



## Terms and Conditions of Trade

### Interpretation

1.
  - a. "Agreement" refers to any contract or agreement, whether formal or informal, written, oral, or partly written and partly oral, formed between the Company and the Customer to supply Goods and Services.
  - b. "The Company" shall mean Tough Glass, its successors and assignees or any person acting on behalf of and with the authority of Tough Glass.
  - c. "Customer" shall mean the Customer (or any person acting on behalf of and with the authority of the Customer) as described on any quotation, work authorization or other form as provided by the Company to the Customer.
  - d. "Guarantor" means the person (or persons), or entity, who agrees to be liable for the debts of the Customer on a principal debtor basis.
  - e. "Equipment" shall mean all Equipment including any accessories supplied on hire by the Company to the Customer (and where the context so permits shall include any supply of services). The Equipment shall be described on the invoices, quotation, authority to hire, or any work authorisation form provided by the Company to the Customer.
  - f. "Goods" shall mean Goods supplied by the Company to the Customer (and where the context so permits shall include any supply of Services as hereinafter defined) and are as described on the invoices, quotation, work authorisation or any other forms as provided by the Company to the Customer.
  - g. "Services" shall mean all services supplied by the Company to the Customer and includes any advice or recommendations (and where the context so permits shall include any supply of Goods as defined above).
  - h. "Price" shall mean the price payable for the Goods as agreed between the Company and the Customer in accordance with clause 4 of this Application.
2. Disputes and/or claims do not constitute grounds for non-payment of amounts other than those in dispute.
3. The credit facility will not be provided to the Customer until notice has been provided in writing from the Company stating that the facility has been granted.

### Price and Payment

4.
  - a. At the Company's sole discretion, the Price shall be either:



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- i. As indicated on invoices provided by the Company to the Customer in respect of Goods supplied;
  - ii. The Company's quoted price which shall be binding upon the Company provided that the Customer shall accept the Company's quoted price within thirty (30) days.
- b. In the event that the Company have not commenced the Services or provided the Goods due to delays outside of the Company's control, then a revised quotation may be provided by the Company to the Customer twelve (12) months after the original quotation was issued.
- c. At the Company's sole discretion, a non-refundable deposit may be required
- d. At the Company's sole discretion:
  - i. Payment shall be due before the delivery of the Goods; or
  - ii. Payment for approved Customers shall be made by instalments in accordance with the Company's payment schedule.
- e. Time for payment for the Goods shall be of the essence and will be stated on the invoice or any other forms. If no time is stated then payment shall be due seven (7) days following the date of the invoice.
- f. Payment will be made by cash, or by cheque, or by bank cheque, or by any other method as agreed to between the Customer and the Company.
- g. GST and other taxes and duties that may be applicable shall be added to the Price except when they are expressly included in the Price.

### **Charge**

5. The Customer and the Guarantor(s) hereby charge and mortgage in favour of the Company to secure the repayment of the overdue invoices and all monies which may become owing by the Customer to the Company hereunder all the Customer's and the Guarantor(s) estate and interest in all property both real and personal and present and future.

- a. The Customer and the Guarantor(s) acknowledge and agree that the Company shall be entitled to lodge a caveat where appropriate, in which shall be withdrawn once all payments and other monetary obligations payable hereunder have been met.
- b. Should the Company elect to proceed in any manner in accordance with this clause and/or its sub-clauses, the Customer and Guarantor(s) shall indemnify the Company from and against all the Company's costs and disbursements including legal costs on a solicitor and own client basis.
- c. The Customer and the Guarantor(s) agree to irrevocably nominate, constitute and appoint the Company as the Customer's and Guarantor(s)' true and lawful attorney to perform all necessary acts to give effect to the provisions of this clause 5.

6. The Company may withdraw the facility at any time without notice or the Company may from time to time or at any time increase or decrease the limit (if any) of the facility provided without notice to the Customer or the Guarantor (if any).



7. Where the amount owing under the credit facility at any time exceeds the limit in this Application, the Company reserves the right to suspend credit activities until such time the outstanding amount is reduced below the limit established.

8. All risks in any Goods ordered by the Customer shall be deemed to pass to the Customer from the time the Goods are loaded or delivered by the Company to a courier or carried consigned to the Customer but otherwise:

- a. The Customer hereby acknowledges that the Goods supplied by the Company shall remain the property of the Company until the Company receives payment for the same.
- b. The Company hereby agrees to allow the Customer to deal, sell or trade with the Goods in the normal course of business and for the Customer to retain the sale proceeds of such sale or dealing provided that Customer adheres to the terms and conditions of the Agreement.

#### **Event of Default**

9.
  - a. Should the Customer default in the payment of any monies due, then all monies due to the Company shall immediately become due and payable and shall be paid by the Customer within 7 days of the date of demand. The Company shall be entitled to charge interest at the rate of 15% per annum on all overdue accounts from the date of due payment until the date of actual payment.
  - b. Payments received by the Company will be applied firstly in reduction of interest payable and accruing from month to month; and secondly in reduction of all other monies owing to the Company until such a time as all monies owing to the Company have been paid in full.
  - c. Any expenses, costs or disbursements, including debt collection agency fees, commission and any fees paid to the Company's solicitors (on an indemnity basis), incurred by the Company in recovering any outstanding monies shall be paid by the Customer on an indemnity basis.

#### **Retention of Title**

10.
  - a. The parties agree that the title to Goods and supplied by the Company shall not pass to the Customer until payment for those items and any associated labour has been received in full by the Company.
  - b. Where any part of the purchase price for Goods supplied by the Company remains owing, the Company shall retain legal title to all Goods supplied and not yet used or resold in the ordinary course of business.
  - c. When such Goods are used, even with loss of identity, the legal title to the resultant products shall vest in the Company. The proceeds of sale of the Goods or resultant products shall be received by the Customer as agent of the Company and such proceeds are to be kept in a separate account or are to be accounted for on demand.
  - d. Prior to payment being received in full by the Company the Customer will take custody of the Goods and retain them as the fiduciary agent and bailee of the Company.



- e. The Customer agrees to indemnify the Company against any claim, action, damage, loss, liability, cost, charge, expense, outgoing or payment which the Company suffers, incurs or is liable to pay in respect of the Company's exercise of its rights under clause 9.

## **Access**

11. The Customer shall allow The Company to have clear and free access to the work site at all times to enable them to undertake the works. The Company shall not be liable for any loss or damage to the site (including, without limitation, damage to pathways, driveways and concreted or paved or grassed areas) unless due to the negligence of The Company.

## **Defects**

12.
  - a. After Goods have been delivered or completed, the Client shall inspect the Goods and within two (2) days notify the Company of all alleged defect, shortage in quantity, damage or failure to comply with the description or quote.
  - b. In the event that the Customer believes the Goods are defective in any way, the Customer shall provide the Company with a reasonable time following delivery or completion to inspect the Goods.
  - c. If the Goods are considered defective by the Company after an inspection of those Goods, the Company's liability is limited to either (at the Company's discretion) replacing the Goods or repairing the Goods except where the Client has acquired Goods as a cost within the meaning of the Competition and Consumer Act 2010 (Cth) or the Fair Trading Acts of the relevant state or territory of Australia, and is therefore also entitled to, at the Customer's discretion either a refund of the purchase price of the Goods, repair of the Goods or replacement of the Goods.
  - d. If the Customer does not notify the Company of an alleged defect in accordance with this clause, the Goods shall be presumed to be free from any defect.

13. Goods will not be accepted for return other than in accordance with clause 11 above.

## **Warranty**

14. The Company warrants the quality of Goods of its own manufacture for a period of twelve (12) months. This warranty is restricted to the replacement, free of charge, of Goods showing defects, provided the Customer reports the supposed defects immediately in writing.

15. The conditions applicable to the warranty provided by clause 13 are:

- a. The warranty shall not cover any defect or damage which may be caused or partly caused by or arise through:
  - i. failure on the part of the Customer to properly maintain any Goods;
  - ii. failure on the part of the Client to follow any instructions or guidelines provided by the Company;
  - iii. any use of Goods otherwise than for any application specified on a quote or order form; or



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- iv. the continued use of any Goods after any defect becomes apparent to a reasonably prudent operator or user; or
  - v. fair wear and tear, any accident or act of God
- b. The warranty shall cease and the Company shall thereafter in no circumstances be liable under the terms of the warranty if the workmanship is repaired, altered or overhauled without the Company's consent.
- c. In respect of all claims The Company shall not be liable to compensate the Client for any delay in either replacing or remedying the workmanship or in properly assessing the Customer's claim.

16. For Goods not manufactured by the Company, the warranty shall be the current warranty provided by the manufacturer of the Goods. The Company shall not be bound by, nor be responsible for any term, condition, representation or warranty other than which is given by the manufacturer of the Goods.

### **Limitation of Liability**

17. Without limiting the generality of any other provision of these terms and conditions but subject to clause 12 and 13, the Company is not under any liability to the Customer or to any other person in respect of any loss or damage any loss arising from delay (including consequential loss or damage) however caused, which may be suffered or incurred or which may arise whether directly or indirectly in respect of the supply of the goods or any ancillary services or the failure or omission on the part of the Company to comply with its obligations hereunder and the Customer indemnifies the Company in respect of such loss or damage.

### **Consequential Loss**

18. Without prejudice to the terms of Condition, the Company shall not in any event be liable to the Customer in agreement or tort or otherwise for any indirect or consequential loss or damage or any loss arising from delay; whenever or howsoever arising, including without limitation loss of profit, loss of revenue, economic loss, depletion of goodwill and pecuniary loss of any kind whatsoever.

### **Intellectual Property**

- 19.
- a. Where the Company has designed, drawn or written Goods for the Customer, the copyright in those designs, drawings and documents shall remain vested in the Company and shall only be used by the Customer at The Company's discretion.
  - b. The Customer warrants that all designs or instructions to the Company will not cause The Company to infringe on any patent, registered design or trademark in the execution of the Customer's order and the Customer agrees to indemnify the Company against any action taken by a third party against the Company in respect of any such infringement.
  - c. The Customer hereby authorises the Company to utilize images of the Goods designed or drawn by the Company in advertising, marketing, or competition material by the Company.

### **Equipment Hire**

20. Any Equipment shall at all times remain the property of the Company and is returnable on demand by the Company. In the Event that the Equipment is not returned to the Company in the condition in which it was delivered, the Company retains the right to charge the price of repair or replacement of the Equipment.



## Personal Properties Securities Act 2009 (Cth)

21.

- a. The Customer hereby acknowledges that this Agreement constitutes a security agreement for the purposes of section 22 of the Personal Property Securities Act 2009 ("PPSA").
- b. The Customer will not (except with the written consent of the Company) allow to be, or be liable to become, attached in favour of any person or company, a Security Interest or Transitional Security Interest in any goods owned by the Company.
- c. The Company may register the Agreement as a Security Interest on the Personal Property Securities Register ("PPSR") which will constitute a Security Interest in:
  - i. All goods previously supplied by the Company;
  - ii. All goods that will be supplied in the future by the Company.
- d. The Customer agrees to grant a Purchase Money Security Interest in the Goods which will continue to apply to any Goods coming into existence or proceeds of sale of Goods coming into existence.
- e. The Customer will continue to hold a Security Interest in the Goods in accordance with and subject to the PPSA, notwithstanding that the Goods may be processed, commingled or become an accession with other Goods.
- f. The Customer undertakes to:
  - i. Promptly sign any documents and/or provide all necessary information requested by the Company to lodge a Financing Statement with respect to the registration of any Security Interest or correct a defect in any Financing Statement or Verification Statement.
  - ii. Not register or permit to be registered a Financing Change Statement as defined in section 10 of the PPSA or make a demand to alter the Financing Change Statement pursuant to section 178 of the PPSA in respect of the Goods without the prior written consent of the Company.
  - iii. Provide the Company with not less than 14 days prior written notice of any proposed change in the Customer's name, address, contact numbers, business practice or other such change in the Customer's details registered on the PPSR.
  - iv. Indemnify and upon demand reimburse the Company for all expenses incurred in registering and maintaining a Financing Statement or Financing Change Statement on the PPSR or releasing any Security Interests and/or enforcing or attempting to enforce the Security Interest created by this Agreement.
- g. The Customer waives the right to receive a verification statement or financial change statement relating to any Security Interest registered by the Company.



- h. The parties to this Agreement agree that the Company and the Customer contract out of and nothing in the provisions of sections 95, 96, 117, 118, 121(4), 130, 132(3)(d), 132(4), 135, 142 and 143 of the PPSA shall apply to this Contract.

## 22. If the Customer:

- a. Defaults in the due and punctual observance of all or any of his obligations under any contract arising out of this Application; or
- b. being a person dies, commits an act of bankruptcy; or
- c. being a company, takes or shall have taken against it any action for its winding up, placement under management, administration and/or receivership then the Company without prejudice to any rights or remedies open to it may:
  - i. treat as discharged all or any obligation arising from any Agreement with the Customer;
  - ii. retain any security given or monies paid by the Customer or available through the enforcement of any guarantee, security or bond and apply this in reduction of any sum which may be lawfully recovered by the Customer;
  - iii. Reserve the right to enter upon the Customer's premises or elsewhere to take possession of and remove any Goods which full payment has not been received. The legal and equitable interest and the title in the said Goods shall not therefore pass until full payment has been received by the Company;
  - iv. take such steps as it may deem necessary to mitigate the damages suffered including the putting to use, hiring out, sale or disposal of any Goods supplied or to be supplied under contract or its possession. Should there be any variation to any of the information supplied by the Customer to the Company or in the structure of the Customer's business (such as conversion to or from a company or trust) the Company shall forthwith be notified in writing by the Customer. Unless notification of such variation or change is given and accepted in writing by the Company, the original Customer and those persons who signed as Guarantor(s) on this Application Form shall remain liable to the Company as though any goods or services supplied by the Company were supplied to the original Customer.

## Variation

### 23.

- a. Any variation to the works performed and/or Goods supplied by the Company to the Customer pursuant to an Agreement shall be subject to these Terms and Conditions of Trade.
- b. Any variation must be either:
  - i. in writing and signed by both parties. The Company reserves the right to revise and amend the price of the works if there are any such variations; or



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- ii. agreed to via the exchange of emails between a representative of the Company and of the Customer, confirming the precise scope of the variation works and the price of the variation or method of calculating the price. The Company reserves the right to revise and amend the price of the works if there are any such variations.
- c. to be charged by the Company in addition to the costs of the variation separately charged.
- d. Where any variation to an Agreement is necessary:
  - i. to comply with any written direction lawfully given by a person acting under a written law; or
  - ii. by virtue of circumstances that could not reasonably have been foreseen by the Company at the time when the Agreement was entered into,
  - iii. then the Company shall be entitled to payment for such a variation provided that before carrying out the work relating to the variation, the Company gives to the Customer a statement setting out the reason for, and the cost to be incurred on account of the variation, together with a copy of any written direction referred to in sub-clause 23(d)(i) above.

24. The Company shall not be deemed to have waived any of the terms and conditions of this Application or agreed to any variation thereof unless it has done so expressly in writing and signed by the Company.

25. Where there is any inconsistency between the Terms and Conditions of Trade and any subsequent agreement for the supply of goods, work or materials by the Company, any such subsequent agreement shall be read down to the extent necessary to give full force and effect to these Terms and Conditions.

26. In these Terms and Conditions words in the singular shall be construed as to include the plural and words in the masculine gender shall be construed so as to include every other gender.

27. Where the Customer is a trustee:

- a. the Customer agrees to produce a stamped copy of the trust deed (with all amendments) if and when requested by the Company;
- b. the Customer warrants that it has full power and authority for the benefit purposes and objects of the trust to make this Deed on behalf of the trust and that it shall be bound by the terms of this Deed both personally and as trustee; and
- c. the Customer confirms that the trustees shall be liable for the account and that in addition the assets of the trust shall be available to meet payment of the account.

28. The Customer hereby agrees that the facility hereby applied for does not extend to any transaction and the Customer will not use the facility for any transaction which is or may be a "regulated contract" as that expression is defined in the Credit Act.

29. The Customer and the Guarantor (if any) agree that the certificate of the Company or any person authorised by the Company to give the same shall be conclusive evidence as to the amount owing to the Company by the Customer and Guarantor.





30. The Company reserves the right to use the services of a mercantile agency.

## **Dispute Resolution**

31.

- a. The parties agree not to commence proceedings in relation to any dispute arising in regard to an Agreement without first having regard to the procedure set out in this clause.
- b. in connection with an Agreement, then:
  - i. The party that alleges they have suffered some loss or damage, or is otherwise aggrieved, shall serve the other party, by hand or by mail, with a Notice of Dispute in writing adequately identifying and providing details of the dispute.
  - ii. Within 7 days of receipt of the Notice of Dispute, the parties must meet and take reasonable steps to resolve the dispute.
  - iii. If the dispute cannot be resolved within 7 days of the meeting between the parties, then the parties agree to submit the dispute to arbitration.
  - iv. If the dispute remains unresolved 14 days after service of the Notice of Dispute, the dispute must be arbitrated in accordance with this clause.
  - v. Arbitration shall be effected by a single arbitrator who shall be mutually agreed upon by the parties or, in the event that they fail to agree within 7 days, then the arbitrator shall be the President for the time being of the WA Chapter of the Institute of Arbitrators and Mediators Australia ("IAMA") or his appointee.
  - vi. The parties agree to submit to the arbitration procedures and guidelines adopted by the IAMA.
  - vii. The rules of evidence will not apply strictly to the arbitration, but may be considered by the arbitrator in determining the weight to be attached to each item of evidence.
  - viii. The Arbitration shall be conducted within the State of Western Australia and the Western Australian Courts have jurisdiction in respect of any legal dispute arising from these Terms and Conditions.
- c. If the dispute is not resolved within 90 days of service of the Notice of Dispute (or any longer period as agreed to by the parties), either party who has complied with this clause may end this dispute resolution process by written notice to the other party and immediately thereafter commence court proceedings in relation to this dispute.

## **Confidentiality**

32. The Customer hereby agrees not to request the information referred to below or authorise the disclosure of such information without the prior written consent of the Company:

- a. Copies of security agreements;



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- b. Statements setting out details of amounts secured, obligations secured, terms of payment or performance of obligation;
- c. Approvals or corrections of specified personal property indicating which items of personal property have security interests; and/or
- d. Approvals or corrections of amounts secured, obligations secure, terms of payment or performance of obligation.

### **Jurisdiction**

33. The Customer and Guarantor(s) agree that the law of Western Australia shall apply to this Application and its/ their dealings with the Company and the Customer, Guarantor(s) and the Company consent to the jurisdiction of the relevant court in the said State.

34. The Customer further acknowledges that it has had the opportunity of obtaining independent legal advice and that it understands the Terms & Conditions outlined above. The party accepts these Terms and Conditions in acknowledgement that they are legally binding and presently enforceable.

*"The Customer and the Guarantor accepts these Terms and Conditions in acknowledgement that they are legally binding and presently enforceable."*