



## Terms and Conditions of Sale

### 1. Definitions and Interpretation

**Contract** means this Contract that incorporates these Terms and Conditions;  
**Contract Price** means the price listed in Nepean's acceptance of the Purchaser's Order or if none is stated the Price in Nepean's Quotation to the Purchaser.  
**Goods** mean any goods or services of whatsoever nature that are supplied by Nepean in accordance with these Terms and Conditions and Nepean's quotation to the Purchaser.  
**Nepean** means the Nepean entity listed on the Purchase Order Confirmation, Quotation or Offer to Supply the Goods;  
**PPSA** means the *Personal Properties Securities Act 2009*;  
**Purchaser** means the person or entity who buys or has agreed to buy the Goods from Nepean and includes its officers, employees, agents, or contractors  
**Security Interest** has the meaning given under the PPSA;  
**Terms and Conditions** means the terms and conditions that are provided in this Contract or as amended from time to time and are available at [www.nepean.com](http://www.nepean.com);  
**Warranty Period** has the meaning given to it in clause 10(b);  
Words importing the singular shall be deemed to include the plural and vice versa.

### 2. Contract

- (a) Notwithstanding anything contained in any Purchaser Order issued by the Purchaser or in correspondence between the Purchaser and Nepean or elsewhere, these Terms and Conditions together with Nepean's quotation (if any) constitute the entire terms and conditions of the agreement between the Purchaser and Nepean in regard to the Goods stated on the quotation or on the Purchaser Order or provided by Nepean, and will prevail over and supersede all prior negotiations, proposals, trading history, correspondence or previous dealings between the Parties.
  - (b) By offering to purchase or purchasing the Goods the Purchaser is agreeing to be bound exclusively by Nepean's quotation (if any) and these Terms and Conditions.
  - (c) The Purchaser acknowledges that in entering into this Agreement the Purchaser did not rely on any representation other than those which are expressly incorporated into Nepean's quotation or in these Terms and Conditions.
  - (d) A Purchase Order from the Purchaser shall constitute an offer to purchase the Goods. Nepean reserves the right to make alterations to its quotation at any time before its acceptance of a Purchase Order from the Purchaser. Notwithstanding that a quotation has been made no contract exists between Nepean and the Purchaser until Nepean accepts the Purchase Order in writing.
  - (e) Receipt of a Purchase Order by Nepean does not represent acceptance of that Purchase Order by Nepean and Nepean reserves the right to decline any Purchase Order at its absolute and sole discretion at any time.
  - (f) Nepean will not be liable to the Purchaser or any other third party should it not accept a Purchase Order.
  - (g) If there is any inconsistency or variance between the provisions of any quotation by Nepean and these Terms and Conditions then the former shall prevail to the extent of the inconsistency or variance provided that notwithstanding any acceptance by Nepean of any Purchase Order or offer to purchase from the Purchaser that may contain any provision inconsistent with or purporting to vary or reject any of these Terms and Conditions, any contract between Nepean and the Purchaser arising from Nepean's acceptance of such Purchase Order or offer to purchase shall be subject to these Terms and Conditions unless and to the extent only that Nepean expressly agrees in writing to any variation thereof.
  - (h) These terms shall apply to any separable portion of any quotation or contract arising between Nepean and the Purchaser and to the Goods supplied thereunder.
  - (i) Any rights, remedies, liabilities, conditions, warranties, standards or specifications which apply to or in respect of any Contract arising between Nepean and the Purchaser under or by virtue of the Australian Consumer Law or any other enactment of Australia or of any State or Territory thereof affecting such contract and which cannot be excluded from such contract are deemed to apply to such contract notwithstanding any inconsistency with these terms.
- (j) Subject to sub clause (i) above, to the fullest extent permitted at law, no warranties expressed or implied by law, trade custom or otherwise and no representations, descriptions, conditions or statements are binding on Nepean unless set out in these Terms and Conditions or expressly incorporated into these terms by reference by Nepean in writing.

### 3. Price

- (a) Unless otherwise stated, all prices quoted/stated do not include sales tax, goods and services tax, value added tax or any other tax, duty or impost levied over the Goods in Australia or elsewhere. All such taxes, duties and imposts will be added to the price at the designated rate unless, in the case of Australian sales tax (if applicable), a tax exemption number is stated or exemption certificate is provided at the time of order.
- (b) If GST is imposed in Australia on any supply made under or in connection with this Contract, Nepean may recover from the Purchaser an amount on account of GST, such amount to be in addition to the price or any other amount or consideration payable under this Contract and to be calculated by multiplying the Price or any other amount or consideration payable by the Purchaser for the relevant supply, by the prevailing GST rate. Any amount on account of GST recoverable from the Purchaser under this clause, shall be calculated without any deduction or set-off of any other amount and is payable by Purchaser upon demand, whether such demand is by means of an invoice or otherwise.
- (c) Unless stated otherwise, all prices, quotes or other amounts are in Australian Dollars (AUD\$).
- (d) Prices included in Nepean's quotation are based upon the quantities of Goods and description of the services referred to in Nepean's quotation. Should the Purchaser offer to purchase a quantity of Goods or type of services which is at variance with that referred to in the quotation, Nepean reserves the right, at its sole discretion, to amend the price quoted for such Goods and/or services.
- (e) All quotations issued by Nepean remain open for acceptance for a period of thirty (30) days from the date of the quotation unless an alternate period is specified in the quotation.

### 4. Price Adjustments

- (a) Unless otherwise expressly stated in writing, prices quoted by Nepean are based on the costs of material, labour, freight, insurance, and duties and other costs and charges at the date of any quotation or such other date specifically referred to therein in respect of such matters. Such prices shall be subject to adjustment in respect of any variation in such costs, rates or charges or their method of assessment occurring after that date and until the completion of any contract between Nepean and the Purchaser based on such quotation including, without limitation, changes in:
  - (i) Australian costs;
  - (ii) overseas costs;
  - (iii) foreign currency and exchange rates;
  - (iii) customs and excise duties, levies, charges, imposts and the like; and
  - (iv) transport costs.
  - (v) raw materials costs including but not limited to steel and copper prices;
- (b) Nepean shall give the Purchaser reasonable notice of any increase in the prices quoted where the amount of such increase is, in Nepean's opinion, substantial.
- (c) Unless otherwise expressly stated in writing in Nepean's quotation sales tax, GST, VAT or any other tax, levy or the like imposed on either the sale, manufacture, dealing with, distribution, import, export or use

## Terms and Conditions of Sale

of the Goods or measured by the selling price of goods or otherwise howsoever levied against or added to the price of the Goods shall in all cases be an excluded cost that shall be added to the price for payment by the Purchaser.

- (d) Unless otherwise expressly stated in writing in Nepean's quotation any customs duties, levies, taxes, (carbon) costs and the like imposed in respect of the goods applicable at the date of any quotation or such other date specifically referred to therein in respect of such matters will be added to the price and any variation thereto, for whatever reason, shall be to the Purchaser's account.
- (e) Where Nepean is delayed or the works are varied by the act or omission of the Purchaser or that of the Purchaser's agent, or any contractor for whom the Purchaser is responsible, Nepean shall notify the Purchaser of any additional costs which will be incurred as a result of such delay or variation, which additional costs shall be to the account of the Purchaser.
- (f) The Purchaser is entitled to make variations to the Purchase Order only with Nepean's prior written consent, including an increase or reduction of scope of supply, character, quality, nature or design as well as change of delivery time, provided that such variations are within what the parties could reasonably expect when entering into the Contract. The variation will be formalised by Nepean's issuance of a written variation order confirmation.
- (g) If in performing its obligations Nepean incurs more costs by reason of the creation or amendment after the date of Nepean's quotation of any law or of any order, regulation or by-law having the force of law or any applicable standard, the amount of such increase or decrease shall, as applicable be added to the Contract Price and even where such contract price is quoted as firm or fixed it shall be subject to adjustment for cost variations caused by such creation or amendment.
- (h) Changes in foreign exchange rates shall be payable and calculated at the rate of exchange actually paid by Nepean against the exchange rate in Nepean's quotation. If prices are expressed in different currencies and the Purchaser seeks or requires payment in any other currency than specified in Nepean's quotation, the Purchaser shall bear any foreign exchange risk arising from such payment.
- (i) For the purpose of this clause the expression and meaning of the term 'cost' is deemed to include overheads and interest paid by Nepean.

### 5. Specifications and Drawings

- (a) All descriptive and shipping specifications, drawings, dimensions and weights submitted by Nepean in relation to any quotation are approximate only and any descriptions, illustrations and data contained in any catalogues price lists and/or other advertising or promotional material are intended by Nepean only to present a general view of the Goods and/or Services described therein and none of such specifications, drawings, dimensions, weights, descriptions, illustrations or data shall form part of any contract arising between Nepean and the Purchaser.
- (b) In Supplying the Goods and/or Services the subject of the contract between Nepean and the Purchaser, Nepean may provide such drawings relating to the Goods and/or Services as Nepean deems in its sole discretion are reasonable and necessary. Any and all Intellectual Property Rights in any drawings supplied by Nepean shall remain vested in Nepean.

- (c) All information relating to any patents, designs, drawings, specifications, computer software or code, information, samples and the like provided by Nepean shall be treated by the Purchaser as confidential and shall not be copied or disclosed by the Purchaser to a third party.
- (d) The Purchaser's Order shall be accompanied by sufficient information, drawings and data to enable Nepean to commence work and proceed with the work without interruption. The Purchaser shall be solely responsible for, and warrant, the accuracy of the information it provides.
- (e) Any drawings or other information requiring the Purchaser's approval shall be approved, amended or rejected and returned to Nepean within 7 days of the date of receipt by the Purchaser of such drawings or other information requiring approval.
- (f) Unless Nepean has expressly agreed otherwise in writing, Nepean makes no representation nor gives any warranty in respect of fitness for any specific purpose or particular use.
- (g) Unless otherwise expressly agreed in writing it is Purchaser's responsibility and cost to obtain and provide any licences, access, approvals or permits as necessary for performance of any contract arising between Nepean and the Purchaser.
- (h) Any performance figures provided by Nepean are based on the Nepean's experience and are not guaranteed performance figures. Nepean shall have no liability to the Purchaser should the Goods and/or Services supplied fail to attain such performance figures unless Nepean has expressly guaranteed in writing the attainment of such performance figures, but subject always to recognised tolerances and reasonable variances applicable to such performance figures.
- (i) Where Nepean has expressly guaranteed performance figures in respect of Goods and/or Services and the performance figures attained in respect of such Goods and/or Services on any test are outside applicable tolerances and variances, Nepean shall be given reasonable time to rectify the performance of such Goods and/or Services.

### 6. Payment

- (a) Unless otherwise expressly agreed in writing by Nepean, all invoices supplied by Nepean must be paid in full (without any set-off or counterclaim) within 14 days of the date of the invoice. Payment is only received by Nepean when the payment is made in cash, or when the proceeds of other methods of payment are cleared and credited to Nepean's bank account.
- (b) If the Purchaser fails to pay the price when due, Nepean may at Nepean's sole discretion, at any time until payment is made in full:
  - (i) suspend delivery of the Goods, the subject of this Contract;
  - (ii) suspend any Goods the subject of any other contract with the Purchaser without incurring any liability whatsoever to the Purchaser thereof.
  - (i) in addition to any other rights charge the Purchaser weekly interest on the overdue amount based on the prevailing Commonwealth Bank of Australia base corporate overdraft rate for facilities over \$100,000 plus 3%, calculated from the date payment was due to the date of receipt of full and final payment. Payment will be first credited against interest accrued.
  - (iv) recover as a debt due from the Purchaser, the cost to Nepean of recovering any overdue amount, including legal or other associated costs. Nepean shall be entitled at any time to assign to any other person all or any part of the debt owing to Nepean and notwithstanding any rule of common law or equity to the contrary, or the appointment of a liquidator, receiver and/or manager over the Purchaser and the assets thereof, and the assignee thereof shall be entitled to claim full rights of set-off or counterclaim against the Purchaser as charge holders or successors in respect of the debt or part thereof so assigned.



## Terms and Conditions of Sale

- (c) Notwithstanding any rights of lien to which Nepean may otherwise be entitled, Nepean shall have a specific lien (including 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 have been paid in full.
- (d) if Goods are in whole or in part ready for delivery and if delivery of such Goods is delayed by reason of instructions given, or lack of instructions by the Purchaser, then full payment of that part of the contract price outstanding shall be due and payable 14 days after notification by Nepean to the Purchaser that such Goods are ready for delivery as though delivery had been completed in accordance with these Terms and Conditions.
- (e) Unless expressly set out in Nepean's quotation, Nepean shall not be required to provide any security for its obligations under this Contract. Where any security is expressly agreed to by Nepean it will be given in the form of a bank guarantee be issued by Nepean's bankers containing an expiry date not exceeding 18 months. The Security shall be supplied by Nepean on Delivery of the Goods and the Purchaser must return and release the security on expiry of the Warranty Period specified in these Terms and Conditions.

### 7. Delivery

- (a) Time will not be of the essence under this Contract.
- (b) Unless stated otherwise in Nepean's quotation, all Goods are supplied ex-works at the place of manufacture and delivery to a carrier's vehicle, including loading, shall constitute delivery by Nepean to the Purchaser. No allowance has been made in the Price for transport, insurance or unloading costs. Where the Purchaser requests delivery other than ex-works Nepean, at its sole discretion, may agree to act as agent for the Purchaser to effect such delivery and all costs of carriage and insurance in relation thereto will be to the Purchaser's account. In any event the Purchaser shall ensure provision of reasonable access to the point of delivery and for off-loading and/or handling without delay.
- (c) Nepean reserves the right, in its sole discretion to make partial deliveries of any Goods and to invoice such partial deliveries separately to the Purchaser in accordance with clause 6 of these Terms and Conditions.
- (d) Unless otherwise expressly agreed in writing by Nepean, all delivery dates provided by Nepean are approximate only and although every reasonable effort will be made by Nepean to deliver Goods by the estimated delivery date, any failure by Nepean to deliver the Goods by any particular date will not entitle the Purchaser to cancel the Contract or void any of these terms of this Contract or entitle the Purchaser to claim any compensation whatsoever (including liquidated or unliquidated damages) from Nepean for late delivery.
- (e) Where Nepean agrees in writing to guarantee a delivery date, Nepean will not be liable for failure to fulfil or for delays in delivering the Goods where delivery is prevented, delayed or hindered by a force majeure event, any act or omission or direction of the Purchaser, the Purchaser's employees, agents or contractors or where Nepean is delayed by any other cause beyond Nepean's reasonable control.
- (f) All delivery dates are dependent upon the timely receipt of the Purchaser's written order, all necessary particulars or details required for production and payment of any progress claims strictly in accordance with this Contract.
- (g) If after a period of 14 days from the date Nepean notifies the Purchaser that Goods are ready for delivery and delivery of such Goods is delayed for any reason beyond Nepean's reasonable control Nepean shall be entitled, at its sole discretion, to arrange for suitable storage of such Goods at its premises or elsewhere and Nepean shall take reasonable measures to protect the Purchaser's interest in such Goods. To the

extent permitted by law, the Purchaser shall pay all reasonable costs of such storage together with all reasonable costs of insurance, demurrage, handling and other contingent charges as a result of the storage and delivery of the Goods.

- (h) In addition to sub clause (g) above, if Goods are in whole or in part ready for delivery and if delivery of such Goods is delayed by reason of instructions given, or lack of instructions by the Purchaser, or any other delay outside of Nepean's reasonable control, then Nepean shall be entitled to invoice and payment for those Goods in accordance with clause 6(d).

### 8. Risk and Title

- (a) The risk of loss of or damage to the Goods will pass to the Purchaser at the time of delivery.
- (b) Property and Title to the Goods supplied by Nepean will not pass to the Purchaser until such time as the Goods have been paid for in full.
- (c) Until such time as title and property in such Goods passes to the Purchaser the relationship between Nepean and the Purchaser shall be fiduciary and the Purchaser shall hold the Goods as bailee for Nepean, and:
  - (i) The Purchaser must ensure that the Goods are stored at the Purchaser's place(s) of business and shall be marked in such a manner as they are readily identifiable as Nepean's property; and
  - (ii) The Purchaser may (unless Nepean advises you otherwise,) use, lease at market rates, or sell for full value, the Goods in the ordinary course of the Purchaser's business. However, if the Purchaser receives payment from a third party, the Purchaser agrees to hold such parts of the proceeds as relates to the Goods, separately and in identifiable form, on trust for Nepean. Such part shall be deemed to be equal in dollar terms to the amount owing by Purchaser to Nepean at the time of the receipt of such proceeds;
  - (iii) The Purchaser is licensed by Nepean to, in the ordinary course of his/its business, process in such fashion as the Purchaser may wish and/or incorporate such Goods in or with any product or products, subject to the express condition that the new product or products or any other chattel whatsoever containing any part of such Goods shall be separately stored and marked so as to be identifiable as being made from or with Goods the property of Nepean;
  - (iv) if Goods the property of Nepean are mixed with goods and/or material the property of the Purchaser or are processed with or incorporated therein, the product thereof shall become and/or shall be deemed to be the sole and exclusive property of Nepean;
  - (v) the Purchaser acknowledges and agrees that in relation to Goods that are inventory, the Purchaser will not allow any security interest to arise in respect of the Goods unless Nepean has perfected its purchase money security interest; and
  - (vi) the Purchaser must insure the Goods at its cost, naming Nepean as loss payee, for full replacement cost against all risks. Nepean may apply the proceeds of any insurance payment to reduce the amount that Purchaser owes Nepean.

### 9. Purchase Money Security Interest

- (a) If a term used in this clause has a particular meaning in the PPSA, it has the same meaning in this clause.
- (b) the Purchaser acknowledges, accepts and agrees that this Contract creates a purchase money security interest (as that term is defined in the PPSA) in the Goods as commercial property and, for avoidance of doubt, the proceeds of sale of the Goods. The Purchaser must, promptly

## Terms and Conditions of Sale

upon request by Nepean, sign any documents (including any new agreements), provide all necessary information and do anything else required by Nepean to ensure that the security interest is a perfected purchase money security interest (as that term is defined in the PPSA) and the Purchaser agrees to do all things Nepean considers necessary to:

- (i) enable Nepean to apply for registration, complete any financing statement or give any notification, in connection with the security interest; and/or
- (ii) ensure that the security interest is enforceable, perfected and otherwise effective;
- (c) The Purchaser waives its right under the PPSA to receive a copy of any verification statement or financing change statement (as those terms are defined in the PPSA).
- (d) The Purchaser agrees to sign or do all things necessary to perfect Nepean's rights under this Contract and appoints Nepean as its' attorney to sign any document or do anything that may be required to enforce Nepean's rights in the event of default by the Purchaser.

### 10. Warranties

- (a) Nepean warrants that the goods when delivered to the Purchaser will generally comply with the description for the Goods in the Purchase Order Confirmation or Nepean's quotation.
- (b) Unless otherwise expressly agreed to in writing by Nepean all Goods shall be warranted to be free from material defects for a period of 12 months from the date of delivery of the Goods. All Services shall be warranted to be supplied with due care and skill for a period of 3 months from the date the services are provided (each referred to as the "Warranty Period").
- (c) The warranty above does not extend to include Nepean's labour costs. Any removal, reinstallation and other consequential costs will be at the Purchaser's account. The warranty cover for repaired/replaced items will expire on the same date as the warranty for the rest of the Goods and/or Services. When warranty repairs are required to be carried out at locations other than at Nepean's premises, then the cost for labour, travel, travel time and accommodation costs incurred by Nepean will be to the Purchaser's account.
- (d) The warranty in this clause does not apply in respect of defects due to or arising from:
  - i. incorrect or negligent handling, disregard of operating and/or maintenance instructions, overloading, unsuitable operating conditions, defective civil or building work, accident, neglect, faulty erection (unless carried out by Nepean), acts of God, repairs or alterations carried out without Nepean's consent, non-compliance with Nepean's manual or operating instructions, fair wear and tear or by any other causes beyond Nepean's reasonable control;
- (e) If the Purchaser is a Consumer (as that term is defined under Australian Consumer Law) in relation to any of Nepean's Goods or services purchased by the Purchaser, such Goods and services come with guarantees that cannot be excluded under the Australian Consumer Law. The Purchaser is entitled to a replacement or refund for a major failure and for compensation for any other reasonably foreseeable loss or damage. If there is a breach of a warranty provided by Nepean in regard to the Goods or services provided under this Contract then Nepean will:
  - i. Repair or replace the Goods or the relevant parts; or
  - ii. Re-supply or rectify the services; or
  - iii. Where Nepean determines that it is not feasible to repair or replace the Goods or services, refund to the Purchaser the

amount of the Contract Price for those relevant Goods or services.

- (f) To claim the warranty under sub clause (e) above the Purchaser must write to Nepean at the address contained in Nepean's quotation within the relevant Warranty Period specifying the nature of the defect, breach or non-conformance. If the Purchaser makes a warranty claim in accordance with this clause, the Purchaser will be responsible for all expenses associated with the warranty claim other than the costs of the repair, replacement, rectification or refund for the Goods or services including the cost of returning any defective Goods to Nepean.
- (g) If the Purchaser is a Non-Consumer (as that term is defined under Australian Consumer Law) in relation to any of Nepean's Goods or services purchased by the Purchaser, the following warranty provisions shall apply:
  - i. If the Goods or services provided by Nepean are substantially in accordance with the requirements of the Contract, excluding minor omissions or minor defects which do not substantially affect normal use of the Goods or services, the Purchaser must promptly advise the date of acceptance within 24 hours from delivery of the Goods or completion of the services, otherwise acceptance will be deemed to have been notified on the expiration of that period.
  - ii. Any Goods which are rejected by the Purchaser and where Nepean has accepted the rejection, the rejected Goods will be repaired or replaced by Nepean, at Nepean's discretion. If the Goods are rejected, the notice must state the reasons for the rejection, otherwise Nepean will not be obliged to accept the notice of rejection.
  - iii. If there is a breach by Nepean of any warranty provided by Nepean in relation to the Goods or services either under this Contract or otherwise, Nepean will at Nepean's discretion, which will be the Purchaser's sole remedy, either repair or replace the Goods, re-supply any services or refund the Contract Price for the relevant Goods or services.
  - iv. All claims with respect to a breach of warranty must be made by to Nepean in writing within the Warranty Period, otherwise Nepean will not be liable for the defect, breach or non-conformance.
  - v. The repair of Goods at the Purchaser's site or any other location the Goods are stored is at Nepean's option. The cost of returning any defective Goods to Nepean shall be borne by the Purchaser.
  - vi. Second hand Goods or overhauled Goods are not subject to warranty unless specifically stated in Nepean's quotation or otherwise specifically agreed in writing by Nepean at the time of acceptance of the Purchaser's offer.
- (h) The Purchaser agrees that it did not rely on the skill or judgment of Nepean in relation to the suitability of the Goods for a particular purpose and no claim may be made against Nepean relating to the suitability of the Goods.

### 11. Intellectual Property

- (a) The Purchaser agrees and acknowledges that all intellectual property rights including but not limited to: patent, design, trademark, know how or copyright or other intellectual property rights, in respect to the Goods or their manufacture (as applicable) are owned exclusively by and vest automatically in Nepean upon creation;
- (b) Nepean grants to the Purchaser a royalty-free, irrevocable, non-transferrable perpetual, licence to use the Intellectual Property for the use, repair and maintenance of the Goods only;



## Terms and Conditions of Sale

- (c) The Purchaser must not without Nepean's prior written consent decompile, disassemble, reverse engineer, manufacture, duplicate or modify any of the Goods or components thereof nor reproduce, copy or disclose nor permit others to reproduce, copy or disclose any of Nepean's designs, specifications or drawings.
- (d) In the event of any claim for infringement of intellectual property (including but not limited to a registered design, trade mark, copyright, letters patent, or rights of confidentiality) relating to any Goods or components thereof (other than goods or components based on a specification or design provided or specified by the Purchaser), Nepean will at its discretion either replace or modify such goods or component with non-infringing goods or components or procure for the Purchaser the right to use such goods or components. Nepean will not be liable for any losses arising from use or non-use of any such infringing goods or components.
- 12. Confidentiality**
- (a) All information relating to patents, designs, other Intellectual Property, drawings, specifications, computer programs, information, samples and any other information provided by Nepean shall be regarded as confidential and shall not be copied or disclosed by the Purchaser to a third party except with Nepean's prior written consent, and shall only be used pursuant to the contract for which they are provided.
- (b) The Purchaser acknowledges that the Confidential Information is at all times the property of Nepean and a breach of this clause is likely to be harmful to the business and interests of Nepean and monetary damages alone may not be a sufficient remedy for a breach of this clause and in addition to any other remedy which may be available at Law or equity, Nepean may be entitled to an interim or interlocutory or permanent injunctions or any of them, to prevent breach of this this clause or to compel specific performance to it.
- 13. Force Majeure**
- (a) Nepean shall not be liable for any failure to or delay in fulfilling its obligations under this Contract, due to any cause beyond Nepean's reasonable control, including but not limited to acts of God, acts of civil or military authority, fires, epidemics, floods, earthquakes severe weather events, riots, wars, sabotage, labor disputes, governmental actions or inability to obtain materials, components, energy, manufacturing facilities, or transportation.
- (b) If there is an event of force majeure Nepean shall be entitled, at its sole discretion, by notice to the Purchaser either to :
- (i) extend the time for delivery of the Goods by a period equal to the time lost by reason of such delay;
  - (ii) terminate the Purchase Order for the Goods; or
  - (ii) decline to accept any further Purchase Orders.
- Nepean will not be liable for any damages for any failure to perform its obligations under the terms and conditions of this Contract due to an event of force majeure.
- 14. Cancellation**
- The Purchaser may not cancel the Purchase Order or Contract without Nepean's prior written consent. Such cancellation if agreed to by Nepean shall be on such conditions as Nepean may decide in its absolute discretion including but not limited to payment of reasonable and appropriate cancellation charges determined by Nepean.
- 15. Packaging, tests and inspections**
- (a) Where inspections and tests are performed they will be undertaken in accordance with Nepean's standard practice, including test documentation, and will be carried out at the place of manufacture or elsewhere at Nepean's sole discretion. Such inspections and tests, together with any additional tests as may be specified in Nepean's quotation, are the only inspections and tests included in the quoted price. Should any further inspection or tests be required by the Purchaser these will be subject to the Nepean's prior agreement and will result in an increase in the contract price and an extension to the time for delivery.
- (b) Unless stated otherwise in any quotation packing is not included in the contract price. Any packing required by the Purchaser and not specifically stated as being included in any quotation shall be to the Purchaser's account.
- 16. Date for Supply and Extension of Time**
- (a) Any date for delivery or contract period shall be extended in respect of any delay suffered by Nepean relating to instructions given by, or a lack of instructions from, the Purchaser, or any other acts or omissions of the Purchaser, or the Purchaser's employees, agents, contractors or those for whom the Purchaser is responsible, including any delay or withdrawal of access by the Purchaser to the premises required for Nepean to fulfil its obligations under this Contract.
- (b) Nepean shall not be liable to the Purchaser for any failure to meet any obligation under any contract arising between Nepean and the Purchaser to the extent that such failure is caused by or arises from:
- (i) Force majeure event; or
  - (ii) any other cause whether arising from natural causes, human agency or anything beyond the reasonable control of Nepean.
- 17. Assignment and Subcontracting**
- Nepean may assign, sub-contract or otherwise transfer any right, obligation or benefit under this Contract, or any part thereof, to any other party in Nepean's sole discretion. The Purchaser may not assign or otherwise transfer its rights without the prior written consent of Nepean.
- 18. Exclusion of Liability and Consequential Loss**
- Notwithstanding any other provision of this Contract and to the extent permitted by law, Nepean has no liability and the Purchaser waives and releases Nepean from all liability, including by way of tort, contract, equity, statute, indemnity or otherwise, to the Purchaser for loss of use, loss of production, loss of profit (actual or anticipated), loss of income, loss of revenue, loss of business, loss of contract, loss of business reputation, loss of goodwill, loss of anticipated saving or wasted overheads, any increased costs of finance or borrowing, costs and expenses incurred in mitigating any loss or damage or for any consequential loss, special, indirect, exemplary or punitive damage.
- 19. Limitation of Liability**
- Notwithstanding the other provisions in this agreement, the maximum liability of Nepean to the Purchaser, however caused, including by way of tort (including negligence), contract, equity, statute, indemnity or otherwise, arising out of or in any way in connected with this Contract or its subject matter is limited to, in aggregate, ten percent (10%) of the Contract Price.
- 20. Lien**
- (a) The Purchaser agrees and acknowledges that in respect of any of the Purchaser's Goods delivered to Nepean for repair, maintenance, service, refurbishment or other works, the Purchaser acknowledges that Nepean has a general law lien over all personal property in Nepean's possession belonging to the Purchaser ("Repairer's Lien").
- (b) The Purchaser agrees that Nepean may, in its sole discretion, exercise the Repairer's Lien over any of the Purchaser's personal property in Nepean's possession in respect of any outstanding amounts due and unpaid by the Purchaser and may retain the Goods and serve a notice



## Terms and Conditions of Sale

on the Purchaser requiring immediate payment of the amounts outstanding.

- (c) If the amounts outstanding by the Purchaser have not been paid within 60 days of Nepean providing the notice in (b) or after Nepean makes reasonable attempts to contact the Purchaser, Nepean may sell Goods and apply the proceeds in the first instance to the satisfaction of the amounts outstanding by the Purchaser and the costs of exercising the right of sale. Nepean shall return to the Purchaser any remaining proceeds after the satisfaction of the amounts outstanding by the Purchaser and the costs of exercising the right of sale.

### 21. Dispute Resolution

- (a) If at any time any question, dispute or difference ("Dispute") whatsoever should arise between Nepean and the Purchaser in connection with or arising out of this Contract, then either party may give to the other notice in writing of the existence of such Dispute.
- (b) Within 14 days of the giving of notice of the existence of such dispute in (a), the General Managers or other Senior Executive of the Parties must meet and attempt in good faith to mutually resolve such Dispute.
- (c) If the parties are unable to mutually resolve such Dispute within 21 days, then the parties may submit the Dispute to arbitration by a sole arbitrator appointed jointly by the parties, and if one cannot be agreed jointly within 14 days, to an arbitrator appointed by the President for the time being or Acting President for the time being of the NSW Chapter of The Institute of Arbitrators, Australia. The arbitrator shall not be a person who has participated in any informal dispute resolution procedure in respect of the Dispute. The award of the arbitrator shall be final and binding on the parties, including any determination on the costs. The seat of the arbitration shall be in Sydney, Australia. The laws governing the arbitration shall be the laws of New South Wales, Australia.

### 22. Notices

Any notice to be given to the Purchaser shall be deemed to be given upon its being posted or sent by facsimile to the address or facsimile number of the Purchaser set out in the Contract or to the Purchaser's registered office or to the Purchaser's last known address.

### 23. General

- (a) Headings appear as a matter of convenience only and will not affect the interpretation or meaning of the clause.
- (b) If any provision of this Contract or the conditions is declared by an judicial or other competent authority to be void, voidable, illegal or otherwise unenforceable, or indications to that effect are received by either of the parties from any competent authority, that provision the provision should be read down to the minimum extent necessary to render it enforceable and valid, and if incapable of being read down, it will be severed from this Contract and the remaining provisions of this Contract will remain in full force and effect unless Nepean decides that the effect of such severance is to defeat the original intention of the parties in which event Nepean will, to the extent permitted by law, be entitled to terminate this Contract by thirty (30) days' notice to the Purchaser.
- (c) These Terms and Conditions are governed by and construed with reference to the laws for the time being in force in the State of New South Wales. Each party irrevocably and unconditionally submits to the exclusive jurisdiction of the courts of the State of New South Wales, and of any courts that have jurisdiction to hear appeals from any of those courts, and waives any right to object to any proceedings being brought in those courts.

- (d) Unless expressly stated otherwise, nothing in this Contract constitutes a joint venture, agency, partnership or other fiduciary relationship between the Parties.
- (e) Each of the parties warrants that it has the power to enter into this Contract and has obtained all necessary resolutions and approvals to do so.
- (f) All rights granted to Nepean are cumulative and no exercise by either of the parties of any right under this Contract will restrict or prejudice the exercise of any other right granted by this Contract or otherwise available to Nepean.
- (g) The failure by Nepean to enforce at any time any provision, term or condition of this Contract is not a waiver of them or of the right at any time subsequently to enforce all provisions, terms and conditions of this Contract.
- (h) To the fullest extent permitted by law the parties agree that the United Nations Convention on Contracts for the International Sale of Goods shall not apply to this Contract.