

# Belle Banne Conveyor Services Pty Ltd - Purchase Terms & Conditions

## 1. Definitions

In these Terms and Conditions:

- (a) "ACDC" means the Australian Commercial Disputes Centre.
- (b) "Act" means the *Corporations Act 2001* (Cth).
- (c) "Belle Banne" means Belle Banne Conveyor Services Pty Ltd (ACN: 146 806 055) for the joint venture of Belle Banne (Vic) Hybrid Unit Trust & Fenner Dunlop Conveyor Services Pty Ltd (ABN: 91 342 398 023)
- (d) "Belle Banne Tools" means any tooling, dies, gauges, jigs, fixtures, moulds, equipment, patterns and other facilities supplied by Belle Banne or its Related Body Corporate, either directly or indirectly, to Supplier or paid for to be paid for by Belle Banne or its Related Body Corporate.
- (e) "Force Majeure" means an act of God, a strike, a lockout, act of public enemy, civil commotion, war, blockade, riot, state of emergency, lightning, fire, storm, flood, washout, explosion, Government restraint, or any form or Government intervention and any other cause which is not within the control of the party alleging it.
- (f) "Goods" means the products and, if any, services, specified in the Purchase Contract.
- (g) "GST" and "Tax Invoice" will have the meaning attributed to those terms in a *New Tax System (Goods and Services Tax) Act 1999* (Cth).
- (h) "INCOTERMS" means the standard accepted commonly used trade Terms and Conditions utilised in international trade as published by the International Chamber of Commerce and entitled "Incoterms 2000".
- (i) "Insolvency Event" means in respect of Supplier death, liquidation, provisional liquidation, voluntary administration, compromise, arrangement, amalgamation, administration, reconstruction, winding up, dissolution, assignment for the benefit of creditors, arrangement or compromise with creditors, the appointment of a receiver, the inability of Supplier to pay its debts when they fall due, bankruptcy or the filing for bankruptcy under Chapter 11 of the United States Bankruptcy Code or any event that is analogous to the aforementioned events under any Law.
- (j) "Intellectual Property Rights" means patents, design rights, copyrights, trademarks and service marks (whether registered or not and applications for any of the foregoing) know-how and rights of a like nature throughout the world.
- (k) "Law" means any requirement of any statute, rule, regulation, proclamation, ordinance or by-law, present or future and whether state, federal or otherwise.
- (l) "Material Adverse Change" means any change to the circumstances of Belle Banne (beyond the control of Belle Banne) which Belle Banne believes has a material adverse impact on the ability of Belle Banne to observe the Purchase Contract. A Material Adverse Change includes, but is not limited to, the cancellation or variation of an order for products, into which the Goods have been incorporated, by an entity to which Belle Banne supplies the said products.
- (m) "Purchase Contract" means the purchase contract issued by Belle Banne and accepted by Supplier stipulating the Goods to be supplied, the agreed price for the Goods and other details relevant to the supply of the Goods. The Purchase Contract includes any document sent by Belle Banne to Supplier stipulating the quantity and timing of the delivery of the Goods. The Purchase Contract is subject to these Terms and Conditions.
- (n) "Related Body Corporate" has the same meaning as this term has under the Act.
- (o) "Rules" means the rules for Domestic Arbitration prescribed by the ACDC.
- (p) "Supplier" means the seller of the Goods specified in the Purchase Contract.
- (q) "Technical Materials" means all plans, designs, drawings, engineering information, data, specifications, reports, accounts and other material of a technical nature.
- (r) "Tender" means any document, drawing, specification or design issued by Belle Banne pursuant to which Belle Banne has agreed to purchase the Goods from Supplier as described in the Purchase Contract. This includes, but is not limited to, documents, drawings, specifications or designs of an entity to which Belle Banne supplies products.
- (s) "Tender Documents" means the documents applicable to the Tender.
- (t) "Terms and Conditions" means these "Terms and Conditions of Purchase Contract".
- (u) The terms "EXW", "FCA", "FAS", "FOB", "CFR", "CIF", "CPT", "CIP", "DAF", "DES", "DEQ", "DDU" and "DDP" have the meaning these terms are given in the INCOTERMS.

## 2. General

- (a) These Terms and Conditions override any inconsistent terms and conditions in any document or communication used by Supplier in relation to the supply of Goods (including any terms and conditions that may be printed on the underside of or attached to an invoice or delivery docket provided by Supplier) or any industry practice or earlier course of dealing.
- (b) If the Purchase Contract bears reference to a Tender the Tender Documents will apply in addition to these Terms and Conditions. Where the terms of the Tender Document and these Terms and Conditions are inconsistent these Terms and Conditions will prevail.
- (c) If any INCOTERM is nominated in the Purchase Contract, the terms of INCOTERMS applies except as otherwise provided or as inconsistent to these Terms and Conditions.

## 3. Acceptance

If written acceptance of the Purchase Contract is not provided by Supplier to Belle Banne, the commencement of supply of Goods by Supplier will constitute acceptance by Supplier of the terms of the Purchase Contract, including these Terms and Conditions.

## 4. Price

- (a) The price of the Goods is fixed in accordance with the prices listed on the Purchase Contract and is not subject to increases in price without Belle Banne's prior approval in writing. Unless an INCOTERM to the contrary is agreed to by the parties and nominated on the Purchase Contract, the price of the Goods includes delivery to the destination stated in the Purchase Contract and the off-loading of the Goods by Supplier at the point of destination.
- (b) The Price includes any applicable GST. Where GST is payable either:
  - (1) Supplier must provide Belle Banne with a Tax Invoice that complies with all requirements in the GST Act; or
  - (2) Belle Banne may require Supplier to accept a Recipient Created Tax Invoice (as provided for in the GST Act) as created by Belle Banne.
- (c) Supplier must submit monthly itemised invoices to Belle Banne in a form approved by Belle Banne. Unless otherwise stated on the face of the Purchase Contract, Belle Banne will have at least 30 days from the end of the month in which the invoice is received in which to pay Supplier the invoiced amount. Belle Banne may withhold any amount that it disputes in good faith until the dispute has been resolved.
- (d) No interest is payable on the late payment of any amounts by Belle Banne.
- (e) Belle Banne may set-off any amounts payable by Supplier pursuant to **clauses 8.3** and **11** against any amounts payable to Supplier.

## 5. Delivery

- (a) Time is of the essence and deliveries must be made both in the quantities and at times specified in the Purchase Contract. Delivery should be made to the location nominated in the Purchase Contract or such other place nominated by Belle Banne by providing Supplier at least 12 hours notice of any change of delivery location.
- (b) Supplier agrees that the cost of delivery is determined according to the INCOTERM nominated on the Purchase Contract, and if no INCOTERM has been nominated, delivery will be DDP.
- (c) If delivery is not made by the date specified in the Purchase Contract, or within a reasonable time if no date is specified, Belle Banne will be entitled to terminate the contract in respect of the Goods undelivered or delivered late and of any Goods already delivered under this contract which cannot be effectively and commercially used by Belle Banne by reason of the non-delivery or late delivery of the first mentioned goods.
- (d) Without limiting the generality of **clause 13**, upon termination according to **clause 5(c)** Belle Banne is entitled to:

- (1) return to Supplier, at Supplier's risk and expense any Goods detailed in **clause 5(c)** and to recover from Supplier any money paid by Belle Banne in respect of such Goods, and Goods already delivered but which cannot be effectively and commercially used due to non-delivery or late delivery of other Goods;
- (2) recover from Supplier any additional expenditure reasonably incurred by Belle Banne in obtaining other goods in replacement of the goods detailed in **clause 5(c)** and any other damages and losses incurred by Belle Banne arising from late or non-delivery of Goods or any part thereof.

- (e) A notice of shipment must be sent by Supplier to Belle Banne at the time the Goods are shipped, which must state the description of the Goods, the reference number of this Purchase Contract, the name of the vessel, the port of shipment or delivery, shipping route, the quantity loaded, the invoice amount and other particulars from time to time, requested by Belle Banne.
- (f) Supplier must ensure that the Goods are suitably packed or otherwise prepared for shipment so as to secure the lowest transportation and insurance rates and in accordance with the carriers' requirements.
- (g) The packing and marking of the Goods must comply with the Law of Australia and any country from which the Goods are to be exported and in accordance with the instructions of Belle Banne.
- (h) All documents related to the shipping of the Goods must be provided to Belle Banne at the time that the Goods depart the port of export including, without limitation:

- (1) the bills of lading;
- (2) certificate of insurance;
- (3) packing declaration;
- (4) declarations to customs and quarantine authorities;
- (5) evidence of payment of all customs duties and other charges; and
- (6) certificate of origin of the Goods.

- (i) If Supplier considers the Goods cannot be delivered in time in accordance with Belle Banne's Purchase Contract, Supplier must notify Belle Banne immediately and give to Belle Banne an estimate of the period of delay and details of the steps which Supplier proposes to take to minimise the delay. Supplier must comply with Belle Banne's reasonable instructions in order to minimise the delay.

## 6. Warranties

- (a) These Terms and Conditions are additional to all warranties, conditions and undertakings express or implied by the *Trade Practices Act 1974* (Cth) or any other Law or as set out in the Tender Documents.
- (b) Supplier warrants that all Goods meet the description, specification drawings, data or samples and quality standards provided by Supplier or set out in the Purchase Contract or other document issued by Belle Banne or its representatives to Supplier regarding Belle Banne's requirements for the Goods including, without limitation, the Tender Documents. Any in-progress inspection by Belle Banne's employees or agents or other representative does not affect this warranty.
- (c) Supplier warrants that the Goods are new, of good title, of merchantable quality, made of good materials and workmanship and free from defects, encumbrance, lien or security interest.
- (d) Supplier warrants that all Goods are fit for the purpose for which goods of the same kind are commonly supplied and any purpose which Belle Banne or its representatives make known to Supplier, and must be accompanied by any necessary instructions, technical documents, operating and service manuals and any applicable warranties. If a standard of performance is specified Supplier warrants that Goods will be capable of such performance.
- (e) The Goods must carry any applicable manufacturer's warranty which passes on to any buyer or customer from Belle Banne without liability to Belle Banne. Supplier must assign to Belle Banne at the request of Belle Banne the benefit of any warranty or guarantee that Supplier has received from any supplier (whether under contract or by implication or operation of law).
- (f) Supplier warrants to Belle Banne that it will provide all information required by Belle Banne to report the export, import or transport of the Goods in a timely and accurate manner to enable Belle Banne to observe its requirements pursuant to any Law.
- (g) Supplier warrants to Belle Banne that it holds good title to any Intellectual Property Rights in or associated with the Goods and provides Belle Banne, the successors, assigns, customers and users of Belle Banne's products (incorporating the Goods) and any Related Body Corporate of Belle Banne a licence to use any Intellectual Property Rights in or associated with the Goods.

**6.2** Supplier agrees to defend, protect and completely indemnify (including legal expenses on the requisite hourly basis set by Belle Banne's lawyers) Belle Banne, its successor, assigns, customers and the users of Belle Banne's products (incorporating the Goods) and any Related Body Corporate of Belle Banne from and against any claim arising by reason of the use of the Goods, including all claims for actual or alleged infringement of any Intellectual Property Rights.

**6.3** Without limiting the effect of **clause 8.1**, Supplier agrees to indemnify and keep indemnified Belle Banne against all and any liability arising from the breach of any warranty provided pursuant to **clause 6.1**.

## 7. Inspection and return

- (a) All Goods are received subject to inspection within a reasonable time after delivery or before delivery at Belle Banne's discretion irrespective of the date of payment. Signed delivery dockets do not mean acceptance by Belle Banne of the Goods delivered but only the number of packages or cartons delivered.
- (b) Belle Banne may reject any Goods or parts thereof that are not in accordance with the Purchase Contract or these Terms and Conditions. Notice of rejection will be provided to Supplier in writing by Belle Banne and must specify the reasons for rejection. Belle Banne is entitled to return the rejected Goods to Supplier at Supplier's expense and risk.
- (c) In all cases of rejection Belle Banne will be entitled to require Supplier to replace the rejected Goods with Goods which are acceptable to Belle Banne or request repayment of any money paid to Supplier in respect of the rejected Goods or may terminate this contract.
- (d) Without limiting the generality of **clause 13**, upon termination according to this clause:

- (1) Belle Banne is entitled to return to Supplier at Supplier's risk and expense any Goods previously delivered to Belle Banne which cannot be effectively and commercially used by Belle Banne by reason of not having the rejected Goods and to recover from Supplier any moneys paid by Belle Banne in respect of such Goods; and
- (2) Supplier is liable for any costs, loss or damage suffered or incurred by Belle Banne in relation to Goods that are rejected including the cost of replacement goods.

#### 8. Defective goods

8.1 Should any Goods fail to conform to the warranties contain in **clause 6**, Belle Banne will notify Supplier and Supplier must, if requested by Belle Banne, indemnify Belle Banne for any incidental and consequential damages cause by such non-conforming Goods, including but not limited to, costs, expenses and losses incurred by Belle Banne:

- (a) in inspecting, sorting, repairing or replacing such nonconforming goods;
- (b) resulting from production interruptions;
- (c) conducting recall campaigns or other corrective services actions regardless of whether such campaigns are conducted by Belle Banne or an entity that Belle Banne supplies to and regardless of whether the recall campaign relates to the Goods or a product in which the Goods have been incorporated; and
- (d) claims for personal injury (including death) or property damage cause by such non-conforming Goods.

8.2 If Supplier becomes aware of any matter which may affect the Goods or Belle Banne's use of the Goods, Supplier must notify Belle Banne in writing immediately of the matter giving full details of all relevant information. This includes anything which may affect the composition, characteristics or Belle Banne's use of the Goods, the health, hygiene or safety of any person and Suppliers', Belle Banne's or the Good's compliance with any Law, standard or code of practice.

8.3 Belle Banne may set-off the amounts owing under **clause 8.1** against any amounts otherwise payable by Belle Banne to Supplier.

#### 9. Tooling to remain Belle Banne's property

- (a) The Belle Banne Tools remain Belle Banne's property whether during or after the termination of this Purchase Contract.
- (b) Supplier must keep the Belle Banne Tools in good condition and when necessary repair the Belle Banne Tools at its own expense.
- (c) Supplier agrees that it will not use any Belle Banne Tools for any purpose other than to supply Goods to Belle Banne and will return and deliver up the Belle Banne Tools following the expiry or termination of this Purchase Contract.
- (d) Without limiting the generality of **Clause 16**, Belle Banne retains all Intellectual Property Rights in Belle Banne Tools.

#### 10. Changes, Cancellation and Variations

(a) Belle Banne may at any time direct Supplier in writing to change the Goods or any aspect of the supply of the Goods. Supplier's obligation to supply the Goods following such a change will be subject to the parties agreeing upon the applicable prices, rates or charges acting reasonably and with reference to the prices, rates and charges set out in the Purchase Contract.

(b) Belle Banne may cancel or vary the Purchase Contract (in whole or part) at any time in response to a legitimate business need of Belle Banne including, without limitation, a Material Adverse Change. Belle Banne must give Supplier written notice of such cancellation or variation and must pay Supplier for all Goods delivered up to the date of cancellation or variation. Unless otherwise agreed, Belle Banne must also purchase Goods which have actually been produced by Supplier but not delivered by Supplier and work in progress and other materials produced or acquired by Supplier to manufacture the Goods but only to the extent to which such items cannot be used by Supplier producing goods for itself. Save as expressly set out in this clause, Belle Banne will have no liability to Supplier for cancelling or varying the Purchase contract.

#### 11. Deduction & Set-Off

Belle Banne may deduct or set-off against any amount payable to Supplier any amount payable by Supplier to Belle Banne, including but not limited to any amount due by Supplier for Goods rejected by Belle Banne or for warranty claims made by Belle Banne or by its customers that relate to the Goods.

#### 12. Notification of certain events

Supplier must promptly notify Belle Banne in writing if any of the following events occur or is likely to occur to Supplier:

- (a) a change in trade name, or place of business;
- (b) change in the ownership or control of Supplier;
- (c) the sale or transfer of all or any part of Supplier's business;
- (d) the acquisition by any competitor of Belle Banne of any interest of any kind in the ownership of Supplier;
- (e) an Insolvency Event concerning Supplier or a Related Body Corporate; and
- (f) any other matter or thing which may affect Supplier's ability or capacity to supply the Goods to Belle Banne.

#### 13. Termination

(a) In addition to termination rights set out elsewhere in these Terms and Conditions Belle Banne may terminate this Purchase Contract by written notice to Supplier if:

- (1) Supplier is in default of any of its obligations set out in the Purchase Contract (including these Terms and Conditions) that is not capable of remedy, or if capable of remedy is not remedied within 30 days of written notice by Belle Banne of such default;
- (2) Supplier breaches any warranties Supplier has provided under these Terms and Conditions;
- (3) an event in **clause 12**, has occurred in relation to Supplier other than a change of trade name or place of business;
- (4) an Insolvency Event has occurred in relation to a Related Body Corporate of the Supplier; or
- (5) a Material Adverse Change has occurred in relation to Belle Banne.

(b) Upon termination under this **clause 13**:

- (1) Belle Banne will have the right to withhold any payment for any Goods not yet delivered by Supplier;
- (2) Supplier will be liable to Belle Banne for any incidental or consequential losses incurred by Belle Banne as a result of Supplier's default under these Terms and Conditions; and
- (3) Supplier must return the Belle Banne Tools and grant to Belle Banne an irrevocable licence to enter Supplier's premises for the purpose of taking possession of the Belle Banne Tools.

(c) Supplier does not have any claim whatsoever at law or equity against Belle Banne if Belle Banne cancels an order under this clause.

#### 14. Property and risk

(a) Property and risk in the Goods will pass according to the INCOTERM elected under the Purchase Contract.

(b) Where no INCOTERM is elected under the Purchase Contract property and risk in the Goods will pass to Belle Banne upon Belle Banne taking delivery of the Goods and the Goods having been inspected and accepted by an authorised representative of Belle Banne. Where Goods are delivered in instalments the property and risk in the Goods pass to Belle Banne upon delivery of that instalment. The passing of property and risk in the Goods will be without prejudice to any right of rejection which Belle Banne is entitled under these conditions.

(c) If Belle Banne pays for Goods before they are accepted, that does not constitute acceptance of the Goods.

#### 15. Insurance

Supplier must maintain at its sole expense insurance with reputable and financially responsible insurance companies, which adequately covers Supplier's liability against Belle Banne and third parties for any incidental and consequential loss or damage arising out of or incidental to any recall campaign pursuant to defective Goods or Goods suspected of being defective. Belle Banne is entitled to require certain insurance coverages and amounts be taken out by Supplier. Belle Banne may request to see, and Supplier will be required to produce within 48 hours, evidence that this clause has been complied with.

#### 16. Intellectual Property

(a) Belle Banne retains the Intellectual Property Rights in any Technical Materials provided to Supplier under the Purchase Contract.

(b) In return for the payment of the purchase price, the Supplier assigns to Belle Banne all Intellectual Property Rights in any Technical Material created by the Supplier or on the Supplier's behalf for the purpose of the Purchase contract other than any pre-existing Intellectual Property Rights of the Supplier.

#### 17. Confidentiality

Unless otherwise required by Law, Supplier must keep confidential the terms of the Purchase Contract (including but not limited to prices), these Terms and Conditions and all confidential information it receives from Belle Banne or which relates to the Goods or Belle Banne's business, Intellectual Property Rights or other products. Supplier must not make any public announcements or disclosure in relation to the Goods, these Terms and Conditions or its relationship with Belle Banne without Belle Banne's prior written consent. The obligations of this clause continue to apply after the fulfilment of any part of the Purchase Contract or termination or cancellation of the Purchase Contract.

#### 18. Force Majeure

(a) Any delay or failure by either party to perform its obligation will be excused if, and to the extent that, it is cause by Force Majeure, provided notice of such delay or failure (including the anticipated duration of the delay or failure) is given by the affected party to the other party as soon as possible after the Force Majeure (but in no event more than 3 days thereafter).

(b) During the period of such delay or failure to perform by Supplier, Belle Banne may, at its option, purchase Goods from other sources and reduces its scheduled purchases from Supplier by such quantities, without liability to Belle Banne, or have Supplier provide the Goods from other sources in quantities and at times requested by Belle Banne, and at the price set out on the Purchase Contract.

(c) In addition, Supplier, at its expense must take such actions as are necessary to ensure the supply of Goods to Belle Banne for a period of at least 30 days during any anticipated labour disruption or resulting from the expiration of Supplier's labour agreements or contracts. If requested by Belle Banne, Supplier must, within 10 days, provide adequate assurances that the delay will not exceed 30 days. If the delay lasts more than 30 days or Supplier does not provide adequate assurance that the delay will cease within 30 days, Belle Banne may immediately terminate this contract without liability.

#### 19. Limit of liability

(a) The maximum liability of Belle Banne to Supplier as a result of a breach of any of these Terms and Conditions by Belle Banne will be limited to the amount of liquidated damages nominated on the Purchase Contract. This amount represents a genuine estimate of the maximum amount of damages Supplier will suffer in the event of default by Belle Banne.

(b) Should an amount of liquidated damages not be nominated on the Purchase Contract the maximum liability of Belle Banne for breach of the Purchase Contract or these Terms and Conditions will be the total price of Goods ordered under the Purchase Contract.

(c) Belle Banne will in no circumstances be liable to the Supplier, whether in contract or tort or any other basis, for any special, incidental, consequential, indirect or exemplary damages.

#### 20. Compliance with Laws

Supplier must comply at all times with all requirements of any Laws of Australia or of the country of origin of the Goods applying to the Goods including, but not limited to, the manufacture, labelling, transportation, importation, exportation, licensing, approval or certification of the Goods and all other Laws from which liability may accrue to Belle Banne from violation and Supplier agrees to defend, protect and completely indemnify (including legal expenses on the requisite hourly basis set by Belle Banne's lawyers) Belle Banne, its successor and assigns and any Related Body Corporate of Belle Banne from and against any claim arising from any breach of this clause by Supplier.

#### 21. Claims

Any claims that a party has not complied with its requirements under the Purchase Contract or these Terms and Conditions must be brought within a reasonable time.

#### 22. Governing law

This Purchase Contract is governed by the Law of the State of Victoria without giving effect to international principles of the conflict of laws and Supplier and Belle Banne expressly exclude the application of the 1980 United Nations Convention on Contracts for the International Sale of Goods with respect to sales covered by this Purchase Contract. Belle Banne and Supplier submit to the non-exclusive jurisdiction of the Courts of Victoria.

**23. Dispute resolution**

**23.1** In the case of a dispute between the parties, the following process for resolution will be followed:

- (a) internal management conference between the parties within 14 days;
- (b) mediation within a further 14 days conducted in accordance with Guidelines for Commercial Mediation issued from time to time by the ACDC and in force at the date of the dispute;
- (c) if the party making the claim remains dissatisfied after the meeting convened under **clause 23.1** , or at any time during or at the conclusion of any mediation held pursuant to **clause 23.2**, that party may then institute proceedings against the other party.

**23.2** For the purposes of **clause 23.1**:

- (a) the language of the dispute resolution will be English;
- (b) the venue of the dispute resolution will be Australia;
- (c) each party will bear their own costs and one-half of the costs of any mediation.
- (d) each party is entitled to legal representation at all stages; and
- (e) the process set out in **clause 23.1** will not exclude the rights of the parties to seek urgent interlocutory relief.

**23.3** This **clause 23** does not constitute an arbitration agreement within the meaning of the *Commercial Arbitration Act 1985*.

**24. Assignment**

- (a) Belle Banne is entitled to assign any rights, benefits or duties under the Purchase Contract to a Related Body Corporate without requiring the consent of Supplier.
- (b) Supplier will not assign or delegate its rights or obligations under the Purchase Contract without the prior written consent of Belle Banne. For these purposes any change to the directors or shareholders of Supplier from the date of this Purchase Contract will require the prior written consent of Belle Banne.

**25. Rights are cumulative**

The rights of Belle Banne under these Terms and Conditions are cumulative and additional to any other rights Belle Banne may have at Law or in equity.

**26. Severability**

If any term or condition or part of these Terms and Conditions is illegal, unenforceable or invalid, those Terms and Conditions or part of the Terms and Conditions are to be treated as removed from these Terms and Conditions, but the rest of these Terms and Conditions are not affected.

**27. Waiver**

Belle Banne will not be deemed to have waived any of its rights or remedies under these Terms and Conditions or at Law by allowing any time or indulgence or by not exercising any right or remedy arising out of any default by Supplier.

**28. Variation and replacement**

- (a) No variation of the Purchase Contract will be of any force unless it is in writing and signed by both parties.
- (b) Belle Banne may at any time replace or amend these Terms and Conditions, such replacement to be effective from the date specified by Belle Banne in its notice to Supplier and
- (c) vising of the replacement or amendment.