

TERMS AND CONDITIONS OF TRADE ("TRADING TERMS")

1. **WORDS USED IN THIS AGREEMENT**
- 1.1. "Amount Owing" means the price of Goods plus all costs, hire charges, insurance charges, repairs, expenses, disbursements and penalties for which you are liable to pay or
- 1.2. "Consumer Legislation" means any statute applicable from time to time relating to consumer rights in the supply of goods, including the Competition and Consumer Act 2010 and the Australian Consumer Law as in force in each State and Territory.
- 1.3. "Contract" means the contract that is formed between us and you when we supply Goods to you, the terms of which are these Trading Terms.
- 1.4. "Customer", "you" or "your" means the purchaser of any Goods or services from us and includes any representative, agent or employee of the purchaser.
- 1.5. "Default" means:
- (a) you are unable to pay your debts as they fall due;
 - (b) you are in breach of your obligations under any Contract or any other agreement with us;
 - (c) you have indicated by notice or conduct that you no longer intend to comply with your obligations under any Contract or any other agreement with us;
 - (d) an administrator, liquidator or provisional liquidator has been appointed in respect of you or your Guarantor or steps are being taken to have such an appointment made;
 - (e) a receiver, receiver and manager, administrator or controller has been appointed in respect of any of your assets or your Guarantor's assets or such steps are being taken to have such an appointment made;
 - (f) an application has been made for (or resolution passed for) you or your Guarantor to be bankrupted, liquidated, dissolved or deregistered or steps are being taken to have such an application made or resolution passed;
 - (g) you are acting in any way which is detrimental to us or our Goods;
 - (h) you have been convicted of a criminal offence, or
 - (i) all or substantially all your assets have been acquired by another entity (whether governmental or private) or otherwise effective control of your business has been transferred or agreed to be transferred to any third party.
- 1.6. "Force Majeure Event" means any event outside our reasonable control including acts of God, declared or undeclared war, fire, flood, storm, landslide, earthquake, hurricane, cyclone, riot, power failure, defaults of manufacturers and suppliers, the inability to obtain equipment, supplies or other facilities (not caused by our failure to pay), industrial action and labour disputes, theft or any criminal act or any other event beyond our control that may prevent or delay the supply of Goods to you.
- 1.7. "Goods" means all parts and other goods, products, property or services supplied by us to you.
- 1.8. "GST" means any tax, levy, charge or impost implemented under *A New Tax System (Goods and Services Tax) Act 1999 (Cth)* (GST Act) or any legislative instrument of the Parliament of the Commonwealth of Australia substantially in the form of, or which has a similar effect to, the GST Act.
- 1.9. "Guarantor" has the meaning defined in the Guarantee and Indemnity enclosed with these Trading Terms.
- 1.10. "PMSI" has the meaning in the PPSA.
- 1.11. "PPSA" means the *Personal Property Securities Act 2009 (Cth)* and its associated regulations and amendments.
- 1.12. "Proceeds" has the meaning in the PPSA.
- 1.13. "Quote" includes any offer or tender for the supply of Goods by us to you and any drawings or specifications listed therein.
- 1.14. "Security Interest" has the meaning in the PPSA.
- 1.15. "Valspar", "we", "us" or "our" means Valspar Paint Australia Pty Ltd ACN 000 035 914, Valspar (WPC) Pty Ltd ACN 007 527 371 or any of their related bodies corporate (within the meaning of Section 50 of the Corporations Act 2001 (Cth)).
2. **CUSTOMER'S AUTHORITY**
- 2.1. You warrant that you are either:
- (a) the Customer; or
 - (b) the agent of the Customer and authorised to accept and are accepting these Trading Terms personally and as agent of the Customer.
- 2.2. If you are a trustee and are acting in your capacity as trustee of a trust, you warrant you have full power to enter into any Contract and that you (and the trust) and all the trust's real and personal property shall be bound by and subject to any Contract both personally and as the trustee, irrespective of whether or not you disclose the existence of the trust at the time you accept these Trading Terms or at the time you enter into any other contract with us.
- 2.3. You must not assign any of your rights or obligations under a Contract without our prior written consent.
- 2.4. You must advise us of any alteration to your entity structure, legal identity or status under any of any revocation of an agent's authority to purchase Goods from us on your behalf. Our conduct alone shall not be deemed acceptance of such alteration or revocation and until your notification is received and accepted by us in writing, you shall remain liable for any Amount Owing.
3. **ACCEPTANCE**
- 3.1. All Goods are supplied on the basis of Contracts with you and any order for Goods received by us from you and/or use of your credit account with us (if any) constitutes acceptance of the terms of a Contract, including these Trading Terms.
4. **PRICE**
- 4.1. Unless otherwise agreed by us in writing (via Quote or otherwise), the price of the Goods or services shall be as provided in our price ruling at the date of supply of the Goods. Unless specifically stated otherwise, all prices stated are in Australian dollars.
- 4.2. Our prices are based on costs and charges at the date of supply of the Goods. Unless specifically stated as a fixed price, the price (including any price specified in a Quote) will be increased by the amount of GST and other applicable taxes and duties. We may also increase the price as a result of:
- (a) any fluctuation affecting the cost of supply, production or delivery that occurs between our acceptance of the order and the date of delivery including fluctuations in currency exchange, prices of materials and services, labour costs and government charges or regulations; and
 - (b) if you are not paying by cash, any and all costs incurred as a result of your method of payment, including without limitation, any credit card costs.
5. **AUTHORITY TO ENTER**
- 5.1. You irrevocably authorise us to enter your premises at any time to deliver Goods or for any other purposes that form the subject matter of a Contract, including these Trading Terms.
- 5.2. Unless otherwise agreed in writing, you agree to:
- (a) provide suitable access, information, documents and facilities required by us to properly complete or co-ordinate our site access including use of goods or passenger lifts, cranes, hoists and scaffolding, rubbish removal facilities, temporary power and water supply, abutments or safety lighting to allow us to safely and efficiently perform any purpose that forms the subject matter of a Contract; and
 - (b) provide or obtain all consents or other authorities required to deliver the Goods to your site including approvals from owners, occupiers and others.
6. **DELIVERY AND RISK OF GOODS**
- 6.1. Unless specified in writing:
- (a) delivery costs are not included in the price of Goods or services; and
 - (b) delivery shall be deemed complete when we give possession of the Goods to you at our premises or at your premises (if we agree to deliver the Goods to you via carrier or otherwise). Risk in the Goods passes to you on delivery.
- 6.2. Where we do agree to deliver or arrange delivery of the Goods to you:
- (a) we will be liable for the Goods during transit and attempt to meet any reasonable delivery or target completion date(s) made known to us and agreed by us. In the absence of any agreed date(s), we will deliver the Goods within a reasonable time. Unless expressly agreed we will not be liable for liquidated or any other damages or compensation delays.
 - (b) We reserve the right to deliver the Goods by instalments and each instalment shall be deemed to be a separate Contract. Failure by us to deliver one or more instalments shall not entitle you to cancel any Contract relating to the Goods.
 - (c) The time for completion of delivery shall be extended for any event directly or indirectly causing delay including but not limited to a Force Majeure Event.
 - (d) You will be liable for any extra costs incurred, due to circumstances beyond our reasonable control, to engage other resources or to work outside our ordinary working hours to endeavour to meet your completion target.
7. **HEALTH AND SAFETY AND THE ENVIRONMENT**
- 7.1. You will ensure that the Goods are used in accordance with the safety and environmental instructions provided by us or the manufacturer and only for the purpose and within the capacity for which they were designed.
8. **RECEIPT OF GOODS, RETURNS, VARIATIONS & CANCELLATION OF ORDERS**
- 8.1. All Goods must be carefully checked upon receipt. You shall check that all Goods (as detailed on the delivery docket) are correct in name, colour, quantity, size, mix, finish, and free from faults at the time of delivery.
- 8.2. You acknowledge that there may be minor variations, within industry standards, between the Goods and samples and colour indications shown to you. We may, at our discretion, supply equivalent alternative options.
- 8.3. No claims for returns, variations or cancellations will be accepted once Goods have been converted in any way. We shall be at liberty to decline or refuse such a request as we think fit. We may charge a re-stocking fee for any returns or variations we accept.
- 8.4. Returns will only be accepted if the Goods are not in accordance with your order and are returned within 7 days of receipt of the Goods. You shall afford us the opportunity to inspect the Goods within a reasonable time. If you fail to comply with this provision, the Goods shall be conclusively presumed to be in accordance with the Contract and free from any defect or damage.
- 8.5. You may not cancel or vary any order without our written consent. If you do so, in addition to any other rights we have, we may retain any deposit paid. You will be liable for all costs or losses (including profit and fee) incurred by us as a result of you varying or cancelling any order.
- 8.6. We may at any time and without reason or notice to you any Guarantor cancel without liability, any Contract either in whole or part for the supply of Goods to you. Any cancellation under this clause shall not affect our claim for any Amount Owing or for any damages for any breach of your obligations under a Contract.
9. **CREDIT FACILITIES**
- 9.1. We may grant, or decline to grant, credit to you. We may in our complete discretion, at any time and without reason or notice to any Guarantor, and without prejudice to any other right we have in law or equity:
- (a) increase, decrease or suspend the amount of credit supplied to you;
 - (b) terminate or suspend any credit arrangement we have with you in which case all monies owing by you to us shall be immediately due; and
 - (c) request additional security from you on terms satisfactory to us before proceeding further with any order.
- 9.2. You acknowledge that none of any Contract, these Trading Terms or any other credit arrangement you have with us relating to the supply by us of Goods to you, shall be construed to be a credit contract as defined by section 4 of the National Credit Code.
10. **PAYMENT TERMS & PAYMENT VALIDITY**
- 10.1. Any deposit required by us will be paid immediately on the creation of a Contract and is non-refundable.
- 10.2. Unless credit facilities have been granted to you by us, all invoices shall be payable before delivery or collection upon receipt of an invoice from us. Where we have granted credit facilities to you, all accounts shall be paid on or before the last business day of the calendar month following the month of sale.
- 10.3. You agree that:
- (a) you will comply with clause 11 ("Disputes") for any disputed invoices;
 - (b) we may allocate payments received from you to invoices as we see fit notwithstanding any specific tender by you;
 - (c) we supply all Goods to you on condition that all payments made to us from you are valid and in the ordinary course of business and in reliance on the validity of any payment you make to us; we may:
 - (i) delay revocation of the authority granted by us to you pursuant to clause 14 ("Providing Security");
 - (ii) continue to supply you after the receipt of such payment, whether or not those Goods are paid for by you;
 - (iii) use the payment for our own purposes; and
 - (iv) forego our immediate right to take action against you and any Guarantor in relation to any late payment.
- 10.4. Valspar reserves the right to charge a standard credit card fee of 1.5% for transactions paid via credit card. However, in the event that the payment is made by the due date, this fee will be waived.
11. **DISPUTES**
- 11.1. If you dispute an invoice issued by us in relation to the supply of Goods you must within 30 days from the date of the invoice (the "disputed invoice") provide us with a written payment schedule which:
- (a) identifies the invoice to which it relates;
 - (b) states the amount you claim is owing (the claimed amount);
 - (c) what you are prepared to pay (Scheduled Amount); and
 - (d) if the Scheduled Amount is less than the claimed amount:
 - (i) how you calculated the Scheduled Amount;
 - (ii) your reason for the difference between the Scheduled Amount and the claimed amount; and
 - (iii) your reason(s) for withholding payment.
- 11.2. If you do not:
- (a) respond to the invoice by paying the invoiced amount in full; or
 - (b) comply with the requirements of clause 11.1,
- you will become liable for the claimed amount.
- 11.3. Subject to clause 10 ("Payment Terms & Payment Validity"):

12. both parties will negotiate the resolution of any dispute arising from a Contract. Either party may at any time refer any dispute to adjudication and may refer any matter that is not finally resolved by adjudication to arbitration. Notwithstanding the above clause, should you fail to seek adjudication or arbitration within 14 days of notification of the dispute, we shall be entitled to enforce our rights via litigation. **DEFAULT**
- 12.1. You irrevocably terminate any credit facilities or other contract you have with us or suspend any credit facilities (including any Contract):
- (a) immediately following the occurrence of any of the events set out in clause 11.1;
 - (b) without further supplies of Goods to you;
 - (c) exercise our right to seize, dispose of or retain control pursuant to our retention of title clauses and/or enforce any Security Interest we may hold;
 - (d) exercise any discounts and revert you to our standard pricing;
 - (e) determine that Amount Owing will immediately become due and payable notwithstanding that the due date for payment of that Amount Owing has not yet arisen;
 - (f) if the Default relates to non-payment of an invoice in accordance with the payment terms, charge interest (as liquidated damages) on those overdue payments at the rate of 2.5% per month; and
 - (g) exercise our right to obtain a mortgage under clause 15,
- and you shall be liable for all costs incurred by us in recovering any amount owing including debt collection agency commissions, fees and full legal costs.
13. **RETENTION OF TITLE - PAYMENT OF ALL DEBTS**
- 13.1. All Goods remain our property and title to the Goods does not pass from us to you until:
- (a) the Amount Owing on all Goods has been paid in full; and
 - (b) to the extent permitted by law, all other debts owing by you to us have been paid, notwithstanding that payments may be made for the purpose of settlement of specifically designated claims;
- 13.2. Until payment of all Amounts Owing or other debts owing to us, you may sell and deliver the Goods in the ordinary course of business, as our fiduciary and agent (but you shall not hold yourself out as such).
- 13.3. Clause 13.1 applies notwithstanding any arrangement under which we provide credit to you. To the extent there is any inconsistency, the terms of this clause 13 shall prevail.
- 13.4. Until payment of the Amount Owing on all Goods and all other debts owing to us:
- (a) you shall hold the Goods as our agent and shall store the Goods (or any funds you receive in payment of the Goods) in such a way that it is clear that they are our property and they will not deteriorate;
 - (b) you will insure the Goods against all usual risks to full replacement value and hold any insurance monies which you receive in respect of the Goods on trust for us;
 - (c) other than the resale or use of the Goods in the ordinary course of business, you will immediately notify us of any action which affects our interest in the Goods; and
 - (d) the proceeds of any Goods you resale or use shall be received and held by you (in whatever form) in trust for both you and us. Our interest as beneficiary under that trust shall be that portion of the proceeds which does not exceed the Amount Owing on all Goods and all other debts owing to us. The balance of the proceeds (if any) shall be your beneficial interest under that trust.
- 13.5. You irrevocably give us a licence without notice to enter all premises at which we on reasonable grounds believe the Goods to be stored, to inspect, remove, or repossess any Goods not paid for by you. We shall not be liable for, and you agree to release us from, any costs, damages or expenses or any other monies or losses suffered by you or any third party as a result of this action. You shall indemnify us for any liability we suffer as a result of such actions.
- 13.6. We may bring an action for any Amount Owing on all Goods and all other debts owing to us despite the fact ownership of the Goods may not have passed to you.
- 13.7. The Security Interest created under this clause shall extend to:
- (a) any Proceeds of the Goods (including, but not limited to, cash and receivables); and
 - (b) any product or mass into which the Goods subsequently become part of if the Goods are so manufactured, processed, assembled or comingled.
- 13.8. A Security Interest in Goods created by this clause 13 that becomes an accession to other goods continues in the accession.
14. **PROVIDING SECURITY**
- 14.1. Interpretation - all section references in this clause shall mean the relevant clause in the PPSA.
- 14.2. Application - this clause applies to the extent the PPSA applies to these Trading Terms and any Contract from time to time.
- 14.3. Security: By accepting supply from us, you agree that:
- (a) you grant a Security Interest, to all present and after-acquired:
 - (i) Goods; and
 - (ii) Proceeds;
 - (b) the Security Interest, in so far as it secures payment of the Amount Owing, is a PMSI;
 - (c) notwithstanding the payment of part or all of the purchase price relating to the Goods by you to us under any one invoice, a Security Interest exists in all present and after acquired Goods until the Security Interest is discharged in writing by us; and
 - (d) all payments received from the Customer must be applied in accordance with section 14(6)(c) of the PPSA.
- 14.4. You will not be deemed to be granting an accession to any property that is not subject to the Security Interest granted pursuant to these Trading Terms or any Contract.
- 14.5. You will not do, omit to do, or allow to be done or omitted to be done, anything which might adversely affect any Security Interest in Goods granted in our favour and you will not move any of the Goods outside Australia.
- 14.6. **Financing Statement:** You acknowledge, agree and undertake (as the case may be) to:
- (a) sign any further documents and/or provide any further information (which information you warrant to be complete, accurate and up to date in all respects) which we may reasonably require to register a financing statement or financing change statement on the Personal Property Securities Register or in connection with the issue of a verification statement;
 - (b) irrevocably appoint us to be your attorney to do anything which you agree to do under a Contract and anything which the attorney thinks desirable to protect our interests under a Contract and you will take all steps required to do anything done by the attorney under this clause;
 - (c) not register or apply to register a financing statement or financing change statement which is in any way connected with the Goods without our prior written consent, which may be given or withheld at our absolute discretion.
- (d) You will, upon demand, meet our costs:
- (i) in relation to registering a financing statement or financing change statement, or releasing any financing statement on the Personal Property Securities Register; and
 - (ii) enforcing our Security Interest, including our legal costs, as a solicitor client basis; and
 - (e) give us not less than 14 days prior written notice of any proposed change in your name, and/or any other change in your details or otherwise (including but not limited to a change in the your place of incorporation, address, location, nature of business, ownership, facsimile or phone number, or business practices).
- 14.7. **Waiver and Contract Out:** To the extent permitted by law, you agree with us to contract out of Sections 95, 121(4), 125, 130, 132(3)(f), 132(4), 142 and 143 of the PPSA.
15. **SECURITY & RIGHT TO MORTGAGE**
- 15.1. You and/or any Guarantor agree that in the event of a Default we shall have the right to complete and register a mortgage over any property owned by you and/or any Guarantor in order to protect our rights and interest under a Contract. We shall also have the right to our discretion to place a caveat on any such property for the purpose of this clause.
- 15.2. You agree to do all acts required for us to register the mortgage and if you fail to do so within 3 working days of our request, you and/or the Guarantor hereby irrevocably appoint us as your attorney for the purpose of us exercising our rights under this clause.
16. **PRIVACY**
- 16.1. You irrevocably authorise us to make such enquiries as we deem necessary to investigate your credit-worthiness from time to time including (but without limiting the generality of the foregoing) the making of enquiries to persons nominated as trade referees, your bankers or any of your other credit providers (collectively, "the information sources") and you authorise the information sources to disclose to us such information concerning you which is within their possession and requested by us.
- 16.2. We may disclose personal information relating to your credit history with us to:
- (a) credit reporting agencies; and
 - (b) organisations to which you have listed us as a trade referee.
- 16.3. You may gain access to your personal information held by us upon request.
17. **WARRANTIES AND EXCLUSION AND LIMITATION OF LIABILITY**
- 17.1. To the extent permitted by law, and in excess as set out in a Contract we do not provide, or are not liable for, any warranty, condition or guarantee relating to the Goods.
- 17.2. We do not exclude, restrict or modify any liability that cannot be excluded, restricted or modified, or which cannot be excluded, restricted or modified except to a limited extent, as between us and you by law including under the Consumer Legislation.
- 17.3. To the extent that our liability cannot be lawfully excluded, our liability is limited at our option to:
- (a) replacement of the Goods or supply of equivalent goods;
 - (b) payment of the cost of replacing the Goods or acquiring equivalent goods;
 - (c) payment of the cost of having the Goods repaired; or
 - (d) repair of the Goods.
- 17.4. To the extent permitted by law, we will not be liable to you or any Guarantor (or any agents or employees) whether in contract, tort, breach of statutory duty or otherwise for:
- (a) any minor variation in product specifications including but not limited to colour or design, which may occur from time to time;
 - (b) any consequential, indirect or special loss, damage or injury; or
 - (c) any delays in delivery, loss of profits, revenue, business opportunity, anticipated savings, wasted overheads or damage to goodwill, regardless of whether in the circumstances it is deemed direct, indirect, consequential or special losses.
- 17.5. In any event and subject to clauses 17.3 and 17.4 above, should a court or adjudicator of relevant jurisdiction find us liable, our maximum aggregate liability to you arising out of any claim for loss or damages, however arising, shall not exceed the lesser of:
- (a) the relevant Contract price;
 - (b) the value of the Goods which are the subject of the claim; or
 - (c) the actual value of the loss you have incurred.
- 17.6. Nothing in these clauses shall excuse payment of the Amount Owing as it becomes due under a Contract.
- 17.7. If you on-sell any of the Goods to a third party, you agree:
- (a) to not give or make any assertion or representation in relation to the Goods without our prior written approval;
 - (b) not to hold yourself out to be our agent; and
 - (c) except to the extent of our liability to you by law, to indemnify us for any losses incurred due to third party claims against us as manufacturer of the Goods.
18. **FORCE MAJEURE**
- 18.1. Notwithstanding any other provisions of a Contract, we shall not be liable for any claims resulting from our delay or failure in the performance of any obligation or the exercise of any right as a result of a Force Majeure Event.
- 18.2. Nothing in this clause shall excuse payment of any debt (including any Amount Owing) due or becomes due under a Contract and the occurrence of a Force Majeure Event shall not give you a right to cancel a Contract with us.
19. **BATCH NUMBER**
- 19.1. All of the Goods carry on their label or container a batch number.
- 19.2. You acknowledge that, should a problem arise, during or after application of a Good or Goods within a coating system which requires technical investigation by our laboratory, you must provide the batch number pertaining to each relevant Good, together with a description of the Good and systems used, prior to any laboratory investigation being instigated. Where you cannot supply a batch number to us, we reserve our right to charge a non-refundable laboratory investigation fee of \$500 (which fee is payable before the commencement of the laboratory investigation). You acknowledge that receipt of a written recommendation and subsequent procedure the onus is on you to apply the Goods recommended within a coating system correctly and that such applications are to be in accordance with our technical data sheet and correct coating procedures.
20. **OTHER TERMS**
- 20.1. Each provision of these Trading Terms and any Contract of which it forms a part, is severable from the other. If for any reason a term or part of a term is invalid or unenforceable, that term or part of the term will be severed to the extent that it is invalid (and no further) and it shall not prejudice or affect the validity or enforceability of any other term or other part of the term.
- 20.2. Unless otherwise expressly agreed in writing by us, these Trading Terms (and any Contract of which they form a part):
- (a) may be amended by us from time to time;
 - (b) unless it is expressly stated otherwise and agreed by us, shall prevail in the event of any conflict between these Trading Terms and the provisions of any document issued by you including but not limited to any invitation to tender, conditions of purchase, subcontract or head contract conditions or any other agreement or document evidencing your Contract with us, including the terms and conditions set out in any invoice;
 - (c) Where we expressly agree in writing to amend these Trading Terms, you agree that:
 - (i) our Trading Terms form part of that written agreement and are only varied in the way expressly agreed to by us;
 - (ii) the new agreement must state that it is to prevail; and
 - (iii) the new agreement will supersede these Trading Terms only so far as the conflict and no further.
- 20.3. The benefits and obligations of the terms of any Contract, including these Trading Terms, shall be governed by Australian law except to the extent expressly negated or varied by the Contract.
- 20.4. All the rights and remedies under a Contract shall remain in full force notwithstanding any neglect, forbearance or delay in enforcement by us.
- 20.5. Any notice provided by us to you or any Guarantor, including notification of any alterations of a Contract, shall be deemed to be delivered and received by you:
- (a) immediately if sent to your last known fax or email address; or
 - (b) three days after posting to your last known mailing address.