

TERMS AND CONDITIONS OF TRADE

1. Definitions

In these Terms:

"**ACL**" means the Australian Consumer Law Schedule of the *Competition and Consumer Act*;

"**Agreement**" means any agreement for the provision of goods by Elliott Clarke to the Customer;

"**consumer**" is as defined in the ACL and in determining if the Customer is a consumer, the determination is made if Customer is a consumer under the Agreement;

"**Customer**" means the person, jointly and severally if more than one, acquiring goods from Elliott Clarke;

"**goods**" means goods supplied by Elliott Clarke to the Customer;

"**Goods**" is as defined in the ACL;

"**PPSA**" means the *Personal Property Securities Act 2009* (Cth) and associated regulations as amended;

"**Elliott Clarke**" means Elliott Clarke & Co Pty Ltd and

"**Terms**" means these Terms and Conditions of Trade and the Order and Special Fabric Information Guide.

Basis of Agreement

Unless otherwise agreed by Elliott Clarke in writing, the Terms apply exclusively to every Agreement and cannot be varied or replaced by any other terms, including the Customer's terms and conditions of purchase (if any).

Any quotation provided by Elliott Clarke to the Customer for the proposed supply of goods is:

- (a) valid for 30 days; and
- (b) only valid if in writing.

The Terms may include additional terms in Elliott Clarke's quotation, which are not inconsistent with the Terms.

An Agreement is only accepted by Elliott Clarke when Elliott Clarke accepts, in writing or electronic means, an offer from the Customer or provides the Customer with the goods.

Elliott Clarke has absolute discretion to refuse to accept any offer.

Pricing

Prices quoted for the supply of goods are exclusive of GST and any other taxes or duties imposed in relation to the goods.

If the Customer requests any variation to the Agreement, Elliott Clarke may increase the price to account for the variation.

Where there is any change in the costs incurred by Elliott Clarke in relation to goods, Elliott Clarke may vary its price to take account of any such change, by notifying the Customer.

Elliott Clarke reserves the right to change its prices.

Payment

Unless otherwise agreed in writing:

- (a) customers with credit accounts must make full payment for the goods within 30 days of the date of Elliott Clarke's invoice;
- (b) customers without a credit account must make full payment for the goods prior to order or delivery of the goods; and
- (c) Elliott Clarke reserves the right to require payment of a deposit equivalent to 50% of the total purchase price.

Payment terms may be revoked or amended at Elliott Clarke's sole discretion upon giving the Customer written notice.

The time for payment is of the essence.

Payment Default

If the Customer defaults in payment by the due date of any amount payable to Elliott Clarke, then all money which would become payable by the Customer to Elliott Clarke at a later date on any account, becomes immediately due and payable without the requirement of any notice to the Customer, and Elliott Clarke may, without prejudice to any of its other accrued or contingent right:

- (a) charge the Customer interest on any sum due at the prevailing rate pursuant to the Penalty Interest Rates Act 1983 (Vic) plus 4 per cent for the period from the due date until the date of payment in full;
- (b) charge the Customer for, and the Customer must indemnify Elliott Clarke from, all costs and expenses (including without limitation all legal costs and expenses) incurred by it resulting from the default or in taking action to enforce compliance with the Agreement or to recover any goods;
- (c) cease or suspend supply of any further goods to the Customer;
- (d) by written notice to the Customer, terminate any uncompleted contract with the Customer.

Clauses (c) and (d) above may also be relied upon, at Elliott Clarke's option:

- (a) where the Customer is a natural person and becomes bankrupt or enters into any scheme of arrangement or any assignment or composition with or for the benefit of his or her creditors or any class of his or her creditors generally; or
- (b) where the Customer is a corporation and, it enters into any scheme of arrangement or any assignment or composition with or for the benefit of its creditors or any class of its creditors generally, or has a liquidator, administrator, receiver or manager or similar functionary appointed in respect of its assets, or any action is taken for, or with the view to, the liquidation (including provisional liquidation), winding up or dissolution without winding up of the Customer.

The Customer and the Directors, Partners or Proprietor referred to in the Sole Proprietor or Partnership Account Application or Company Account Application ("Account Applications" hereby charge all their right, title and interest in the property or properties listed as Private Addresses of the Partners, Proprietors or Directors in the Account Applications and also any property or properties that they own currently or may acquire in the future solely or jointly or have or become to have a beneficial interest in, in favour of Elliott Clarke, with the due and punctual observance and performance of all of the obligations of the Customer. The Customer indemnifies Elliott Clarke against all expenses and legal costs (on a solicitor/own client basis) for preparing, lodging and removing any caveat.

The Customer and the Directors, Partners or Proprietor referred to in the Account Applications hereby acknowledge that Elliott Clarke may at its discretion register and lodge a caveat(s) on such property or properties in respect of the interests conferred on it under this clause. Such registration of a caveat by Elliott Clarke over the Customer's or an individual's property or properties must not be challenged by the Customer or individual in any way whatsoever, and the Customer agrees not to take any steps in filing a "lapsing notice" via the Land Titles Office to have the caveat removed, until such time that the Customer has paid all monies owing by it to Elliott Clarke as claimed from time to time.

Passing of Property

Until Elliott Clarke receives full payment in cleared funds for all goods supplied by it to the Customer, as well as all other amounts owing to Elliott Clarke by the Customer:

- (a) title and property in all goods remain vested in Elliott Clarke and do not pass to the Customer;
- (b) the Customer must hold the goods as fiduciary bailee and agent for Elliott Clarke;
- (c) the Customer must keep the goods separate from its goods and maintain Elliott Clarke's labelling and packaging;
- (d) the Customer must hold the proceeds of sale of the goods in trust for Elliott Clarke in a separate account with a bank to whom the Customer has not given security however failure to do so will not affect the Customer's obligation as trustee;
- (e) in addition to its rights under the PPSA, Elliott Clarke may without notice, enter any premises where it suspects the goods are and remove them, notwithstanding that they may have been attached to other goods not the property of Elliott Clarke, and for this purpose the Customer irrevocably licences Elliott Clarke to enter such premises and also indemnifies Elliott Clarke from and against all costs, claims, demands or actions by any party arising from such action.

Personal Property Securities Act

Notwithstanding anything to the contrary contained in these Terms, the PPSA applies to these Terms.

For the purposes of the PPSA:

- (a) terms used in this clause that are defined in the PPSA have the same meaning as in the PPSA;
- (b) these Terms are a security agreement and Elliott Clarke has a Purchase Money Security Interest in all present and future goods supplied by Elliott Clarke to the Customer and the proceeds of the goods;
- (c) the security interest is a continuing interest irrespective of whether there are monies or obligations owing by the Customer at any particular time; and
- (d) the Customer must do whatever is necessary in order to give a valid security interest over the goods and their proceeds which is able to be registered by Elliott Clarke on the Personal Property Securities Register.

The security interest arising under this clause attaches to the goods when the goods are collected or dispatched from Elliott Clarke's premises and not at any later time.

Where permitted by the PPSA, the Customer waives any rights to receive the notifications, verifications, disclosures or other documentation specified under sections 95, 118, 121(4), 130, 132(3)(d), 132(4), 135 and 157 of the PPSA.

Elliott Clarke and the Customer agree to contract out of and nothing in the provisions of sections 96, 125, 129, 142 and 143 of the PPSA will apply to these Terms.

To the extent permitted by the PPSA, the Customer agrees that:

- (a) the provisions of Chapter 4 of the PPSA which are for the benefit of the Customer or which place obligations on Elliott Clarke will apply only to the extent that they are mandatory or Elliott Clarke agrees to their application in writing; and
- (b) where Elliott Clarke has rights in addition to those in Chapter 4 of the PPSA, those rights will continue to apply.

The Customer must immediately upon Elliott Clarke's request:

- (a) do all things and execute all documents necessary to give effect to the security interest created under this Agreement; and
 - (b) procure from any person considered by Elliott Clarke to be relevant to its security position such agreements and waivers (including as equivalent to those above) as Elliott Clarke may at any time require.
- Elliott Clarke may allocate amounts received from the Customer in any

manner Elliott Clarke determines, including in any manner required to preserve any Purchase Money Security Interest it has in goods supplied by Elliott Clarke.

For the purposes of section 275(6) of the PPSA, the parties agree and undertake that these Terms and any information pertaining to the sale of goods and details of the goods shall be kept confidential at all times. Neither party may disclose any information pertaining to these Terms or the sale of the goods, except as otherwise required by law or that is already in the public domain.

Risk and Insurance

The risk in the goods and all insurance responsibility for theft, damage or otherwise will pass to the Customer immediately on the goods being delivered to the Customer or taken from Elliott Clarke's premises by the Customer.

The Customer assumes all risk and liability for loss, damage or injury to persons or to property of the Customer, or third parties arising out of the use, installation or possession of any of the goods sold by Elliott Clarke, unless recoverable from Elliott Clarke on the failure of any statutory guarantee under the ACL.

Performance of Agreement

Any period or date for delivery of goods stated by Elliott Clarke is an estimate only and not a contractual commitment.

Elliott Clarke will use its reasonable endeavours to meet any estimated dates for delivery of the goods but will not be liable for any loss or damage suffered by the Customer or any third party for failure to meet any estimated date.

Delivery

Unless agreed otherwise, Elliott Clarke will arrange for the delivery of the goods to the Customer.

Elliott Clarke is responsible for all costs associated with delivery, including freight, insurance and other charges arising from the point of dispatch of the goods to the Customer to the point of delivery, unless a special delivery is requested and paid by the customer.

Where the delivery address is not within the metropolitan area of Melbourne or Sydney, Elliott Clarke will charge a \$15.00 freight charge.

Elliott Clarke may make part delivery of goods and Elliott Clarke may invoice the Customer for the goods provided.

If delivery is unable to be completed the Customer is deemed to have taken delivery of the goods.

If agreed that the Customer will collect the goods:

- (a) the Customer must collect the goods with 7 days of being advised they are ready;
- (b) if the Customer does not collect the goods within this time, the Customer is deemed to have taken delivery of the goods.

Liability

Except as the Terms specifically state, or as contained in any express warranty provided in relation to the goods, the Agreement does not include by implication any other term, condition or warranty in respect of the quality, merchantability, acceptability, fitness for purpose, condition, description, assembly, manufacture, design or performance of the goods or any contractual remedy for their failure.

If the Customer:

- (a) is a consumer nothing in these Terms restricts, limits or modifies the Customer's rights or remedies against Elliott Clarke for failure of a statutory guarantee under the ACL;

- (b) on-supplies the goods to consumer, subject to sub-clause (c):
 - (i) if the goods are not of a kind ordinarily acquired for personal, domestic or household use or consumption, then the amount specified in section 276A(1) is the absolute limit of Elliott Clarke's liability to the Customer;
 - (ii) otherwise, payment of any amount required under section 274 of the ACL is the absolute limit of Elliott Clarke's liability to the Customer;
 - howsoever arising under or in connection with the sale, installation, use of, storage or any other dealings with the goods by the Customer or any third party;
- (c) uses up or transforms the goods in the course of trade, and when the Customer supplies its own goods to a consumer the goods are no longer "goods" as defined in the ACL then Elliott Clarke will not be liable to the Customer or the consumer in any way arising under or in connection with the sale, installation, use of, storage or any other dealings with the goods by the Customer or any third party.

If sub-clauses (a), (b) or (c) do not apply, then other than as stated in the Terms or any written warranty statement Elliott Clarke will not be liable to the Customer or the consumer in any way arising under or in connection with the sale, installation, use of, storage or any other dealings with the goods by the Customer or any third party.

Elliott Clarke is not liable for any indirect or consequential losses or expenses suffered by the Customer or any third party, howsoever caused, including but not limited to loss of turnover, profits, business or goodwill or any liability to any other party, except to the extent of any liability imposed by the ACL.

The Customer acknowledges that it has not relied on any service involving skill and judgement, or on any advice, recommendation, information or assistance provided by Elliott Clarke in relation to the goods or their use or application.

Nothing in the Terms is to be interpreted as excluding, restricting or modifying or having the effect of excluding, restricting or modifying the application of any State or Federal legislation applicable to the sale of goods or supply of services which cannot be excluded, restricted or modified.

Cancellation

If Elliott Clarke is unable to deliver or provide the goods, then it may cancel the Customer's order (even if it has been accepted) by written notice to the Customer.

No purported cancellation or suspension of an order or any part of it by the Customer is binding on Elliott Clarke once the order has been accepted.

Cancellations will not be accepted if Elliott Clarke has cut or dispatched the order, or if the goods have been especially imported to meet the customer order.

Elliott Clarke may accept fabric returns of stock fabrics (NOT Indent or Commercial orders), however, these will only be accepted if the following conditions are met

- (a) Elliott Clarke agrees to the return and notifies the customer in writing.
- (b) The goods are to be returned at the Customer's cost. Credits will only be applied once the goods have been physically returned to a place specified by Elliott Clarke and have been inspected to be free from damage.
- (c) The returned goods are in their original packaging and have not been cut or damaged in any way.
- (d) A 30% restocking fee, which is calculated from the original order and deducted to any credit applied to the Customer account or refund.

Claims and Shortages

The customer must inspect the goods on delivery. This responsibility remains with the Customer even if the goods are delivered to a third party by agreement.

Elliott Clarke will not be liable for any shortages, damage or non-compliance with the specifications in the Agreement unless:

- (a) the Customer notifies Elliott Clarke and the Carrier with full details and description within 5 days of delivery;
 - (b) the goods have not been cut;
 - (c) the Customer, on request, makes the goods available for inspection; otherwise the Customer is deemed to have accepted the goods. When any shortages, claim for damaged goods or non-compliance with the Agreement specifications is accepted by Elliott Clarke, Elliott Clarke may, at its option, replace the goods, or refund the price of the goods.
- If the goods are properly returned but Elliott Clarke finds there is a discrepancy in the stated reason or quantities provided by the Customer, Elliott Clarke reserves the right to refuse to credit the Customer.

Force Majeure

Elliott Clarke is not liable in any way howsoever arising under the Agreement to the extent that it is prevented from acting by events beyond its reasonable control including, without limitation, industrial disputes, strikes, lockouts, accident, breakdown, import or export restrictions, acts of God, acts or threats of terrorism or war. If such an event occurs, Elliott Clarke may suspend or terminate the Agreement.

Miscellaneous

The law of Victoria from time to time governs the Terms. The parties agree to the non-exclusive jurisdiction of the courts of Victoria, the Federal Court of Australia, and of courts entitled to hear appeals from those Courts.

Elliott Clarke's failure to enforce any of these Terms shall not be construed as a waiver of any of Elliott Clarke's rights.

If a clause is unenforceable it must be read down to be enforceable or, if it cannot be read down, the term must be severed from the Terms, without affecting the enforceability of the remaining terms.

A notice must be in writing and handed personally or sent by email, facsimile or prepaid mail to the last known address of the addressee. Notices sent by pre-paid post are deemed to be received upon posting. Notices sent by facsimile or email are deemed received on confirmation of successful transmission.