

# THE MARTOGG GROUP

## TERMS AND CONDITIONS OF TRADE

### 1. Definitions

In these Terms and Conditions of Trade:

**Agreement:** means any agreement, order, contract or security agreement entered into for the sale and/or supply of Goods by Martogg to the Customer, the terms and conditions of which shall (subject always to these Terms) be contained in:

- (a) these Terms;
- (b) any Credit Application that is accepted by Martogg;
- (c) any guarantee and/or indemnity that is accepted by Martogg (including, but not limited to, any Deed of Guarantee of Indemnity which forms part of Martogg's Credit Application booklet);
- (d) any quotation(s) provided by Martogg and accepted by the Customer;
- (e) any invoice(s) provided by Martogg; and
- (f) any Customer order(s);

**Terms:** means these Terms and Conditions of Trade (and security agreement as defined by the PPSA);

**Customer:** means a person, firm or corporation, jointly and severally if there is more than one, to whom Martogg agrees to supply or sell Goods under an Agreement, and (unless otherwise agreed in writing) includes the person or entity named as 'Applicant' in any relevant Credit Application that is accepted by Martogg;

**Goods:** means goods and/or services sold or supplied by Martogg to the Customer including, if applicable, Packaging;

**GST:** means Goods and Services Tax as that term is defined in the GST Act;

**GST Act:** means *A New Tax System (Goods and Services Tax) Act 1999* (Cth) as amended;

**Intellectual Property:** means all copyright, patents, trade marks, designs, formulae, specifications, confidential information, manufacturing processes and all modifications, improvements and derivations (whether registerable or not) owned or licensed by Martogg in respect of the Goods;

**Liability** means any liability, loss, damage, cost, expense or claim, howsoever arising and whether actual or contingent, present or future, fixed or unascertained, and whether in contract, tort, or otherwise arising at law;

**Martogg:** means such of the following entities (and if more than one of them then jointly and severally) who agree to supply Goods to the Customer in accordance with these Terms and any Agreement:

- (a) Kantfield Pty Ltd t/as Martogg & Company (ABN 68 006 073 418); or
- (b) Engineering Compounds & Resins Pty Ltd t/as Encor (ABN 34 005 612 322); or
- (c) General Polymers (Aust.) Pty Ltd t/as General Polymers (ABN 36 064 184 27); or
- (d) M.E. Hogg Australia Pty Ltd t/as Gentrade (ABN 99 114 219 082); or
- (e) Circular AU Pty Limited (ABN 30 667 028 453).

**Packaging:** means re-usable packaging, stillages and pallets delivered or supplied to the Customer by or on behalf of Martogg;

**PPSA:** means Personal Property Securities Act 2009 (Cth).

### 2. Basis of Agreement

- 2.1 Unless otherwise agreed by Martogg in writing, the Terms apply exclusively to every agreement entered into for the sale of Goods by Martogg to the Customer and cannot be varied or supplanted by any other condition, including the Customer's terms and conditions.
- 2.2 These Terms shall apply to and bind the Customer in respect of each and every Agreement between Martogg and the Customer.
- 2.3 Any written quotation provided by Martogg to the Customer concerning the proposed supply of Goods is:
  - (a) valid for 30 days;
  - (b) an invitation to treat only;
  - (c) subject to the Customer offering to enter into an Agreement and accepting these Terms.
- 2.4 These Terms include all additional terms of any document which make up the Agreement and which are not inconsistent with these Terms.
- 2.5 The Agreement is entered into by Martogg when Martogg confirms its acceptance of an offer from the Customer in writing or electronic means or provides the Customer with the Goods.
- 2.6 Martogg in its absolute discretion may refuse to accept any offer.
- 2.7 It is the Customer's responsibility to provide Martogg with its specific requirements in relation to the Goods.
- 2.8 Martogg may vary or amend (including, without limitation, by replacement) these Terms by notice in writing to the Customer at any time. Any variations or amendments will apply to orders made by the Customer after the date of notice. Without limitation, the Customer will be deemed to have agreed to the amended Terms if the Customer continues to trade with Martogg after the date of notice.

### 3. Pricing

- 3.1 Prices and charges, quoted for the supply of Goods exclude GST and any other taxes or duties imposed on or in relation to the Goods (including, but not limited to any Fuel Levy or Carbon Levy). In addition to payment of the price of Goods and any other charges the Customer must pay any GST and any other taxes, duties or charges imposed on the Goods (including, but not limited to any Fuel Levy or Carbon Levy).
- 3.2 If the Customer requests any variation to the Agreement, Martogg may increase the price to account for the variation.
- 3.3 Where there is any change in the costs incurred by Martogg in relation to the Goods, Martogg may, by written notice to the Customer, vary its price(s) and/or charges for the Goods in order to take account of any such change.
- 3.4 Martogg reserves the right to include a Fuel Levy charge and/or a Carbon Levy charge as components of any invoice to the Customer, in addition to any quoted or other amounts.

### 4. Payment

- 4.1 Unless otherwise agreed in writing:

- (a) the Customer must make payment of Martogg's invoices within 30 days of the end of month in which Martogg's invoice is raised; and
- (b) Martogg reserves the right to require payment in full prior to the delivery of any Goods at its sole and absolute discretion.
- 4.2 Payment by cheque is not deemed made until the proceeds of the cheque have cleared.
- 4.3 Payment terms may be revoked or amended at the sole discretion of Martogg immediately upon giving written notice to the Customer.
- 4.4 The Customer is not entitled to make any claim on or against Martogg while any amount is outstanding from the Customer to Martogg.
- 4.5 The Customer is not entitled to set off any amounts against amounts that are outstanding to Martogg.
- 4.6 The Customer is not entitled to deduct any sum from the amount due on any of Martogg's invoices for any reason whatsoever.
- 4.7 Martogg may, at any time, set off amounts owed by Martogg (or any of its related bodies corporate) to the Customer against amounts owed by the Customer to Martogg (or any of its related bodies corporate).

## **5. Payment Default**

- 5.1 If the Customer fails or refuses to make payment by the due date of any amount payable to Martogg under these Terms or any Agreement, then all money which would become payable by the Customer to Martogg at a later date on any account, becomes immediately due and payable without the requirement of any notice to the Customer, and Martogg may, without prejudice to any other remedy available to it:
    - (a) claim a general lien over any and all Goods that are the subject of a customer order(s) but in the possession of Martogg, and subject to giving 14 days written notice to the Customer, sell the said Goods by private treaty or public auction (whichever Martogg in its sole discretion deems appropriate) and allocate the proceeds thereof to the repayment of its sale costs and expenses and/or any sum which is due and payable by the Customer to Martogg;
    - (b) charge the Customer interest (calculated daily) on any sum due at the prevailing rate pursuant to the Penalty Interest Rates Act 1983 (Vic) plus 2 per cent per annum for the period from the due date until the date of payment in full;
    - (c) charge the Customer for all expenses and costs (including, but not limited to, legal costs on an indemnity basis) incurred by Martogg as a result of the Customer's default;
    - (d) cease or suspend (for such period as Martogg thinks fit in its sole and absolute discretion) its performance of any Agreement, including the supply of any further Goods; and/or
    - (e) by notice in writing to the Customer, terminate any Agreement with the Customer so far as unperformed by Martogg;
    - (f) by notice or action accept the Customer's repudiation of these Terms and/or any Agreement, without effect on the accrued rights of Martogg under these Terms or any Agreement.
  - 5.2 Each of the remedies contained in Clauses 5.1(a)-(f), above may also be relied upon, at the option of Martogg, where:
    - (a) the Customer is an individual and commits an act of bankruptcy (within the meaning of the *Bankruptcy Act 1966* (Cth)), 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;
    - (b) 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, provisional liquidator, administrator, receiver or receiver and manager appointed, 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;
    - (c) the Customer is in default of any obligation under an Agreement and/or these Terms and (save as otherwise provided hereunder) that default has not been remedied within five days of Martogg giving the Customer notice of the relevant default;
    - (d) the Customer is or becomes (in the reasonable opinion of Martogg) insolvent;
    - (e) the Customer (including its officers, employees, and representatives) or any guarantor of its obligations hereunder, has provided any false, misleading, fraudulent, inaccurate, or incomplete information or documentation to Martogg in respect of any Agreement between them, including, but not limited to, information or documentation that is provided when completing Martogg's Credit Application form; or
    - (f) any guarantor of the Customer's obligations under any Agreement defaulting under the terms of the relevant guarantee and/or indemnity.
  - 5.3 The Customer indemnifies (and must keep indemnified) and holds harmless Martogg in respect of any claims or actions against, and costs, expenses, losses, damages, and any other liabilities incurred by Martogg in relation to:
    - (a) the matters set out in Clause 5.1 and 5.2, above;
    - (b) any default by the Customer under any other provision of these Terms or any Agreement;
    - (c) any action whatsoever taken by Martogg to enforce a right, power, discretion, and/or remedy that is available to it, whether under these Terms, pursuant to any Agreement, or otherwise.
  - 5.4 The Customer releases Martogg from any and all Liability whatsoever incurred by the Customer (including, but not limited to consequential Liabilities of the kind described at Clause 13.3 hereof) as a direct or indirect result of the cessation, suspension, termination, or acceptance of the repudiation of these Terms and/or any Agreement by Martogg in accordance with this Clause 5.
- ## **6. Title**
- 6.1 Legal and equitable title and property in any and all Goods sold or supplied by Martogg to the Customer will remain with Martogg and will not pass to the Customer until:
    - (a) Martogg has received payment in full of all amounts owing for those Goods; and
    - (b) Martogg has received payment in full of all other amounts owed or unpaid by the Customer to Martogg, including, but not limited to, outstanding invoices, sums due under these Terms, or losses claimed on any kind.
  - 6.2 Receipt by Martogg of any form of payment other than cash will not be deemed to be received until that form of payment has been unconditionally honoured, cleared, or recognised and until then Martogg's ownership rights in respect of the Goods will continue in accordance with Clause 6.1, above.

6.3 It is further agreed that in addition to any rights that Martogg may have under Chapter 4 of the PPSA, until title in the Goods passes to the Customer in accordance with this Clause 6:

- (a) the Customer must hold the Goods as a fiduciary and as bailee for Martogg and will be responsible for any loss, damage, or conversion of the Goods;
- (b) the Customer must store the Goods in such a manner as to show clearly that they remain Martogg's property;
- (c) Martogg may give notice to the Customer to return the Goods (or any of them) to Martogg. Upon such notice, the rights of the Customer to obtain ownership or any other interest in the Goods will cease;
- (d) Martogg will have the right to stop the Goods in transit whether or not part or previous delivery has been made;
- (e) if the Customer fails to return the Goods to Martogg, then without prejudice to any other rights and without prior notice, Martogg or Martogg's agent may enter upon and into land and premises owned, occupied or used by the Customer, or any premises as the invitee and licensee of the Customer, where the Goods are situated and take possession of the Goods which remain the property of Martogg pursuant to this Clause 6 and the Customer irrevocably licenses Martogg to enter such premises and:
  - (i) indemnifies Martogg from and against all costs, claims, demands or actions by any party arising from such action; and
  - (ii) releases and holds Martogg harmless from any and all liability whatsoever incurred by the Customer (including but not limited to consequential Liabilities of the kind described at Clause 13.3 hereof) as a direct or indirect result of such action.
- (f) the Customer will not deal with any money of Martogg that is in its possession in any way which may be adverse to Martogg;
- (g) the Customer will hold any proceeds from its sale or disposal of the Goods on trust for Martogg;
- (h) the Customer will not encumber or charge the Goods in any way or grant or otherwise give any interest including granting a security interest (as defined by the PPSA) in the Goods while they remain the property of Martogg.
- (i) the Customer must ensure that the Goods are not and will not be subject to any security interest (including a lien) granted or created in favour of any third party (whether under contract, statute, or common law) without Martogg's prior written consent. Without limiting Martogg's rights, if you are or become aware of a third party's interest in or relating to such a security interest, you must notify Martogg immediately in writing and provide all relevant details, relating to the security interest, including the third party's full name and contact details, the nature of the security interest and the Goods that are subject to the security interest;
- (j) Martogg may issue proceedings, including for the recovery of the price of the relevant Goods, notwithstanding that ownership of the Goods may not have passed to the Customer; and
- (k) if the Goods (or any of them) are converted or made part of any end product or are commingled or are accession Goods for the purposes of the PPSA, the parties agree that Martogg will be the owner of the end product and any proceeds associated with the Goods.

6.4 If there is any inconsistency between Martogg's rights under this Clause 6 and its rights under Chapter 4 of the PPSA, this Clause 6 prevails.

## **7. Risk and Insurance**

7.1 The risk in the Goods and all insurance responsibility for theft, damage or otherwise in respect of the Goods will pass to the Customer immediately on the Goods being delivered or otherwise entering into the possession or control of the Customer.

7.2 The Goods are sold to the Customer on the basis that the Customer has obtained all necessary licenses or permits under all relevant laws and regulations in relation to the Goods. Further, by entering into the relevant Agreement(s), the Customer:

- (a) warrants and represents that it holds all necessary licenses or permits under all relevant laws and regulations in relation to the Goods;
- (b) acknowledges that Martogg relies upon the said warranties and representations when entering into this Agreement.

7.3 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 Customer's use or possession of any of the Goods, whether such Goods are used singularly, or in combination with other substances, or any process.

## **8. Acknowledgments**

8.1 The Customer acknowledges that:

- (a) it has not relied on any service involving skill and judgment, or on any advice, recommendation, information or assistance provided by Martogg in relation to the Goods their use or application;
- (b) it has the sole responsibility of satisfying itself that the Goods are suitable for the use of the Customer or any contemplated use by the Customer, whether or not such use is known by Martogg; and
- (c) it does not rely on any warranty or representation made by Martogg unless that warranty or representation is included in these Terms or other document that forms part of an Agreement.

8.2 Any description of the Goods provided in a quotation or invoice is given by way of identification only and the use of such description does not constitute a contract of sale by description.

## **9. Performance of Agreement**

9.1 Any period or date for delivery of Goods stated by Martogg is intended as an estimate only and is not a contractual commitment. Martogg will use its best endeavours to meet any estimated dates for delivery of the Goods but will under no circumstances whatsoever be liable for any loss or damage suffered by the Customer or any third party (whether direct or indirect) for failure to meet any estimated date.

9.2 A completed drivers' manifest or delivery docket whether signed by the driver or by the Customer or its employee or agent will be proof of delivery of Goods invoiced.

## **10. Delivery**

10.1 Martogg will, at its discretion, arrange for the delivery of the Goods to the Customer and shall designate the route and the means

of transportation for the delivery of Goods. In the event that the Customer requires a more expensive route and/or means of transportation, the Customer will reimburse Martogg for any extra cost involved.

- 10.2 Unless otherwise agreed in writing by Martogg, the Customer will be responsible for all costs associated with delivery, including freight, insurance and other charges arising from the point of despatch of the Goods to the Customer to the point of delivery.
- 10.3 The Customer must provide reasonable and proper access to the location specified for delivery.
- 10.4 The Customer authorises Martogg to subcontract delivery in its absolute discretion.
- 10.5 The Customer indemnifies Martogg against any loss or damage suffered by Martogg, its sub-contractors or employees as a result of delivery of Goods, except where caused by the negligence of Martogg.
- 10.6 The obligation of Martogg to deliver Goods shall be satisfied by the delivery by Martogg of the quantity of Goods ordered (+/- 10%) or if delivery is by instalments, by the delivery of the quantity of Goods to be delivered in each instalment (+/- 10%). The Customer shall only be required to pay for the actual quantity of the Goods delivered by Martogg.
- 10.7 If Martogg does not receive forwarding instructions sufficient to enable it to despatch the Goods within 14 days of notification that the Goods are ready, the Customer shall be deemed to have taken delivery of the Goods from such date. The Customer shall be liable for storage charges payable monthly on demand.

#### **11. Personal Property Securities Act (PPSA)**

- 11.1 If a term used in this Clause 11 has a particular meaning in the PPSA, it has the same meaning in this Clause.
- 11.2 The Customer acknowledges and agrees that:
  - (a) the PPSA applies to this Agreement;
  - (b) these Terms constitute and create a security agreement for the purposes of the PPSA; and
  - (c) these Terms create a security interest over the Goods in favour of Martogg as the secured party.
- 11.3 The Customer grants Martogg a purchase money security interest (as that term is defined in the PPSA) (PMSI) in all Goods supplied by Martogg to the Customer from time to time and, further, any proceeds arising therefrom.
- 11.4 The Customer acknowledges and agrees that the security interest:
  - (a) arising under this Agreement will be perfected by Martogg prior to the Customer obtaining possession of the Goods; and
  - (b) is a continuing and subsisting interest in the Goods with priority over any other security interest and any unsecured creditor of the Customer.
- 11.5 The Customer will do everything required of it to enable Martogg to register and maintain its security interest on the Personal Property Securities Register with the priority Martogg requires.
- 11.6 Martogg does not need to give the Customer any notice under the PPSA unless the notice is required by the PPSA and that requirement cannot be excluded.
- 11.7 If Chapter 4 of the PPSA would otherwise apply to the enforcement of the security interests created under this Agreement, the Customer agrees that sections 95, 120, 121(4), 125, 128, 129, 130, 132(3)(d), 132(4), 134(1), 135, 142, 143, 157(1) and 157(3) of the PPSA will not apply.
- 11.8 The Customer agrees not to disclose to an 'Interested person' or any other person, any information of the kind described in section 275(1) of the PPSA.
- 11.9 The Customer must notify Martogg immediately in writing of any changes to its name, address, contact details or data required to register a financing statement under the PPSA.
- 11.10 Until Title in the Goods passes to the Customer, the Customer will keep and maintain all Goods free of any charge, lien or security interest except as created under this Agreement and otherwise deal with the Goods in a way that will not prejudice the rights of Martogg under this Agreement.
- 11.11 The Customer irrevocably grants Martogg the right to enter any premises or property of the Customer without notice and without being any way liable to the Customer or any other person, if Martogg has cause to exercise any of its right under the PPSA or these Terms and the Customer agrees to indemnify Martogg against any such liability.

#### **12. Packaging**

- 12.1 Packaging in which or on which Goods are delivered remains the property of Martogg (or may be in possession of Martogg under Agreement with third parties) and must not be used for any goods other than the Goods originally contained in the packaging at the time of delivery.
- 12.2 The Customer must return all returnable Packaging delivered by Martogg as soon as practicable after the Goods have been received by the Customer.
- 12.3 The Customer must compensate Martogg for:
  - (a) the replacement costs of any returnable Packaging (including stillages and pallets) that is not returned by the Customer to Martogg within a reasonable period (as determined by Martogg in its sole and absolute discretion); and
  - (b) repair costs incurred in respect of any Packaging that is returned by the Customer to Martogg in damaged or poor condition.

#### **13. Liability**

- 13.1 Except as specifically set out herein or contained in any warranty statement provided with the Goods, any term, condition, guarantee, or warranty in respect of the quality, merchantability, fitness for purpose, condition, description, assembly, manufacture, design or performance of the Goods, whether implied by statute, common law, trade usage, custom or otherwise, is hereby expressly excluded.
- 13.2 To the extent permitted by law, replacement or repair of the Goods or re-supply of the Goods is the absolute limit of Martogg's liability howsoever arising under or in connection with the sale, use of, storage or any other dealings with the Goods by the Customer or any third party.
- 13.3 To the extent permitted by law, Martogg is not liable for any loss, damage, injury, cost, expense, or Liability suffered by the Customer or any third party of any kind whatsoever, and whether actual or contingent, present or future, fixed or unascertained, and whether based in contract, tort or otherwise arising at law, and howsoever arising out of or in connection with any Agreement, these Terms, or the sale or supply of any Goods, including but not limited to indirect and consequential Liability,

including for loss of turnover, loss of profits, loss of contract, loss of goodwill, or increased cost of workings or any liability to any other party, except where such liability is due to the negligence of Martogg or any of its employees or agents.

- 13.4 Martogg is not liable for any loss or damage suffered by the Customer (including but not limited to consequential Liabilities of the kind described at Clause 13.3 hereof) where Martogg has failed to deliver Goods or fails to meet any delivery date or cancels or suspends the supply of Goods.
- 13.5 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 which cannot be excluded, restricted or modified.

#### **14. Cancellation**

- 14.1 If, through circumstances beyond the control of Martogg, Martogg is unable to affect delivery or supply of Goods (or some of them), then:
- (a) Martogg may (at its sole and absolute discretion) cancel the Customer's order (even if it has already been accepted) and/or any relevant Agreement by notice in writing to the Customer; and
  - (b) the Customer shall release Martogg from any claim for any type of compensation (including but not limited to consequential Liabilities of the kind described at Clause 13.3 hereof) whatsoever arising out of or in connection with the cancelled order/Agreement.
- 14.2 No purported cancellation or suspension of an order or any part thereof by the Customer is binding on Martogg after that order has been accepted.
- 14.3 Martogg, in its absolute discretion may review, alter or terminate the Customer's credit limit or payment terms without notice.

#### **15. Specifications**

- 15.1 All specifications, formulae, drawings, illustrations descriptive matter and particulars contained in Martogg's catalogues, website and marketing documents are indicative only, do not form part of this Agreement, and are not representations or warranties of any kind. Any discrepancy will not entitle the Customer to rescind this Agreement or seek compensation or damages.
- 15.2 The Customer must not reverse engineer any Goods.
- 15.3 All drawings, descriptive matter and particulars supplied, remain Martogg's property and are to be returned to Martogg on demand. The Customer must not publish or communicate any of them to any person or publish or permit them to be copied or communicate them to any other person without Martogg's prior consent in writing.

#### **16. Intellectual Property**

- 16.1 The Customer acknowledges that it has no proprietary right or interest in the Intellectual Property and, further, that nothing in these Terms or any Agreement gives the Customer any right or interest in the Intellectual Property.
- 16.2 The Customer must not register or record or attempt to register or record anywhere in the world the Intellectual Property or any part or any patents, inventions, trade marks or designs derived from or similar to the Intellectual Property or aid or abet anyone else in doing so.
- 16.3 The Customer must not at any time create, sell, manufacture or process any Goods using or taking advantage of the Intellectual Property.
- 16.4 The Customer warrants that, where it provides materials for use by Martogg or provides manufacturing directions, it is legally entitled to do so.
- 16.5 The Customer indemnifies and agrees to keep indemnified Martogg against all liability, losses or expenses incurred by Martogg in relation to, or in any way directly or indirectly connected with, any breach of any intellectual property rights in relation to the Customer's manufacturing directions or material provided by the Customer for the manufacture or supply of the Goods.
- 16.6 Any Intellectual Property provided to the Customer by Martogg in connection with the Goods remains the exclusive property of Martogg and must be returned to Martogg on demand and must not be copied or communicated to any third party without the express written consent of Martogg.

#### **17. Warranty**

- 17.1 Subject to Clause 17.3, Martogg, in its reasonable discretion if it deems necessary, will replace any Goods or re-supply any Goods that do not meet the standard specified in the product description, provided that the Goods may have an acceptable variance ("the Warranty").
- 17.2 Provision of the Warranty is subject to:
- (a) payment in full in accordance with these Terms or any Agreement;
  - (b) written notice from the Customer within 14 days of delivery of any Goods that it believes does not meet specifications or Goods that are defective;
  - (c) the provision of a sample of the Goods to Martogg for testing;
  - (d) correct storage of the Goods in accordance with instructions; and
  - (e) using the Goods in accordance with their intended purpose.
- 17.3 The Warranty excludes damage or alteration to the Goods arising from circumstances outside the control of Martogg, including, without limitation to where the Goods are not used for their intended purpose, or where Goods or any part of them have been treated, processed or changed in any manner.
- 17.4 The Customer warrants to use the Goods in accordance with:
- (a) any instructions provided to it by Martogg from time to time;
  - (b) all government and local regulations, including but not limited to all relevant environmental laws and regulations governing the storage, use, handling and maintenance of the Goods; and
  - (c) all necessary and appropriate precautions and safety measures relating to the storage, use, handling and maintenance of the Goods.

#### **18. Miscellaneous**

- 18.1 The law of Victoria from time to time governs the Terms and 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.
- 18.2 Failure or delay by Martogg to enforce any right, power, discretion, and/or remedy pursuant to these Terms shall not operate as (nor be construed as) a waiver of any such right, power, discretion and/or remedy.
- 18.3 If any of the Terms are unenforceable it shall be read down so as to be enforceable or, if it cannot be so read down, the condition shall be severed from these Terms without affecting the enforceability of the remaining conditions.
- 18.4 A notice must be in writing and handed personally or sent by facsimile, email, or prepaid mail to the nominated or last known address of the addressee. Notices sent by pre-paid post are deemed to be received upon posting. Production by a party of a copy of a facsimile transmission or email message bearing the time and date of dispatch will be conclusive evidence that the transmission or message was sent on that date and time shown.
- 18.5 The Customer may not assign, sub-contract, or licence any rights, benefits, or obligations under these Terms or any Agreement without the prior consent of Martogg, which consent may be withheld at Martogg's sole and absolute discretion.
- 18.6 The Customer irrevocably nominates, constitutes, and appoints Martogg as the Company's attorney to perform all necessary acts to give effect to these Terms.

## **19. Privacy**

- 19.1 Martogg is bound by the Privacy Act 1988 and takes steps to ensure that all personal information obtained in connection with the Customer will be appropriately collected, stored, used, disclosed and transferred in accordance with the Australian Privacy Principles. Such information may be accessed by request to Martogg in accordance with the Privacy Act.
- 19.2 Martogg requires that the Customer comply with the Australian Privacy Principles in connection with any personal information supplied to it by Martogg in connection with this Agreement.

## **20. Trusts**

- 20.1 This Clause 20 applies if the Customer is the trustee of a trust, whether or not Martogg has notice of the trust.
- 20.2 Where the Customer comprises 2 or more persons and any of those persons is a trustee, this Clause 20 applies to such trustee.
- 20.3 The Customer agrees that even though it enters into these Terms and/or an Agreement as trustee of a trust, the Customer will also be liable personally for the performance and observance of every obligation to be observed and performed by the Customer, whether express or implied, in these Terms or under any Agreement.
- 20.4 The Customer warrants that it has a right of indemnity against the property of the trust and that right has not been, and in the future will not be, excluded, modified, released, lost, or diminished (whether by agreement, breach of trust, or otherwise).
- 20.5 The Customer must not, without Martogg's prior written consent:
  - (a) resign or be removed as trustee of the trust or appoint or allow the appointment of a new or additional trustee of the trust;
  - (b) amend or revoke any of the terms of the trust;
  - (c) vest or distribute the property of the trust or advance or distribute any capital of the trust to a beneficiary or resettle any of the property of the trust;
  - (d) permit a beneficiary to have the use, occupation, employment, or possession of the property of the trust;
  - (e) do or permit or omit to do an act or thing in breach of the terms of the trust, or which would permit the trustee to be removed as trustee of the trust;
  - (f) exercise or permit or allow to be exercised a power to change the vesting date of the trust or provide for an early determination of the trust;
  - (g) lend any money, give any guarantee, or incur any debt other than in the ordinary course of business of the trust; or
  - (h) pay any of the income of the trust to any beneficiary of the trust if such payment will prejudice or affect the Customer's ability to pay all amounts due to Martogg.

## **21. Commencement**

- 21.1 These Terms are effective from 8 December 2021.