
Orca Solar Lighting Pty Ltd – Terms & Conditions of Trade

1. Definitions

- 1.1 "OSL" means Orca Solar Lighting Pty Ltd, its successors and assigns or any person acting on behalf of and with the authority of Orca Solar Lighting Pty Ltd.
- 1.2 "Client" means the person/s or any person acting on behalf of and with the authority of the Client requesting OSL to provide the Services as specified in any proposal, quotation, order, invoice or other documentation, and:
- (a) if there is more than one Client, is a reference to each Client jointly and severally; and
 - (b) if the Client is a part of a Trust, shall be bound in their capacity as a trustee; and
 - (c) includes the Client's executors, administrators, successors and permitted assigns.
- 1.3 "Goods" means all Goods or Services supplied by OSL to the Client at the Client's request from time to time (where the context so permits the terms 'Goods' or 'Services' shall be interchangeable for the other).
- 1.4 "Price" means the Price payable (plus any GST where applicable) for the Goods as agreed between OSL and the Client in accordance with clause 5 below.
- 1.5 "GST" means Goods and Services Tax (GST) as defined within the "A New Tax System (Goods and Services Tax) Act 1999" (Cth).

2. Acceptance

- 2.1 The Client is taken to have exclusively accepted and is immediately bound, jointly and severally, by these terms and conditions if the Client places an order for or accepts delivery of the Goods.
- 2.2 These terms and conditions may only be amended with the consent of both parties in writing, and shall prevail to the extent of any inconsistency with any other document or agreement between the Client and OSL.
- 2.3 Electronic signatures shall be deemed to be accepted by either party providing that the parties have complied with Section 14 of the Electronic Transactions (Queensland) Act 2001 or any other applicable provisions of that Act or any Regulations referred to in that Act.
- 2.4 The Client acknowledges that the supply of Goods on credit shall not take effect until the Client has completed a credit application with OSL and it has been approved with a credit limit established for the account.
- 2.5 In the event that the supply of Goods request exceeds the Clients credit limit and/or the account exceeds the payment terms, OSL reserves the right to refuse delivery.

3. Errors and Omissions

- 3.1 The Client acknowledges and accepts that OSL shall, without prejudice, accept no liability in respect of any alleged or actual error(s) and/or omission(s):
- (a) resulting from an inadvertent mistake made by OSL in the formation and/or administration of this contract; and/or
 - (b) contained in/omitted from any literature (hard copy and/or electronic) supplied by OSL in respect of the Services.
- 3.2 In the event such an error and/or omission occurs in accordance with clause 3.1, and is not attributable to the negligence and/or wilful misconduct of OSL; the Client shall not be entitled to treat this contract as repudiated nor render it invalid.

4. Change in Control

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

5. Price and Payment

- 5.1 At OSL's sole discretion the Price shall be either:
- (a) as indicated on any invoice provided by OSL to the Client; or
 - (b) OSL's quoted price (subject to clause 5.2) which will be valid for the period stated in the quotation or otherwise for a period of sixty (60) days.
- 5.2 OSL reserves the right to change the Price:
- (a) if a variation to the Goods which are to be supplied is requested; or
 - (b) if a variation to the Services originally scheduled (including any applicable plans or specifications) is requested; or
 - (c) where additional Services are required due to the discovery of hidden or unidentifiable difficulties which are only discovered on commencement of the Services; or
 - (d) in the event of increases to OSL in the cost of labour or materials which are beyond OSL's control.
- 5.3 Variations will be charged for on the basis of OSL's quotation, and will be detailed in writing, and shown as variations on OSL's invoice. The Client shall be required to respond to any variation submitted by OSL within ten (10) working days. Failure to do so will entitle OSL to add the cost of the variation to the Price. Payment for all variations must be made in full at the time of their completion.
- 5.4 At OSL's sole discretion a deposit may be required.
- 5.5 Time for payment for the Goods being of the essence, the Price will be payable by the Client on the date/s determined by OSL, which may be:
- (a) the date specified on any invoice or other form as being the date for payment; or
 - (b) failing any notice to the contrary, the date which is thirty (30) days following the date of any invoice given to the Client by OSL.
- 5.6 Payment may be made by cash, cheque, bank cheque, electronic/on-line banking, credit card (a surcharge may apply per transaction), or by any other method as agreed to between the Client and OSL.
- 5.7 The Client shall not be entitled to set off against, or deduct from the Price, any sums owed or claimed to be owed to the Client by OSL nor to withhold payment of any invoice because part of that invoice is in dispute.
- 5.8 Unless otherwise stated the Price does not include GST. In addition to the Price the Client must pay to OSL an amount equal to any GST OSL must pay for any supply by OSL under this or any other agreement for the sale of the Goods. The Client must pay GST, without deduction or set off of any other amounts, at the same time and on the same basis as the Client pays the Price. In addition the Client must pay any other taxes and duties that may be applicable in addition to the Price except where they are expressly included in the Price.

6. Delivery of Goods

- 6.1 Delivery (“**Delivery**”) of the Goods is taken to occur at the time that:
- (a) the Client or the Client’s nominated carrier takes possession of the Goods at OSL’s address; or
 - (b) OSL (or OSL’s nominated carrier) delivers the Goods to the Client’s nominated address even if the Client is not present at the address.
- 6.2 At OSL’s sole discretion the cost of delivery is either included in the Price or is in addition to the Price.
- 6.3 Any time specified by OSL for delivery of the Goods is an estimate only. The Client must take delivery by receipt or collection of the Goods whenever they are tendered for delivery. OSL will not be liable for any loss or damage incurred by the Client as a result of delivery being late. In the event that the Client is unable to take delivery of the Goods as arranged then OSL shall be entitled to charge a reasonable fee for redelivery and/or storage.

7. Risk

- 7.1 Risk of damage to or loss of the Goods passes to the Client on Delivery and the Client must insure the Goods on or before Delivery.
- 7.2 If any of the Goods are damaged or destroyed following delivery but prior to ownership passing to the Client, OSL is entitled to receive all insurance proceeds payable for the Goods. The production of these terms and conditions by OSL is sufficient evidence of OSL’s rights to receive the insurance proceeds without the need for any person dealing with OSL to make further enquiries.
- 7.3 If the Client requests OSL to leave Goods outside OSL’s premises for collection or to deliver the Goods to an unattended location then such Goods shall be left at the Client’s sole risk.
- 7.4 OSL shall be entitled to rely on the accuracy of any plans, specifications and other information provided by the Client. The Client acknowledges and agrees that in the event that any of this information provided by the Client is inaccurate, OSL accepts no responsibility for any loss, damages, or costs however resulting from these inaccurate plans, specifications or other information.

8. Specifications

- 8.1 The Client acknowledges that:
- (a) it is their responsibility to ensure that all Goods, plant or equipment which OSL is to supply (or are to connect any of its Goods to) are of the correct type, size, rating, standard, quality, colour and finish, conform with all relevant Australian standards and local statutory requirements, and are as specified in the specifications, drawings and plans upon which OSL based the quotation on and therefore, the Client agrees to indemnify OSL against any costs incurred by OSL in rectifying such errors if required;
 - (b) all descriptive specifications, illustrations, drawings, data, dimensions, ratings and weights stated in OSL’s or the manufacturer’s fact sheets, price lists or advertising material, are approximate only and are given by way of identification only. The Client shall not be entitled to rely on such information, and any use of such does not constitute a sale by description, and does not form part of the contract, unless expressly stated as such in writing by OSL;
 - (c) while OSL may have provided information or figures to the Client regarding the performance of the Goods, the Client acknowledges that OSL has given these in good faith, and are estimates based on industry prescribed estimates.
- 8.2 The Client shall be responsible for ensuring that the Goods ordered are suitable for their intended use.

9. Title

- 9.1 OSL and the Client agree that ownership of the Goods shall not pass until:
- (a) the Client has paid OSL all amounts owing to OSL; and
 - (b) the Client has met all of its other obligations to OSL.
- 9.2 Receipt by OSL of any form of payment other than cash shall not be deemed to be payment until that form of payment has been honoured, cleared or recognised.
- 9.3 It is further agreed that:
- (a) until ownership of the Goods passes to the Client in accordance with clause 9.1 that the Client is only a bailee of the Goods and must return the Goods to OSL on request.
 - (b) the Client holds the benefit of the Client’s insurance of the Goods on trust for OSL and must pay to OSL the proceeds of any insurance in the event of the Goods being lost, damaged or destroyed.
 - (c) the Client must not sell, dispose, or otherwise part with possession of the Goods other than in the ordinary course of business and for market value. If the Client sells, disposes or parts with possession of the Goods then the Client must hold the proceeds of any such act on trust for OSL and must pay or deliver the proceeds to OSL on demand.
 - (d) the Client should not convert or process the Goods or intermix them with other goods but if the Client does so then the Client holds the resulting product on trust for the benefit of OSL and must sell, dispose of or return the resulting product to OSL as it so directs.
 - (e) the Client irrevocably authorises OSL to enter any premises where OSL believes the Goods are kept and recover possession of the Goods.
 - (f) OSL may recover possession of any Goods in transit whether or not delivery has occurred.
 - (g) the Client shall not charge or grant an encumbrance over the Goods nor grant nor otherwise give away any interest in the Goods while they remain the property of OSL.
 - (h) OSL may commence proceedings to recover the Price of the Goods sold notwithstanding that ownership of the Goods has not passed to the Client.

10. Personal Property Securities Act 2009 (“PPSA”)

- 10.1 In this clause financing statement, financing change statement, security agreement, and security interest has the meaning given to it by the PPSA.
- 10.2 Upon assenting to these terms and conditions in writing the Client acknowledges and agrees that these terms and conditions constitute a security agreement for the purposes of the PPSA and creates a security interest in all Goods that have previously been supplied and that will be supplied in the future by OSL to the Client.
- 10.3 The Client undertakes to:

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- (a) promptly sign any further documents and/or provide any further information (such information to be complete, accurate and up-to-date in all respects) which OSL may reasonably require to;
 - (i) register a financing statement or financing change statement in relation to a security interest on the Personal Property Securities Register;
 - (ii) register any other document required to be registered by the PPSA; or
 - (iii) correct a defect in a statement referred to in clause 10.3(a)(i) or 10.3(a)(ii);
 - (b) indemnify, and upon demand reimburse, OSL for all expenses incurred in registering a financing statement or financing change statement on the Personal Property Securities Register established by the PPSA or releasing any Goods charged thereby;
 - (c) not register a financing change statement in respect of a security interest without the prior written consent of OSL;
 - (d) not register, or permit to be registered, a financing statement or a financing change statement in relation to the Goods in favour of a third party without the prior written consent of OSL;
 - (e) immediately advise OSL of any material change in its business practices of selling the Goods which would result in a change in the nature of proceeds derived from such sales.
- 10.4 OSL and the Client agree that sections 96, 115 and 125 of the PPSA do not apply to the security agreement created by these terms and conditions.
- 10.5 The Client waives their rights to receive notices under sections 95, 118, 121(4), 130, 132(3)(d) and 132(4) of the PPSA.
- 10.6 The Client waives their rights as a grantor and/or a debtor under sections 142 and 143 of the PPSA.
- 10.7 Unless otherwise agreed to in writing by OSL, the Client waives their right to receive a verification statement in accordance with section 157 of the PPSA.
- 10.8 The Client must unconditionally ratify any actions taken by OSL under clauses 10.3 to 10.5.
- 10.9 Subject to any express provisions to the contrary nothing in these terms and conditions is intended to have the effect of contracting out of any of the provisions the PPSA.
- 11. Security and Charge**
- 11.1 In consideration of OSL agreeing to supply the Goods, the Client charges all of its rights, title and interest (whether joint or several) in any land, realty or other assets capable of being charged, owned by the Client either now or in the future, to secure the performance by the Client of its obligations under these terms and conditions (including, but not limited to, the payment of any money).
- 11.2 The Client indemnifies OSL from and against all OSL's costs and disbursements including legal costs on a solicitor and own client basis incurred in exercising OSL's rights under this clause.
- 11.3 The Client irrevocably appoints OSL and each director of OSL as the Client's true and lawful attorney/s to perform all necessary acts to give effect to the provisions of this clause 11 including, but not limited to, signing any document on the Client's behalf.
- 12. Defects, Warranties and Returns, Competition and Consumer Act 2010 (CCA)**
- 12.1 The Client must inspect the Goods on delivery and must within seven (7) days of delivery notify OSL in writing of any evident defect/damage, shortage in quantity, or failure to comply with the description or quote. The Client must notify any other alleged defect in the Goods as soon as reasonably possible after any such defect becomes evident. Upon such notification the Client must allow OSL to inspect the Goods.
- 12.2 Under applicable State, Territory and Commonwealth Law (including, without limitation the CCA), certain statutory implied guarantees and warranties (including, without limitation the statutory guarantees under the CCA) may be implied into these terms and conditions (**Non-Excluded Guarantees**).
- 12.3 OSL acknowledges that nothing in these terms and conditions purports to modify or exclude the Non-Excluded Guarantees.
- 12.4 Except as expressly set out in these terms and conditions or in respect of the Non-Excluded Guarantees, OSL makes no warranties or other representations under these terms and conditions including but not limited to the quality or suitability of the Goods. OSL's liability in respect of these warranties is limited to the fullest extent permitted by law.
- 12.5 If the Client is a consumer within the meaning of the CCA, OSL's liability is limited to the extent permitted by section 64A of Schedule 2.
- 12.6 If OSL is required to replace the Goods under this clause or the CCA, but is unable to do so, OSL may refund any money the Client has paid for the Goods.
- 12.7 If the Client is not a consumer within the meaning of the CCA, OSL's liability for any defect or damage in the Goods is:
 - (a) limited to the value of any express warranty or warranty card provided to the Client by OSL at OSL's sole discretion;
 - (b) limited to any warranty to which OSL is entitled, if OSL did not manufacture the Goods;
 - (c) otherwise negated absolutely.
- 12.8 Subject to this clause 12, returns will only be accepted provided that:
 - (a) the Client has complied with the provisions of clause 12.1; and
 - (b) OSL has agreed that the Goods are defective; and
 - (c) the Goods are returned within a reasonable time at the Client's cost (if that cost is not significant); and
 - (d) the Goods are returned in as close a condition to that in which they were delivered as is possible.
- 12.9 Notwithstanding clauses 12.1 to 12.8 but subject to the CCA, OSL shall not be liable for any defect or damage which may be caused or partly caused by or arise as a result of:
 - (a) the Client failing to properly maintain or store any Goods;
 - (b) the Client using the Goods for any purpose other than that for which they were designed;
 - (c) the Client continuing the use of any Goods after any defect became apparent or should have become apparent to a reasonably prudent operator or user;
 - (d) the Client failing to follow any instructions or guidelines provided by OSL;
 - (e) fair wear and tear, any accident, or act of God.
- 12.10 OSL may in its absolute discretion accept non-defective Goods for return in which case OSL may require the Client to pay handling fees of up to ten percent (10%) of the value of the returned Goods plus any freight costs.
- 12.11 Notwithstanding anything contained in this clause if OSL is required by a law to accept a return then OSL will only accept a return on the conditions imposed by that law.

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13. Intellectual Property

- 13.1 Where OSL has designed, drawn or developed Goods for the Client, then the copyright in any designs and drawings and documents shall remain the property of OSL.
- 13.2 The Client warrants that all designs, specifications or instructions given to OSL will not cause OSL to infringe any patent, registered design or trademark in the execution of the Client's order and the Client agrees to indemnify OSL against any action taken by a third party against OSL in respect of any such infringement.
- 13.3 The Client agrees that OSL may (at no cost) use for the purposes of marketing or entry into any competition, any documents, designs, drawings or Goods which OSL has created for the Client.

14. Default and Consequences of Default

- 14.1 Interest on overdue invoices shall accrue daily from the date when payment becomes due, until the date of payment, at a rate of two and a half percent (2.5%) per calendar month (and at OSL's sole discretion such interest shall compound monthly at such a rate) after as well as before any judgment.
- 14.2 If the Client owes OSL any money the Client shall indemnify OSL from and against all costs and disbursements incurred by OSL in recovering the debt (including but not limited to internal administration fees, legal costs on a solicitor and own client basis, OSL's collection agency costs, and bank dishonour fees).
- 14.3 Without prejudice to any other remedies OSL may have, if at any time the Client is in breach of any obligation (including those relating to payment) under these terms and conditions OSL may suspend or terminate the supply of Goods to the Client. OSL will not be liable to the Client for any loss or damage the Client suffers because OSL has exercised its rights under this clause.
- 14.4 Without prejudice to OSL's other remedies at law OSL shall be entitled to cancel all or any part of any order of the Client which remains unfulfilled and all amounts owing to OSL shall, whether or not due for payment, become immediately payable if:
- (a) any money payable to OSL becomes overdue, or in OSL's opinion the Client will be unable to make a payment when it falls due;
 - (b) the Client becomes insolvent, convenes a meeting with its creditors or proposes or enters into an arrangement with creditors, or makes an assignment for the benefit of its creditors; or
 - (c) a receiver, manager, liquidator (provisional or otherwise) or similar person is appointed in respect of the Client or any asset of the Client.

15. Dispute Resolution

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

16. Cancellation

- 16.1 OSL may cancel any contract to which these terms and conditions apply or cancel delivery of Goods at any time before the Goods are delivered by giving written notice to the Client. On giving such notice OSL shall repay to the Client any money paid by the Client for the Goods. OSL shall not be liable for any loss or damage whatsoever arising from such cancellation.
- 16.2 In the event that the Client cancels delivery of Goods the Client shall be liable for any and all loss incurred (whether direct or indirect) by OSL as a direct result of the cancellation (including, but not limited to, any loss of profits).
- 16.3 Cancellation of orders for Goods made to the Client's specifications, or for non-stocklist items, will definitely not be accepted once production has commenced, or an order has been placed.

17. Privacy Act 1988

- 17.1 The Client agrees for OSL to obtain from a credit reporting agency a credit report containing personal credit information about the Client in relation to credit provided by OSL.
- 17.2 The Client agrees that OSL may exchange information about the Client with those credit providers either named as trade referees by the Client or named in a consumer credit report issued by a credit reporting agency for the following purposes:
- (a) to assess an application by the Client; and/or
 - (b) to notify other credit providers of a default by the Client; and/or
 - (c) to exchange information with other credit providers as to the status of this credit account, where the Client is in default with other credit providers; and/or
 - (d) to assess the creditworthiness of the Client.
- 17.3 The Client understands that the information exchanged can include anything about the Client's creditworthiness, credit standing, credit history or credit capacity that credit providers are allowed to exchange under the Privacy Act 1988.
- 17.4 The Client consents to OSL being given a consumer credit report to collect overdue payment on commercial credit (Section 18K(1)(h) Privacy Act 1988).
- 17.5 The Client agrees that personal credit information provided may be used and retained by OSL for the following purposes (and for other purposes as shall be agreed between the Client and OSL or required by law from time to time):
- (a) the provision of Goods; and/or
 - (b) the marketing of Goods by OSL, its agents or OSLs; and/or
 - (c) analysing, verifying and/or checking the Client's credit, payment and/or status in relation to the provision of Goods; and/or
 - (d) processing of any payment instructions, direct debit facilities and/or credit facilities requested by the Client; and/or
 - (e) enabling the daily operation of Client's account and/or the collection of amounts outstanding in the Client's account in relation to the Goods.
- 17.6 OSL may give information about the Client to a credit reporting agency for the following purposes:

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- (a) to obtain a consumer credit report about the Client;
- (b) allow the credit reporting agency to create or maintain a credit information file containing information about the Client.
- 17.7 The information given to the credit reporting agency may include:
- (a) personal particulars (the Client's name, sex, address, previous addresses, date of birth, name of employer and driver's licence number);
- (b) details concerning the Client's application for credit or commercial credit and the amount requested;
- (c) advice that OSL is a current credit provider to the Client;
- (d) advice of any overdue accounts, loan repayments, and/or any outstanding monies owing which are overdue by more than sixty (60) days, and for which debt collection action has been started;
- (e) that the Client's overdue accounts, loan repayments and/or any outstanding monies are no longer overdue in respect of any default that has been listed;
- (f) information that, in the opinion of OSL, the Client has committed a serious credit infringement (that is, fraudulently or shown an intention not to comply with the Client's credit obligations);
- (g) advice that cheques drawn by the Client for one hundred dollars (\$100) or more, have been dishonoured more than once;
- (h) that credit provided to the Client by OSL has been paid or otherwise discharged.
- 18. Service of Notices**
- 18.1 Any written notice given under this contract shall be deemed to have been given and received:
- (a) by handing the notice to the other party, in person;
- (b) by leaving it at the address of the other party as stated in this contract;
- (c) by sending it by registered post to the address of the other party as stated in this contract;
- (d) if sent by facsimile transmission to the fax number of the other party as stated in this contract (if any), on receipt of confirmation of the transmission;
- (e) if sent by email to the other party's last known email address.
- 18.2 Any notice that is posted shall be deemed to have been served, unless the contrary is shown, at the time when by the ordinary course of post, the notice would have been delivered.
- 19. Trusts**
- 19.1 If the Client at any time upon or subsequent to entering in to the contract is acting in the capacity of trustee of any trust ("Trust") then whether or not OSL may have notice of the Trust, the Client covenants with OSL as follows:
- (a) the contract extends to all rights of indemnity which the Client now or subsequently may have against the Trust and the trust fund;
- (b) the Client has full and complete power and authority under the Trust to enter into the contract and the provisions of the Trust do not purport to exclude or take away the right of indemnity of the Client against the Trust or the trust fund. The Client will not release the right of indemnity or commit any breach of trust or be a party to any other action which might prejudice that right of indemnity.
- (c) The Client will not without consent in writing of OSL (OSL will not unreasonably withhold consent), cause, permit, or suffer to happen any of the following events;
- (i) the removal, replacement or retirement of the Client as trustee of the Trust;
- (ii) any alteration to or variation of the terms of the Trust;
- (iii) any advancement or distribution of capital of the Trust; or
- (iv) any resettlement of the trust property.
- 20. General**
- 20.1 The failure by either party to enforce any provision of these terms and conditions shall not be treated as a waiver of that provision, nor shall it affect that party's right to subsequently enforce that provision. If any provision of these terms and conditions shall be invalid, void, illegal or unenforceable the validity, existence, legality and enforceability of the remaining provisions shall not be affected, prejudiced or impaired.
- 20.2 These terms and conditions and any contract to which they apply shall be governed by the laws of Queensland in which OSL has its principal place of business, and are subject to the jurisdiction of the courts in Queensland.
- 20.3 Subject to clause 12 OSL shall be under no liability whatsoever to the Client for any indirect and/or consequential loss and/or expense (including loss of profit) suffered by the Client arising out of a breach by OSL of these terms and conditions (alternatively OSL's liability shall be limited to damages which under no circumstances shall exceed the Price of the Goods).
- 20.4 OSL may licence and/or assign all or any part of its rights and/or obligations under this contract without the Client's consent.
- 20.5 The Client cannot licence or assign without the written approval of OSL.
- 20.6 OSL may elect to subcontract out any part of the Services but shall not be relieved from any liability or obligation under this contract by so doing. Furthermore, the Client agrees and understands that they have no authority to give any instruction to any of OSL's sub-contractors without the authority of OSL.
- 20.7 The Client agrees that OSL may amend these terms and conditions by notifying the Client in writing. These changes shall be deemed to take effect from the date on which the Client accepts such changes, or otherwise at such time as the Client makes a further request for OSL to provide Goods to the Client.
- 20.8 Neither party shall be liable for any default due to any act of God, war, terrorism, strike, lock-out, industrial action, fire, flood, storm or other event beyond the reasonable control of either party.
- 20.9 Both parties warrant that they have the power to enter into this contract and have obtained all necessary authorisations to allow them to do so, they are not insolvent and that this contract creates binding and valid legal obligations on them.