to have accepted the Goods (and that they are free from any Defect as delivered).

9.2 Subject to any Warranty Conditions, if a Defect arises in any Goods or Services during their Warranty Period, then Bygen may elect to provide any of the remedies specified in clause 11.3(a) in respect of any Defect reported by the Customer, and accepted by Bygen, during the Warranty Period.

9.3 For the purposes of evaluating a Warranty claim, the Customer at the time of lodging the claim must provide details of the Warranty claim, reasonable evidence of the alleged Defect, and proof of purchase. The Customer further agrees to preserve the Goods or Works which are alleged to be affected by a Defect and either return them to Bygen or (if agreed by Bygen) allow Bygen (or a nominated agent) access to the Customer's premises for the purpose of inspecting the Goods or Works.

9.4 If the Customer notifies Bygen of a Defect other than in accordance with this clause 9, or the Goods or Services are affected by an error or defect other than a Defect (including due to ordinary wear and tear or Customer or third party fault, or other exceptions specified in the Warranty Conditions), Bygen may impose a Fee on the Customer (in Bygen's sole discretion) to provide the remedies set out in clause 11.3(a).

10. TERM & TERMINATION

10.1 This Agreement will commence on the Commencement Date and

continue in effect unless terminated in accordance with this clause 10. A Purchase Order will commence on the start date specified in that Purchase Order and continue in effect until the relevant Goods or Services are delivered, unless terminated earlier in accordance with this clause 10.

10.2 Any right of termination provided in a Special Condition applies in addition to this clause 10 and does not have the effect of removing any right herein, unless expressly agreed between the parties.

10.3 Either party may terminate this Agreement and/or any one or more Purchase Orders immediately upon written notice to the other party (the **Relevant Party**) if:

- (a) the Relevant Party commits a material breach of this Agreement which is incapable of being remedied or, if the breach is capable of being remedied, the Relevant Party fails to remedy the breach within 7 calendar days after being required in writing to do so; or
- (b) the Relevant Party is or is reasonably likely to be subject to an Event of Default.

10.4 Bygen may terminate, or suspend the supply of the Goods and Services under, this Agreement and/or any one or more Purchase Orders immediately upon written notice to the Customer if the Customer:

- (a) fails to pay any Fees, or other amounts on or by the due date for payment and otherwise in accordance with this Agreement;
- (b) ceases or fails to provide within a reasonable time any information or assistance reasonably necessary for Bygen to provide any part of the Goods and Services; or
- (c) acts fraudulently or dishonestly or otherwise in breach of any relevant law.

10.5 Either party may terminate this Agreement on 30 days' written notice if no Purchase Order has been in force for a period of at least 30 days prior to the date of the notice.

10.6 For the avoidance of doubt, termination of this Agreement under clauses 10.3 or 10.4 will result in the termination of any Purchase Order in force at the date of termination, but termination of a Purchase Order alone will not affect the operation of this Agreement in

respect of any other than current or future Purchase Order.

10.7 If the supply of the Goods or Services is suspended in whole or in part under clause 10.4, Bygen may, at its sole election:

(a) end that suspension if and when the relevant breach is cured and Bygen has the resources available to re-commence supply of the Goods and Services;

(b) continue the suspension until such time as Bygen has the resources available to again supply the Goods and Services;

or

(c) provide notice of termination at any time if the issue constituting grounds for suspension under clause 10.4 has not been remedied, and the Customer agrees that Bygen will not incur any liability in respect of the failure to supply the Goods and Services during any period in which those Goods and Services are suspended.

10.8 If this Agreement or a Purchase Order is terminated by either party, Bygen will cease providing the relevant Goods and Services and the Customer must immediately pay Bygen all Fees due or incurred up to the date of termination in connection with those Goods and Services, including the unpaid balance of any credit account maintained by Bygen for the Customer under the Customer Credit Application.

10.9 Where the Customer terminates this Agreement or a Purchase Order, it remains liable for any amounts due to Bygen at the date of termination and for any expenses Bygen will incur and cannot avoid as at the date of termination (which may include the cost of Goods that Bygen cannot readily resell and staffing costs and related expenses incurred to deliver the Services).

11. LIABILITY & INDEMNITY

11.1 Except as expressly set out otherwise in this Agreement, and to the fullest extent permitted by the applicable law and legislations (including the Australian Consumer Law), the Customer acknowledges and agrees that Bygen provides the Goods and Services on an “as is” basis, without any implied warranties or conditions of any kind,

including but not limited to warranties of merchantability, fitness for a particular purpose, or non-infringement.

11.2 In this Agreement “as is” basis means to the exclusion of, other than those implied by law, all conditions, warranties, representations, implied terms and/or liability for any loss howsoever caused (including negligence) arising in connection with the Goods and Service or this Agreement that is not solely within the control of Bygen or otherwise without any direct fault on the part of Bygen (e.g. arising out of misuse of the Goods and Services, failure to abide by manufacturer/Bygen instructions, etc).

11.3 In respect of any liability of Bygen which cannot be excluded in accordance with clause 11.1, Bygen limits its liability to the Customer as follows:

(a) under any applicable consumer guarantees in the Australian Consumer Law in relation to the supply of the Goods or Services to either, at Bygen’s sole discretion:

(i) replacing the Goods or part thereof; or

(ii) supplying equivalent goods; or

(iii) repairing the Goods or part thereof; or

(iv) paying the cost of replacing or repairing the Goods; or

(v) re-performing Services or part thereof.

(b) for breach of agreement, negligence, breach of statutory duty or any other cause of action other than a breach of an applicable consumer guarantee (regardless of how that liability is caused), arising under this Agreement or related to any Goods or Services, Bygen’s total aggregate liability to the Customer is limited to the total Fees paid by the Customer for the relevant Goods or Services, excluding any and all consequential damages, indirect losses, loss of profits, loss of revenue, loss of opportunity, loss or destructions of data, and costs of cover.

11.4 Bygen’s Goods come with guarantees that cannot be excluded under the Australian Consumer Law. Nothing in this Agreement limits or excludes any right, guarantee, or entitlement that the Customer may have at law, to the extent that such right, guarantee, or entitlement cannot be limited or excluded. The Customer is entitled to a replacement or

refund for a major failure and compensation for any other reasonably foreseeable loss or damage. The Customer is also entitled to have the Goods repaired or replaced if the Goods fail to be of acceptable quality and the failure does not amount to a major failure.

12. GENERAL

12.1 Subcontractors: The Customer agrees that Bygen may without notice engage subcontractors to assist Bygen in providing the Goods and Services. Bygen will remain liable for the actions or omissions of any subcontractor to the same extent Bygen would be liable under this Agreement if the subcontractor were an employee of Bygen.

12.2 No employment: Nothing contained in this Agreement constitutes the relationship of joint venture, partnership, or employment between the parties and it is the parties' express intention to deny such relationships.

12.3 Assignment: Bygen may by written notice to the Customer assign, transfer, subcontract or otherwise dispose of, in whole or in part, its rights under this Agreement. The Customer must not assign or novate this Agreement without Bygen's prior written consent, such consent not to be unreasonably withheld.

12.4 Variation: This Agreement may only be amended or modified in writing signed by the parties.

12.5 Notices: Any notice or demand to be given or made under this Agreement must be in writing signed by a party's authorised representative. A notice will be deemed to be received

- (a) in the case of a notice given by hand, on delivery;
- (b) in the case of a notice sent by pre-paid post, three (3) business days following the date of postage; And
- (c) in the case of a notice sent by email, upon the recipient or their mail server confirming receipt of the email.

12.6 To the extent that any inconsistency arises between these Terms and Conditions (including any annexure), Special Conditions, Purchase Order a Customer Credit Application, and any related correspondence then those documents will be read in the following order of priority:

- (a) the Special Conditions;
- (b) the Customer Credit Application;
- (c) the Purchase Order;
- (d) these Terms and Conditions; and
- (e) any related correspondence.

12.7 Survival: Clause 1 (Definitions), Clause 7.3 and 7.4 (Intellectual Property), Clause 10 (Termination), Clause 11 (Liability and Indemnity), Clause 12 (General) will continue in force notwithstanding the termination or expiration of a Purchase Order

or this Agreement in its entirety for any reason.

12.8 Governing law: This Agreement is governed by and must be construed in accordance with the laws of Victoria, Australia, and the parties irrevocably consent to the jurisdiction of the courts there and their courts of appeal.

We can be contacted via:

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Schedule 1

Details required to be included in a valid Purchase Order:

- Customer Identity/Name
- Delivery Address
- Quote Reference Number
- Commencement Date
- Agreed Fees/Pricing
- Particulars/description of Goods and/or Services
- Any Special/Additional Conditions
- Term of Purchase Order (From acceptance of Purchase Order to Completion or Termination)
- Payment Terms (Incl. Milestones, Due Date, whether payment is upfront or in credit)
- Whether the Fees include or exclude Expenses (under cl. 3.3)
- Expected Dates and Times for Delivery of Goods and/or Services (and any additional requirements for delivery)
- Any License Terms