

## 1. Definitions

Unless the context dictates otherwise:

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

**Confidential Information** means any information that is disclosed by or on behalf of Opal to the Customer that is by its nature confidential, is designated by Opal as confidential or that the Customer knows or ought reasonably to know is confidential, but does not include any information that is in the public domain (other than through a breach of confidence). Confidential Information includes the Purchase Price and Order details.

**Consequential Loss** means loss of profit, loss of revenue, loss of goodwill or reputation and any other loss, not arising naturally from the relevant breach, whether or not that loss may be reasonably considered as having been in the contemplation of both Parties, at the time they made the Agreement, as the probable cause of the relevant breach.

**Contract** has the meaning given in clause 3.2.

**Customer** means anyone who purchases or orders Goods or applies for credit from Opal.

**Defect** or **Defective** means a material failure of Goods to comply with applicable specifications.

**Existing Materials** means all items, documents, materials and things including in a physical or in an electronic form owned by or licensed to a Party, which is in existence prior to these Terms becoming effective in accordance with clause 2 or which is developed independently of these Terms or a Contract and which is made available by one Party to the other for the purposes of these Terms or a Contract.

**Force Majeure Event** means an event:

- (a) which is outside the reasonable control of the Party claiming that the event has occurred; and
- (b) the adverse effects of which could not have been prevented or mitigated against by that Party by reasonable diligence or reasonable precautionary measures,

including, without limitation, fire, strike, pandemic, civil commotion, acts of terrorism, lock-out, industrial disturbance, riot, war, act of God and governmental order or regulation.

**Goods** means products supplied or to be supplied by Opal to the Customer.

**GST** has the meaning given by the GST Act.

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

**Insolvency Event** in respect of a Party means:

- (a) step is taken to enter into any scheme of arrangement between that Party and its creditors;
- (b) a step is taken by a mortgagee to enter into possession or dispose of the whole or a substantial part of the assets of the

business of that Party;

- (c) a step is taken to appoint a receiver, a receiver and manager, a liquidator, a provisional liquidator, and administrator or other like person to the whole or a substantial part of the assets of the business of that Party;
- (d) the Party ceases to trade or carry on business; or
- (e) the Party is unable to pay its debts as and when they become due or is presumed insolvent for the purposes of any provision of the *Corporations Act 2001 (Cth)*.

**IP Rights** means any rights normally covered by this term and includes existing and future copyright, rights in designs, patents, trademarks all rights in any applications or registrations of those rights whether registered or unregistered (and whether registrable or not) and existing anywhere in the world.

**Laws** means all laws including rules of common law and equity, statutes, regulations, determinations, by-laws, mandatory codes, standards and any applicable guidelines, writs, orders, injunctions, judgments and government authority requirements.

**Materials** any materials, data information or other work product, including drawings, pictures, graphic representations, specifications, designs, photographs, manuals, in any format.

**Opal** means Opal Packaging Australia Pty Ltd (ACN 636 682 883) and/or Specialty Packaging Group Pty Ltd (ACN 005 319 666) as applicable.

**Order** means an order submitted by the Customer and accepted by Opal in accordance with these Terms.

**Party** means each of Opal and the Customer, and together the **Parties**.

**Payment Terms** means the terms for payment of Goods as described in clause 11, or as otherwise agreed in writing by the Parties.

**PPS Act** means the *Personal Property Securities Act 2009 (Cth)*.

**Purchase Price** means the purchase price of the Goods as set out in an Order, subject to any variation in accordance with these Terms.

**Security Interest** means a mortgage, caveat, charge, lien, pledge, security, interest, title retention arrangement, preferential right, trust arrangement, encumbrance, contractual right of set off, any security arrangement in favour of any person or any security arrangement which is deemed to be a security interest for the purposes of the PPS Act.

**Site** means the premises to which the Goods will be delivered by Opal as specified in an Order.

**Terms** means these terms and conditions of sale for the supply of Goods by Opal as set out in this document.

## 2. Application of these Terms

The Customer will be deemed to have accepted the application of these Terms upon accepting an

Order from Opal in accordance with the process set out in clause 3.

### **3. Placement of Orders and provision of Goods**

- 3.1 The Customer may at any time place an Order with Opal in writing or by telephone.
- 3.2 Once Opal has notified the Customer in writing (or via telephone) that it has accepted an Order (which may include revisions to the original Order as required by Opal) this will constitute a binding contract between the Parties for the delivery of Goods to the Customer at the price given in the Order and invoice issued by Opal and in accordance with these Terms (a "**Contract**").
- 3.3 The Customer may request changes to the Order in writing, subject to approval by Opal at its sole discretion.
- 3.4 If a dispute arises in connection with any Order (including any question of identity or authority for any telephone, facsimile email, e-commerce or computer generated Order), the internal records of Opal will be conclusive evidence of what was ordered.
- 3.5 Each Order placed shall be deemed to be a representation by the Customer, that it is and will remain in the future solvent and able to pay all of its debts as and when they fall due.
- 3.6 Opal agrees to supply the Goods on these Terms and the terms of the relevant Contract.

### **4. Entire Agreement**

These Terms supersede all other documentation (including any terms and conditions issued by the Customer on any previous or subsequent Order or any other documentation of the Customer) which relate to the provision of the Goods set out in the Order.

### **5. Packing and Delivery**

- 5.1 The Goods will be packed in accordance with Opal's standard practice and procedures, and the cost of packing is included in the Purchase Price. If the Customer requests in writing that other packing procedures are followed and Opal agrees, the Customer will bear any additional costs incurred by Opal to complete the packing in accordance with the Customer's request.
- 5.2 Opal will deliver the Goods to the relevant Site (or such other location agreed in writing by the Parties) in accordance with the delivery requirements set out in an Order.
- 5.3 Opal will use all reasonable efforts to deliver the Goods to the relevant Site (or such other location agreed by the Parties) within the delivery timeframes set out in an Order.

5.4 The Customer acknowledges that the delivery timeframes are an estimate only and Opal is not liable to the Customer for any delay in delivery of the Goods.

5.5 Where applicable and unless otherwise agreed in writing, all Goods will be Delivered Duty Paid as defined in Incoterms 2010.

### **6. Pallets**

Pallets remain the property of Opal or its nominee at all times until paid for by the Customer. Pallets will be exchanged at the point and time of delivery, or at other times agreed by both parties. Non-returnable pallets are to be paid for by the Customer in accordance with Opal's payment terms. Opal shall render an invoice or credit note for the cost of the number of pallets delivered to and picked up from the Customer. Opal may invoice the Customer where a pallet is damaged by the Customer. Pallets will be charged at applicable costs based on pallet type and location. The Customer indemnifies Opal for the cost of hire and/or replacement of any pallets not returned within 14 days of Opal's written request.

### **7. Inspection**

- 7.1 Upon receipt of the Goods, the Customer must inspect the Goods and note any Defects and/or short supply of the Goods. The Customer must notify Opal in writing of such Defective Goods and/or short supply of the Goods within fourteen (14) days after receipt of the Goods. In that case, the Parties will discuss the situation and endeavor in good faith to resolve it. Notwithstanding the foregoing, the Customer must pay for all Goods delivered to it without set-off. Any required adjustments will be made after resolution of the dispute.
- 7.2 Where the Customer has properly notified and evidenced the Defective Goods and/or short supply, and it is acknowledged by Opal, Opal may issue a credit note in favour of the Customer for the amount of the Defective Goods and/or short supply of the Goods.
- 7.3 Fourteen (14) days after receipt of the Goods, the Customer will be deemed to have accepted the Goods and has no further right to claim a delivered Good is Defective or short supplied, subject to applicable Law.
- 7.4 This clause 7 does not limit the Customer's rights or Opal's obligations under the ACL.

### **8. Purchase Price**

- 8.1 The Customer must pay Opal the Purchase Price in accordance with the Payment Terms.
- 8.2 The Purchase Price contained in a Contract is based on Opal's price lists as

- at the date of the applicable Contract.
- 8.3 Opal price lists may be varied by Opal without notice and exclude GST and other taxes unless expressly noted.
- 8.4 Any volume rebate or settlement discount agreed by Opal will be calculated on base price exclusive of GST and any other applicable taxes.
- 8.5 The Customer agrees to pay for:
- (a) any artwork, designs, stereotypes, blocks engravings or modifications included in any Contract, in addition to the agreed Purchase Price; and
  - (b) any experimental or preliminary work or good agreed to be provided by Opal.

## 9. GST

- 9.1 Terms used in this clause 9 have the same meaning given to them in the GST Act.
- 9.2 Unless otherwise expressly stated, all prices or other sums payable or consideration to be provided under or in accordance with these Terms or a Contract are exclusive of GST.
- 9.3 If GST is imposed on any supply made under or in accordance with these Terms or a Contract, the recipient of the taxable supply must pay to the supplier an additional amount equal to the GST payable on or for the taxable supply subject to the recipient receiving a valid tax invoice before the time of payment. Payment of the additional amount will be made at the same time as payment for the taxable supply is required to be made.
- 9.4 If these Terms or a Contract requires a Party to pay for, reimburse or contribute to any expense, loss or outgoing (**Reimbursable Expense**) suffered or incurred by another Party, the amount required to be paid, reimbursed or contributed by the first Party will be the sum of the amount of the Reimbursable Expense net of input tax credits (if any) to which the other Party is entitled in respect of the reimbursable expense and any GST payable by the other Party.
- 9.5 If GST is payable in relation to a foreign currency amount then the GST will be converted by the Customer into and payable by Opal in Australian dollars in accordance with the Australian Taxation Office Ruling on foreign exchange conversions. The Customer will set out the conversion day and rate used for the conversion in its invoice.

## 10. Deposit

The Customer agrees to pay Opal any deposit required by Opal as required by Opal under a Contract.

## 11. Payment

- 11.1 The Purchase Price for cash purchases must be paid for at the time of Order or at or prior to delivery as required by Opal.
- 11.2 Subject to clause 11.1, the Purchase Price is due in full on or before the last day of the month following the month the invoice was issued by Opal to the Customer.
- 11.3 Any additional payments due by the Customer pursuant to any provision of a Contract must be paid at the time provided in the Contract or, if no time is provided, within 7 days of payment being demanded in writing by Opal.
- 11.4 The Customer shall not be entitled to withhold payment or to make any deductions from the Purchase Price without the prior written consent of Opal.

## 12. Interest

Interest may be charged by Opal at its election on overdue amounts at the prevailing cash rate target percentage nominated by the Reserve Bank of Australia at the date the relevant invoice was issued, plus an additional 2%.

## 13. Set Off

- 13.1 Opal may, in its sole discretion, set off any amount which the Customer, or any of its related entities, owe to Opal under these Terms or Contract against any amount which Opal owes to the Customer or any of its related entities (whether under these Terms or Contract or otherwise).
- 13.2 Opal may apportion payments made by the Customer to outstanding accounts in such amounts and in such order as Opal may determine in its sole discretion.

## 14. Risk and Title

- 14.1 Risk in any Goods supplied to the Customer under these Terms passes to the Customer immediately upon the earlier of:
- (a) Opal's notification that the Goods are ready for collection; or
  - (b) upon delivery of the Goods to the agreed delivery location.
- 14.2 Legal and equitable title in the Goods is retained by Opal until Opal receives payment in full. Until title passes, the Customer is authorised to sell the Goods in the ordinary course of its business.

## 15. PPS Act

- 15.1 The Customer acknowledges and agrees that Opal will have a Security Interest in any Goods supplied to the Customer under these Terms or any Contract.
- 15.2 Opal may register any Security Interest contemplated by these Terms or any Contract.
- 15.3 The Customer must do all things within its reasonable control which Opal requires and considers necessary for the purposes of:
- (a) ensuring the Security Interest is

- enforceable, perfected and otherwise effective;
- (b) enabling Opal to apply for any registration, complete any financing statement or give any notification, in connection with the Security Interest; or
- (c) enabling Opal to exercise rights in connection with the Security Interest.
- 15.4 The Customer irrevocably and unconditionally waives its right to receive any notice from Opal in connection with the registration of any Security Interest.
- 15.5 Opal is not required to provide the Customer with any notice under the PPS Act (including a notice of verification statement or any notice required upon enforcement of Opal's Security Interest) unless the obligation to provide the notice under the PPS Act cannot be excluded.
- 15.6 The Customer will not allow a Security Interest to be created or registered over the Goods in priority to the Security Interest held by Opal.
- 15.7 The Customer must do all things requested by Opal under clause 15.3 within the timeframes requested by Opal.
- 15.8 The Customer agrees that any action taken by Opal in relation to the Customer's Security Interest in the Products is at the cost of the Customer.
- 15.9 Without limiting any duty of confidentiality arising from these Terms, a Contract or otherwise, neither Party may, without the consent of the other Party, disclose any information of the kind referred to in section 275(1) of the PPS Act, except to the extent required by law. The Customer agrees not to authorise the disclosure of any information as contemplated by section 275(7)(c) of the PPS Act except with the prior written consent of Opal.
- 16. Liability and Indemnity**
- 16.1 To the maximum extent permitted by law, Opal's liability in respect of Defective Goods is limited at Opal's sole discretion, to:
- (a) the replacement or repair of the Goods;
- (b) the supply of equivalent Goods; or
- (c) the cost of replacing or repairing the Goods or of acquiring equivalent Goods.
- 16.2 Subject to clause 16.1, and to the maximum extent permitted by law, the maximum cumulative liability of each Party under these Terms, whether under the law of contract, tort or otherwise, will be limited to:
- (a) the total amount paid or payable to Opal under any Contract within the twelve month period
- immediately before the date of the event giving rise to the claim; or
- (b) if the date of the event giving rise to the claim is less than twelve months after the date of the first Contract formed pursuant to these Terms, the total amount paid to Opal under any Contracts between the date of the first Contract and the date the event giving rise to the claim occurred.
- 16.3 Notwithstanding any other clause in these Terms, clause 16.2 will not apply to liability for:
- (a) personal injury or death;
- (b) damage to real or personal property;
- (c) the Customer's breach of clause 27;
- (d) acts of fraud, willful misconduct or willful or fraudulent misrepresentation; or
- (e) any amounts due and payable by the Customer to Opal under these Terms.
- 16.4 To the maximum extent permitted by law, neither Party will be liable for any Consequential Loss, and this exclusion of liability will apply whether the liability or claim is based on breach of contract, repudiation, tort (including negligence), under statute, in equity or otherwise.
- 17. Excluded Terms**
- 17.1 To the maximum extent permitted by law, all terms, conditions, warranties and representations expressed or implied by statute, common law, equity, trade, custom or usage are expressly excluded.
- 17.2 The Customer and Opal agree that the United Nations Convention on Contracts for the International Sale of Goods (the Vienna Convention) shall not apply to any Contract.
- 18. Suitability of Goods**
- 18.1 These Terms and Order or Contract between Opal and the Customer will not be deemed to be a sale by sample.
- 18.2 Any description of the Goods is given by way of identification only and does not constitute a sale by description.
- 18.3 The Customer agrees that Opal and any person purporting to act on Opal's behalf, has not made any representation or given any promise or undertaking which is not expressly set out in writing, whether as to the fitness of the goods for any particular purpose or any other matter.
- 19. Customised Goods**
- 19.1 Opal will not be responsible or liable for any Goods to the extent that the Goods are:
- (a) made or performed to designs,

drawings, specifications or procedures or with any Materials which are provided or approved by or on behalf of the Customer; and

- (b) used, stored, handled or maintained incorrectly or inappropriately after delivery to the Customer.

- 19.2 The Customer must ensure that all Goods comply with all applicable legal requirements and regulatory standards before use or on-sale.
- 19.3 Opal may update, modify, alter or make substitution for any Goods or any component in or used in forming any part of Goods.
- 19.4 It is the Customer's sole responsibility to ensure that materials, designs, drawings, specifications, procedures provided by or on behalf of the Customer, to be used by Opal in manufacturing and supplying Goods are correct, appropriate and comply with all applicable Laws.

## 20. Recovery Costs

The Customer will pay any costs and expenses incurred by Opal or its solicitors, legal advisers, mercantile agents and others acting on Opal's behalf in respect of anything arising in connection with these Terms or a Contract or any dealings with Opal.

## 21. Default and Termination

- 22.1 Upon the Customer's breach or default of any of these Terms, Order or Contract with Opal, Opal may, without prejudice to its other rights:
  - (a) retain all amounts paid by the Customer;
  - (b) cease further deliveries of Goods;
  - (c) seek to recover from the Customer all direct loss and costs incurred;
  - (d) take possession of any Goods not fully paid for; and
  - (e) otherwise suspend its obligations under or terminate these Terms and any Contract.
- 21.2 A Party may terminate these Terms:
  - (a) immediately upon written notice to the other Party if the other Party commits a material breach of these Terms or a Contract and the breach is incapable of remedy or, if the breach is capable of remedy, the other Party fails to remedy the breach within thirty (30) days after receiving notice requiring it to do so; and
  - (b) immediately if an Insolvency Event occurs in relation to the other Party.
- 21.3 Termination of these Terms will not affect

any accrued rights or liabilities of either Party.

- 21.4 Any obligations which are expressed to or, by their nature, survive expiry or termination of these Terms or a Contract, will survive expiry or termination of these Terms or a Contract and are enforceable at any time at law or in equity.

## 22. Confidential Information

The Customer must keep all Confidential Information confidential and must not disclose any Confidential Information without the prior written consent of Opal.

## 23. IP Rights

- 23.1 Nothing in these Terms or a Contract affects the ownership of any rights (including IP Rights) in any Existing Materials.
- 23.2 If Opal and the Customer agree that Opal will use the Customer's Existing Materials to manufacture the Goods pursuant to these Terms and a Contract, the Customer must grant to Opal an irrevocable, royalty-free, worldwide, non-exclusive licence, to use the Customer's Existing Materials to the extent required to perform its obligations under these Terms or a Contract.
- 23.3 The Customer acknowledges that all rights (including IP Rights) in any materials, items, documents or things created by Opal in the course of providing the Goods to the Customer under these Terms or a Contract will be owned by Opal, or its nominee despite any contribution by the Customer.
- 23.4 The Customer must, upon request by Opal, sign all documents and do all things as may be necessary to give full effect to this clause 24.

## 24. Force Majeure

A Party will not be in default or breach of these Terms or a Contract, or will not otherwise be liable to the other Party, for any delay or failure to perform arising from a Force Majeure Event.

## 25. Tooling

The Customer agrees that all tooling, materials, industrial or IP Rights or the like used in the preparation for or production of any Goods or provision of any services will be and remain the property of Opal or its nominee despite any contribution by the Customer.

## 26. Warranties and acknowledgement

- 26.1 The Customer represents and warrants to Opal that at all times:
  - (a) the Customer is duly authorised to permit Opal to use the trade marks, copyright material and any material the Customer specifically requests Opal to use on or in connection with the Goods; and
  - (b) Opal's use of the trade marks, copyright material and any

material the Customer specifically requests Opal to use on or in connection with the Goods will not infringe the IP Rights of any party and will not breach any Law.

## 27. Notice

- 27.1 Any notice or other communication under these Terms or a Contract must be given in writing and may be delivered by hand or sent by email to the authorised representative of the other Party.
- 27.2 A communication is taken to be received:
- (a) if delivered by hand, on that day; or
  - (b) if sent by email, when confirmation of delivery is received by the sender which records the time that the email was delivered to the addressee's last notified email address unless the sender receives a delivery failure notification indicating that the email has not been delivered to the addressee.

## 28. Waiver

- 28.1 Failure by Opal to insist on strict performance of any term, warranty or condition of these Terms or any Contract will not be taken as a waiver, or partial waiver, of:
- (a) these Terms or a Contract or of any rights Opal may have; or
  - (b) any subsequent breach of any term, warranty or condition of these Terms or a Contract.

## 29. Variation

These Terms may only be varied, supplemented or replaced by a document executed by an authorised representative of Opal.

## 30. Severability

Any part of these Terms being a whole or part of a clause, shall be capable of severance without effecting any other part of these Terms.

## 31. Governing Law and Jurisdiction

These Terms shall be governed and construed in accordance with the laws of Victoria, Australia. Each party submits to the non-exclusive jurisdiction of courts exercising jurisdiction in Victoria, Australia, and any courts which have jurisdiction to hear appeals from any of those courts and waives any right to object to any proceedings being brought in those courts.

## 32. Construction and interpretation

Unless expressed to the contrary, in these Terms and a Contract:

- (a) words in the singular include the plural and vice versa;
- (b) if a word or phrase is defined its other grammatical forms have corresponding meanings;
- (c) "includes" means includes without limitation;

- (d) no rule of construction will apply to a clause to the disadvantage of a Party merely because that Party put forward the clause or would otherwise benefit from it;
- (e) a reference to:
  - (i) a person includes a partnership, joint venture, unincorporated association, corporation and a government or statutory body or authority;
  - (ii) a person includes the person's legal personal representatives, successors, assigns and persons substituted by novation;
  - (iii) any legislation includes subordinate legislation under it and includes that legislation and subordinate legislation as modified or replaced;
  - (iv) an obligation includes a warranty or representation and a reference to a failure to comply with an obligation includes a breach of warranty or representation;
  - (v) a right includes a benefit, remedy, discretion or power;
  - (vi) time is to local time in Melbourne, Victoria;
  - (vii) "\$" or "dollars" is a reference to Australian currency;
  - (viii) this or any other document includes the document as novated, varied or replaced despite any change in the identity of the Parties; and
  - (ix) writing includes any mode of representing or reproducing words in tangible and permanently visible form;
- (f) where time is to be calculated by reference to a day or event, that day or the day of that event is excluded; and
- (g) headings do not affect the interpretation of these Terms.