



## WHALE LOGISTICS (AUSTRALIA) PTY LTD

### STANDARD TERMS AND CONDITIONS

#### 1. Definitions

**Agreement** means these Terms and Conditions, together with any Authority and Customer credit application.

**Authority** means the authority by which the Customer appointed Whale to act on its behalf.

**Carriage** means carriage by vehicles and conveyances of all kinds including acts in furtherance of an act of carriage by another or a specific means, whether by air, sea or land transport, or any combination of such transport modes

**Connected Party** means in relation to the Goods the Owner, exporter, importer, supplier, purchaser, carrier or any agent of any of the aforementioned parties, other than Whale.

**Consequential Loss** means any loss or damage which:

- (a) does not arise naturally or in the usual course of things; or
- (b) constitutes, or arises from or in connection with, a loss in revenue, profit or opportunity or a loss of goodwill or business reputation, even if such loss or damage arises naturally or in the usual course of things.

**Container** means any container, flexitank, trailer, transportable tank, flat, pallet or any equipment used to carry or consolidate goods and any equipment of or connected thereto.

**Customer** means:

- (a) Where there is an Authority, the customer named in the Authority, including its employees, officers, agents and contractors.
- (b) Where there is no Authority, the person instructing Whale to provide the Services; and

for the avoidance of doubt, the Customer may also be the Owner.

**Dangerous Goods** means any Goods which are, or may become, hazardous, volatile, explosive, flammable, radioactive, likely to harbour or encourage vermin or pests, or capable of posing a risk or causing damage to any person or property.

**Fees** means Whales' fees for the Services as set out in any quotation, rates schedule, tariff or as otherwise notified to the Customer or a Connected Party and any other amounts payable under these Terms and Conditions. A reference to Whale's fees includes any taxes, including goods and services tax, payable in respect of the Services.

**Force Majeure Event** means anything outside of the reasonable control of Whale including, without limitation, fire, flood, drought, storm (or other adverse weather conditions), lightning, act of God, peril of sea or air, explosion, radioactive or chemical contamination, sabotage, accident, embargo or trade restriction, blockade, labour dispute, strike or shortage, civil commotion, curfew, act of war, actual or threatened act of terrorism, pressure waves caused by aircraft or other devices, meteorites, epidemic, pandemic, the act of an Authority or Law to contain a pandemic or epidemic, plague, quarantine or expropriation, confiscation or nationalisation of container park assets by government authority



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**Goods** means the goods, including packaging, pallets or containers, the subject of the Services.

**Government Authority** means any government agency, authority, department or body, exercising jurisdiction in any nation, state, port or airport.

**Heavy Vehicle National Laws** means the *Heavy Vehicle National Law Act 2012* (Qld) and the respective Australian state and territory laws adopting the schedule to that Act together with the regulations made pursuant to any of the aforementioned Acts.

**Law** means any law, regulation, rule or international convention.

**Loss** means any loss, cost, damage, expense, claim, demand, action, proceeding or liability of any kind, (including legal costs on an indemnity basis) and whether actual, prospective or contingent and whether ascertained or unascertained.

**Owner** means the owner, importer or exporter of the Goods, or a person authorised to act on behalf of the owner or importer of the Goods.

**Perishable Goods** means any Goods liable to waste, deterioration or spoilage, and includes without limitation fruit, vegetables, dairy products, meat, and animals.

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

**Services** means the work performed by Whale in relation to the Goods, including facilitating the import, export, transport, or storage of the Goods; and any ancillary acts for those purposes, including preparing any documentation or providing any information to a Government Authority.

**SBC contract** means a contract that is either a "small business contract" or a "consumer contract" as defined in section 23(3) of Schedule 2 to the *Competition and Consumer Act 2010* (Cth), but does not include:

- (a) a contract of marine salvage or towage;
- (b) a charter party of a ship;
- (c) a contract for the carriage of goods by ship;
- (d) a contract that is not a standard form contract; or
- (e) a "small business contract" where the Customer does not employ fewer than 20 people.

**Subcontractor** means a third party (and their employees, agents and contractors Whale) engaged to provide all or part of the Services.

**Terms and Conditions** means these terms and conditions of trade.

**Transport Document** includes a bill of lading, waybill, consignment note, or similar Carriage document.

**Whale** means Whale Logistics (Australia) Pty Ltd ABN 22 605 301 460 and its nominees, agents and employees.



## 2. General

- 2.1 Whale is not a common carrier. Whale will not be liable as a common carrier.
- 2.2 These Terms and Conditions take priority over and will prevail to the extent of any inconsistency with the Authority, any credit application made by the Customer, the Customer's terms and conditions or other document issued by the Customer, and any terms and conditions set out in any Transport Document, except a Transport Document issued by Whale.
- 2.3 The Agreement is governed by the laws of New South Wales, Australia. Whale and the Customer submit to the jurisdiction of the courts of New South Wales and of the Federal Court of Australia.
- 2.4 A variation of these Terms and Conditions will only be valid if in writing and signed by each party or signed by a person with the authority to bind each party.
- 2.5 Whale may assign its rights and obligations under the Agreement without the Customer's consent. The Customer must not assign its rights and obligations under the Agreement without Whale's written consent.
- 2.6 Any notices under these Terms and Conditions must be in in English and in writing.
- 2.7 Subject to clause 16, all rights, indemnities and limitations of liability contained in these Terms and Conditions will have their full force and effect, despite:
- (a) any breach of term or condition of these Terms and Conditions, the Agreement, or any collateral agreement by Whale;
  - (b) the performance or non-performance of the Services;
  - (c) the delivery or non-delivery of the Goods; or
  - (d) the expiry or termination of the Authority.
- 2.8 Without limiting the effect of clause 2.7, clauses 2.5, 3.14, 4.2, 6.10, 7.3, 7.4, 7.5, 9.2, 10, 11, 13, 14, 15 and 16 of these Terms and Conditions will survive termination.
- 2.9 If a condition or part of a condition of this Agreement is unenforceable, it must be severed from and does not affect the rest of the Agreement.
- 2.10 Whale is not bound by any waiver, discharge or release of a condition or any agreement which purports to change this Agreement, unless it is in writing and signed by or for Whale.
- 2.11 A reference in this Agreement to any law includes any statutory modification, substitution or re-enactment of it.
- 2.12 If the Customer is a trustee of a trust, the Customer:
- (a) will provide Whale with a copy of the trust deed and any documents amending that trust deed;
  - (b) notify Whale of any change in trustee of the trust;
  - (c) agrees that these Conditions apply to, and all requests for Services placed by the Customer with Whale are placed by, the Customer in its personal capacity and as trustee of the trust.



2.13 Any party that enters this Agreement as a disclosed or undisclosed agent agrees to be joint and severally liable for the debts, liabilities and obligations of the principal under this Agreement.

### 3. Services

3.1 Services are provided by Whale subject to these Terms and Conditions.

3.2 Without limitation to other methods of acceptance, by instructing Whale to provide the Services the Customer agrees to be bound by the Terms and Conditions.

3.3 The Goods are at the risk of the Customer.

3.4 Whale may agree or refuse to provide Services at its discretion.

3.5 Whale is authorised by the Customer to choose the method for performance of the Services at Whale's complete discretion.

3.6 The Customer authorises Whale to open any package containing Goods, and do any other thing in order to inspect or weigh the Goods.

3.7 The Customer agrees that:

- (a) the value of the Goods will not be declared or inserted into a Transport Document or contract for the purpose of extending a carrier's liability unless the Customer provides express written instructions to Whale to do so, and if required, the carrier agrees;
- (b) where a Subcontractor's or carrier's charges may be determined by the extent of liability assumed by the Subcontractor or carrier, no declaration of value will be made for the purpose of extending the liability of the Subcontractor or carrier, and the Goods will be dealt with at the Customer's risk for minimum charges, unless the Customer provides written instructions to the contrary to Whale;
- (c) Whale reserves the right to not make any declaration or take any action in respect of the Customer's Goods unless the Customer has provided Whale with sufficient notice, written instructions and the documents necessary to take that action in relation to those Goods.

3.8 At any time, Whale may, acting reasonably, deem that certain Goods are Dangerous Goods.

3.9 Whale at its reasonable discretion may destroy or otherwise deal with any Goods Whale considers are Dangerous Goods, without notice or compensation to the Customer.

3.10 Whale's delivery obligations are satisfied if Whale delivers the Goods to the delivery address instructed by the Customer, and a person at that address provides a receipt or signs a delivery docket, or if authorised by the Customer, the Goods are left at the delivery address without obtaining a receipt or signed delivery docket.

3.11 If a person at the delivery address cannot or refuses to take delivery of the Goods, or the Goods cannot be delivered for any other reason, the Customer authorises Whale to deal with the Goods at Whale's reasonable discretion, including storing, disposing of, or returning the Goods.

3.12 The Goods may be stored at any place at the absolute discretion of Whale at the Customers' expense.

3.13 If Whale stores the Goods, Whale may require that the Customer remove the Goods from storage by giving notice delivered to an address provided by the Customer to Whale.



- 3.14 Without limiting clause 13, where Whale has not received authority from the Shipper, exporter or Supplier of the Goods to release the Goods to the Customer, Owner or consignee and the Customer, Owner or consignee of the Goods is insolvent, placed under external administration, bankrupt or deceased, Whale is authorised to return any Goods to the Shipper, exporter or supplier of those Goods.
- 3.15 The Customer irrevocably appoints Whale with the power and authority to take any action and execute any document in the name of and on behalf of the Customer as required by Whale to provide the Services.
- 3.16 The Customer agrees that Whale may receive and retain for its own account remuneration, allowances, brokerages and commissions from shipping and forwarding agents, shipping lines, insurance brokers, airlines and any other persons with whom Whale deals or that are payments of the nature commonly received by freight forwarders and that Whale is not required to disclose the receipt and retention of such amounts to the Customer, even, without limitation, if acting as agent for the Customer.
- 3.17 The Customer agrees that Whale may charge its Fees and/or recover its administrative costs by way of increasing an amount charged to Whale by third parties, such as a disbursement, when invoicing that amount to the Customer and that there is no obligation on Whale to separately show this portion of the Fee on any invoice.
- 4. Customer Obligations**
- 4.1 The Customer will provide Whale with all assistance, information and documentation necessary to enable Whale to provide the Services, and punctually comply with any Law or request from a Government Authority.
- 4.2 The Customer is under a continuing obligation to provide any information which may materially affect the capacity of the Customer to perform its obligations under the Agreement.
- 4.3 The Customer will keep confidential Whale's fees or charges and any waiver, discount, release or indulgence provided by Whale in relation to the provision of the Services.
- 4.4 If Goods require temperature control, the Customer will provide written notice to Whale of the nature of the Goods and the particular temperature range to be maintained.
- 5. Instructions**
- 5.1 Any instructions given by the Customer must be in writing in English and be legible.
- 5.2 Whale has the discretion to refuse to accept the Customer's instructions.
- 5.3 Sufficient notice of instructions must be given by the Customer to Whale to enable Whale to follow those instructions. If insufficient notice is given and Whale attempts to adopt the Customer's instructions, Whale is not deemed to have accepted the instructions.
- 5.4 If Whale accepts the Customer's instructions on one occasion, Whale will not be bound by those instructions when providing Services in the future.
- 5.5 If Whale accepts the Customer's instructions to perform the Services in a particular way, it will give priority to that method, but may depart from that method at its reasonable discretion.



## 6. Fees

- 6.1 Whales' Fees are earned on the earlier of the commencement of the performance of the Services (or part thereof), or when the Goods are delivered to Whale or its subcontractors.
- 6.2 Whales' Fees may include any disbursements and other amounts that Whale is required to pay third parties in connection with the Services. Whale at its discretion may vary its Fees if the amount of any such disbursements change.
- 6.3 Whale's Fees must be paid within 7 days of an invoice or as otherwise agreed in writing (the **Due Date**). Time is of the essence in respect of the Customer's obligation to make any payment to Whale in connection with this Agreement.
- 6.4 Whale at its discretion may determine its Fees, including by weight, measurement or value, including without limitation, by volumetric conversion.
- 6.5 Whale may re-weigh, re-measure or re-value the Goods at any time, and amend its fees at its reasonable discretion.
- 6.6 Any information contained in a quotation provided by Whale in relation to the Fees applies to the specific item, weight and volume quoted, designated Services and standard of Services, and is only valid until the earlier of 14 days after being provided, the quote being withdrawn or the quote expiring.
- 6.7 A quotation is not an offer and is not binding on Whale. A quotation may change based on changes to freight, insurance, warehousing, fees, and any other charges, with or without notice to the Customer.
- 6.8 Unless otherwise stated, Whale's Fees are exclusive of goods and services tax.
- 6.9 The Customer remains responsible for the payment of Fees:
- (a) even where an arrangement is made for the Fees to be paid by another person;
  - (b) whether or not the Goods are delivered or damaged or the Services performed as instructed.
- 6.10 If the Fees are not paid in full within 7 days of the Due Date then, without limitation to its rights, Whale may charge interest on the late payment at the published business overdraft rate of the Commonwealth Bank of Australia.
- 6.11 The Customer will not defer, set-off or withhold payment of any amount payable to Whale by reason of any claim the Customer has, or claims it has, against Whale.
- 6.12 Any credit terms provided by Whale may be terminated at any time by Whale.

## 7. Subcontractors

- 7.1 The Customer authorises Whale, on any terms whatsoever, including terms that limit the liability of a third-party service provider, to:
- (a) subcontract all or part of the Services to a Subcontractor; and / or
  - (b) as the agent of the Customer, contract with a third-party service provider on behalf of the Customer.
- 7.2 The Customer authorises a Subcontractor to subcontract all or part of the Services.



- 7.3 All exclusions or limitations on the liability of Whale in these Terms and Conditions extend to protect:
- (a) all Subcontractors;
  - (b) the agents, employees and servants of any Subcontractor or Whale; and
  - (c) any person engaged to provide all or part of the Services.
- 7.4 The Customer undertakes that it will not make any claim against, or impose any liability upon, any Subcontractor in connection with the provision of the Services or the Goods.
- 7.5 The Customer undertakes that it will indemnify any Subcontractor from and against any Loss if a claim is made against a Subcontractor by any party (including the Customer) in connection with the provision of the Services or the Goods.
- 7.6 For the purpose of clauses 7.3 and 7.5, Whale acts as trustee on behalf of and for the benefit of any Subcontractor, and to this extent each Subcontractor is deemed to be a party to this Agreement.
- 8. Intellectual Property**
- The Customer agrees that it retains all copyright and intellectual property subsisting in all documents and things created by, or for, Whale in connection with the performance of the Services, including copyright and intellectual property that now exists or that later comes into existence.
- 9. Warranties**
- 9.1 The Customer (on behalf of itself, the Owner, and any Connected Parties) warrants to Whale that:
- (a) it is the owner of the Goods, or is the authorised agent of the owner of the Goods and is authorised to complete and sign documentation related to the Goods and the Services;
  - (b) it enters into the Agreement on its own behalf, or in its capacity as the authorised agent of the owner of the Goods;
  - (c) it and all Connected Parties have complied with all Laws relating to the Goods, including the nature, condition, packaging, handling, storage and Carriage of the Goods;
  - (d) in engaging the Services from Whale, it will not procure Whale to perform any act in breach of any Laws;
  - (e) it and all Connected Parties will observe all Laws and requirements of Government Authorities;
  - (f) all information and documentation provided by the Customer and Connected Parties to Whale is accurate and complete, including without limitation any Container weight declaration, and neither it nor a Connected Party has omitted to provide any requested or material information;
  - (g) the Goods are packed to endure the ordinary risks of handling, storage and the Services, having regard to the nature of the Goods, including without limitation, that in respect of temperature controlled goods, the Container has been properly pre-cool or pre-heated and the Container's thermostatic controls have been correctly set;



- (h) the Goods are not Dangerous Goods, unless Whale has agreed in writing to provide the Services in respect of those particular Dangerous Goods, and in which case, warrants that it has made full disclosure of Dangerous Goods and such Goods are distinctly marked; and
- (i) all Goods are adequately and accurately marked, labelled or branded;
- (j) it will ensure, so far as is reasonably practicable, the safety of any road transport performed for or on behalf of the Customer and it will meet its obligations under the Heavy Vehicle National Law where the Customer is the consignor, consignee, packet or loader of the Goods.

9.2 On request by Whale, the Customer will provide evidence to Whale of compliance with the warranties in clause 9.1.

## 10. Liability

- 10.1 Despite any other clause in these Terms and Conditions, where the Services involve the international Carriage of Goods, the liability limits of Whale will not exceed the maximum liability limit of Whale or the Carrier as determined under any international convention applying to relevant Carriage of the Goods.
- 10.2 To the extent permitted by Law, Whale excludes all liability in respect of any claim made against Whale, its employees, agents and Subcontractors, including without limitation, liability for fundamental breach of contract, or a negligent, unlawful, reckless or wilful act or omission.
- 10.3 Without limitation, Whale excludes all liability for loss, damage or delay to the Goods that occurs while the Goods are in the physical custody of a third party, including a Subcontractor.
- 10.4 Whale is not liable for Consequential Loss suffered by the Customer, regardless of whether or not Whale had knowledge that such damage may be incurred.
- 10.5 Whale excludes from this Agreement all conditions, warranties, terms and consumer guarantees implied by Laws, general law or custom except any the exclusion of which would contravene any Laws or cause this condition to be void (**Non-Excludable Condition**).
- 10.6 Whale's liability for any breach of a Non-Excludable Condition is limited, at Whale's option, to supplying the particular Service again, or the cost of supplying the particular Service again.
- 10.7 Without limiting the generality of clauses 10.1 – 10.6, Whale shall have no liability or responsibility by virtue of the fact that there may be a change in the rates of duty, wharfage, freight, railage or cartage, or any other tariff before or after the performance by Whale or any act involving a less favourable rate or tariff, or by virtue of the fact that a saving may have been effected in some other way had any act been performed at a different time and whether its performance of any of the acts aforesaid is delayed or precipitated through the negligence of Whale or its servants or agents or however caused.
- 10.8 Whale will not be liable for omitting to inspect or take any other action in respect of Goods where Goods have been damaged or pillaged, unless the Customer provides Whale with written instructions to take that action in relation to those Goods and Whale accepts those instructions.
- 10.9 Where the liability of Whale is not excluded by the Agreement, Law or otherwise, the liability of Whale is limited to the lesser of Australian \$100 or the value of the Goods at the time the Goods were received by Whale.
- 10.10 Whale will not be in breach of any of its obligations to the Customer or liable for any Loss (including Consequential Loss) suffered by the Customer arising from or connected with Whale's compliance with



any Law, including without limitation disclosing confidential information to a Government Authority or taking or not taking steps to ensure compliance with the Heavy Vehicle National Laws.

- 10.11 Without limitation to any other clause of the Agreement, Whale will be discharged from all liability in connection with the performance of the Services or the Goods unless:
- (a) notice of any claim is received by Whale within 7 days of the earlier of the delivery of Goods, the date the Goods should have been delivered, or where the claim does not relate to loss or damage to Goods, the event giving rise to the claim; and
  - (b) suit is brought and written notice is received by Whale within 9 months of the earlier of the delivery of the Goods, the date the Goods should have been delivered, or where the claim does not relate to loss or damage to Goods, the event giving rise to the claim.
- 10.12 Whale will not be liable for any delay or failure to perform an obligation under the Agreement caused by a Force Majeure Event.
- 10.13 If a Force Majeure Event causes a delay in the performance of an obligation of Whale exceeding 10 days, Whale may terminate the provision of the Services by notice to the Customer.
- 10.14 Without limitation to any other clause in this Agreement, for Carriage by air, if the Carriage involves an ultimate destination stop in a county other than the country of departure, the Warsaw Convention or the Montreal Convention may be applicable and the relevant convention governs, and in most cases, limits the liability of air Carriers in respect of loss or damage to cargo.
- 11. Indemnity**
- 11.1 The Customer indemnifies Whale from and against (and must pay on demand for) all Loss arising directly or indirectly from or in connection with the Goods or the performance of the Services (including Consequential Loss), including Loss in connection with a breach of contract, or a negligent, unlawful, reckless or wilful act or omission by Whale or its employees, agents and contractors.
- 11.2 Without limitation to clause 11 the Customer indemnifies Whale from and against (and must pay on demand for) any Loss arising from
- (a) all costs and liabilities and charges in connection with Containers involved in the Carriage including:
    - (1) amounts payable by Whale, for the use of Containers involved in Carriage as set out in the contract between Whale and the owner, lessee or operator of that Container;
    - (2) hire and other charges for the Customer's use of the Containers provided by Whale pursuant to their contracts with the owner, lessee or operator of that Container;
    - (3) charges related to the failure or delay in returning the Container to, or at the direction of, Whale or the state in which the Container is returned;
  - (b) any claim against Whale by a person who claims to have an interest in the Goods;
  - (c) breach of this Agreement, including any warranty provided by the Customer;
  - (d) any Loss, cost or liability incurred or suffered by Whale as a result of releasing or delivering the Goods to the Customer or at the direction of the Customer;



(e) any claim for general average and will provide any security requested by Whale for the release of any Goods that are the subject of a claim for general average.

11.3 The Customer indemnifies Whale from and against (and must pay on demand the amount of) all duty, GST, and any other fees and taxes incurred in connection with the Goods payable to a Government Authority.

11.4 The Customer indemnifies Whale from and against (and must pay on demand for) all costs payable to third parties in relation to the Carriage, storage, treatment or entry of the Goods other than amounts that are expressly included in the Fees charged by Whale.

11.5 The indemnities in these clauses 11 continue whether or not the Goods are pillaged, stolen, lost or destroyed.

## 12. Insurance

12.1 Whale will not arrange insurance in the respect of the Goods. The Customer is responsible for arranging insurance in respect of the Goods.

12.2 If Whale refers the Customer to an insurance company or broker, Whale makes no warranty or representation in respect of the insurer or broker or the insurance offered.

## 13. Lien

13.1 Whale has:

- (a) a particular and general lien on all Goods and documents relating to the Goods; and
- (b) a right to sell those Goods and documents by public auction or private sale (at Whale's discretion) without notice and apply the proceeds of sale;

in respect of all sums due and owing from the Customer.

13.2 The lien will also cover Whale's costs and expenses relating to the exercise of its lien and right of sale, including Whale's reasonable legal fees.

13.3 For the purposes of the lien, Whale will retain constructive possession of the Goods and the lien and rights granted by this clause will survive delivery of the Goods. Whale is entitled to retain the proceeds of sale of the Goods in respect of all sums due and owing from the Customer.

## 14. PPSA

14.1 Terms used in clause 14 that are defined in the PPSA have the same meaning as in the PPSA.

14.2 Without limitation to other rights of Whale, from the time the Goods are in the possession of Whale or a Subcontractor, the Goods are subject to a continuing security interest in favour of Whale for the payment of all amounts due and owing by the Customer under the Agreement.

14.3 The Customer acknowledges and consents to Whale's registration and perfection of Whale's security interest under the Agreement for the purposes of the PPSA.

14.4 The Customer will not grant a security interest to another person, or allow any encumbrance to arise, in respect of the Goods.



- 14.5 To the extent permitted by law, the Customer irrevocably waives any right it may have to:
- (a) receive notices or statements under sections 95, 118, 121(4), 124(4), 125, 130, 132(3)(d) 132(4) and 135 of the PPSA; and
  - (b) redeem the Goods under section 142 of the PPSA;
  - (c) reinstate this Agreement under section 143 of the PPSA; and
  - (d) receive a verification statement.
- 14.6 The Customer will do all things and execute all documents reasonably necessary to give effect to the security interest created under this Agreement or comply with any reasonable request by Whale in connection with the PPSA.
- 15. Uncollected goods**
- 15.1 Whale may at its discretion sell or otherwise dispose of Perishable Goods without notice to the Customer where the Goods are not collected immediately upon arrival, are insufficiently or incorrectly addressed or are not identifiable.
- 15.2 Without limitation to clause 15.1, Whale may at its discretion sell or return Goods that cannot be delivered because they are insufficiently or incorrectly addressed, are not identifiable, are uncollected or not accepted after 21 days' notice to the Customer or where the Customer fails to pay any cost or do any action reasonably necessary for Whale to deliver the Goods.
- 15.3 Where Whale sells Goods under clauses 13, 15.1 or 15.2;
- (a) it does so as principal, not as agent, and is not the trustee of the power of sale;
  - (b) the Customer must pay all costs, charges and expenses incurred by Whale in connection with the storage, sale or return of the Goods, which may be deducted from the proceeds of the sale of the Goods;
  - (c) Whale is entitled to recover any deficit from the Customer where the proceeds of sale of the Goods do not satisfy the amounts payable to Whale.
- 16. SBC Contracts**
- Whale does not exclude or limit the application of any compulsory applicable Laws, including Schedule 2 of the *Competition and Consumer Act 2010* (Cth), where to do so would contravene those Laws or cause any part of this Agreement to be void.
- If the Agreement is a SBC Contract, then:
- 16.1 The definition of "Loss" is amended to mean any actual or ascertainable loss, cost, damage, expense, claim, demand, action, proceeding or liability of any kind (including legal costs on an indemnity basis).
- 16.2 Clause 2.5 is modified, so that neither party may assign its rights or obligations under the Agreement without the written consent of the other party, which consent must not be unreasonably withheld.
- 16.3 Clause 3.12 is amended so that "absolute" is replaced with "reasonable".
- 16.4 Clause 6.1 is modified, so that the Fees are earned when the corresponding Service is performed or attempted to be performed, or where applicable, the corresponding disbursement is incurred.



- 16.5 If a variation to a quote or fee under clauses 6.4 or 6.5 is material, where it is reasonably practical, Whale shall give notice to the Customer of that variation.
- 16.6 If the Customer objects to a variation to a quote or fee under clauses 6.4 or 6.5, but does not provide Whale with acceptable alternative directions in respect of the goods, Whale in its discretion may, deliver, return, store or otherwise deal with the Goods, and the Customer shall be liable for all fees earned and costs incurred by Whale in doing so.
- 16.7 Clauses 7.4 and 7.5 are modified, so that the Customer:
- (a) may make a claim against or impose liability upon any Subcontractor; and
  - (b) is not required to indemnify any Subcontractor from and against any Loss,  
  
to the extent that the claim, liability or Loss was directly caused by, or in connection with, a grossly negligent, unlawful, or wilful act or omission by the Subcontractor.
- 16.8 Clause 10.2 is modified so that Whale's liability is not excluded to the extent that it was directly caused by or in connection with a grossly negligent, unlawful, or wilful act or omission by Whale or its employees, agents and contractors.
- 16.9 Clause 10.4 is modified so that Whale will not be liable for Consequential Loss or indirect Loss, unless Whale had received written notice that such loss might be incurred.
- 16.10 Clause 10.9 is modified so that Whale's liability is limited to the lesser of the actual loss suffered by the Customer or the value of the Goods at the time the Goods were received by Whale.
- 16.11 Clause 10.11 does not apply, and, without limitation to any other clause of the Agreement, Whale will be discharged from liability in relation to any claim:
- (a) where the loss to the Customer results from the act of a Subcontractor; and
    - (1) Whale's right to make a claim against that Subcontractor is subject to time limitations; and
    - (2) the Customer does not make its claim against Whale within a period reasonably sufficient to allow Whale to make a corresponding claim against the Subcontractor within any applicable time limitation period, or
  - (b) in all other cases, where the Customer does not make its claim within 2 years from the earlier of the delivery of the Goods, if the Goods are not delivered, the date the Goods should have been delivered or where the claim does not relate to loss or damage to Goods, the time of the event giving rise to the claim.
- 16.12 The Customer is not required to indemnify Whale under clause 11.1 to the extent that the Loss was caused by or in connection with a breach of contract, or a negligent, unlawful reckless or wilful act or omission by Whale or its employees, agents and contractors or due to Whale refusing to follow a specific lawful and reasonable direction provided by the Customer.
- 16.13 Clause 13.1(b) is modified so that Whale may only exercise its right of sale under a lien over Goods after Whale has given 21 days' notice in writing to the Customer of its intention to do so.