

1. DEFINITIONS AND INTERPRETATION

1.1 Definitions

In this Agreement, unless the context otherwise indicates:

Agreement means this agreement between Whittens and the Vendor comprised of the Purchase Order, these terms and conditions, and all other documents annexed to this document or specifically incorporated by reference (which, in the event of any inconsistency, are to be construed in this order).

Confidential Information means all information (whether of a commercial, scientific, engineering, industrial, mining, technical, business, financial nature or otherwise) communicated in whatever form, in relation to:

- (a) the terms and contents of this Agreement;
- (b) information relating to the business or operations of Whittens;
- (c) information relating to the customers, clients, employees, subcontractors of a Party or other persons doing business with that Party;
- (d) information disclosed by or on behalf of Whittens to the Vendor at any time or learnt by the Vendor in carrying out the Services, including all:
 - (i) Whittens supplied information;
 - (ii) Whittens' Background IP; and
 - (iii) Project IP;
- (e) all information and documents:
 - (i) designated or marked as confidential or proprietary; and
 - (ii) disclosed by or on behalf of Whittens to the Vendor;
- (f) information which the Vendor ought to know is confidential; and
- (g) information which is by its nature confidential.

Conflict of Interest means a conflict of interest between Whittens (or its Personnel) and the Vendor (or its Personnel) whether that conflict of interest is perceived or actual.

Defective Goods or Services means Goods or Services that are not in accordance with this Agreement, or are not to the quality or workmanship expected of a Relevant Subcontractor.

Delivery Date means (where relevant) the date the Goods must be delivered, or the date the Services must be completed, by the Vendor as specified in the Purchase Order or Scope of Work, or, if no such date is specified, the date following a reasonable period of time from the date of the Purchase Order having regard to the nature of the Goods or Services, and the Intended Purpose.

Employee Claim means any claim in respect of any death, injury, or occupational disease of any Personnel of the Vendor that is caused or contributed to by the

Vendor or arises out of or in connection with this Agreement.

Equipment means the equipment, mobile plant, tools, appliances and other property supplied by the Vendor for the purpose of supplying the Goods or performing the Services, and includes any Hired Equipment.

Excluded Loss means loss of revenue or profit (other than revenue or profit derived directly from payments for Goods or Services under this Agreement), loss or denial of opportunity, loss of access to markets, loss of goodwill, loss of business reputation, increased overhead costs, and all other loss that is indirect, remote, or unforeseeable.

Expiry Date means the later of:

- (a) the date on which all of the Goods have been delivered (and, if applicable, commissioned) and the Services have been provided; or
- (b) the date the Vendor has demobilised all of its Personnel and Equipment from Site as required under this Agreement (as applicable).

Financiers means at any time those persons who, at such time, have provided, or have commitments to provide, any financing facilities to Whittens or any one or more of its Related Bodies Corporate for any purpose (including bonds, notes, other capital market issues, loans, guarantees, letters of credit, and hedging facilities) and any assignee, transferee, agent, trustee or other representative at such time of any such person or persons.

Force Majeure means any one or more of the following events or circumstances:

- (a) a tropical storm (including cyclone, hurricane, and typhoon), which has been named by the World Meteorological Organisation, and the effects of any rain-bearing depression into which any such named tropical storm may weaken;
- (b) earthquake, landslide, tsunami, mudslide or other catastrophic natural disaster;
- (c) civil riot, civil rebellion, revolution, terrorism, insurrection, militarily usurped power, act of sabotage, act of a public enemy, war (whether declared or not) or other like hostilities;
- (d) fire caused by any of the events referred to in paragraphs (a), (b), or (c);
- (e) ionising radiation, contamination by radioactivity, nuclear, chemical or biological contamination,

but excludes any such event or circumstance (including the consequences of such event or circumstance) to the extent:

- (f) it was caused by a breach of this Agreement by the affected Party, or the act or omission of the affected Party or its Personnel;
- (g) it was within the reasonable control of the affected Party or its Personnel; or

- (h) where the affected Party is the Vendor:
 - (i) it was caused by any breakdown of the Equipment or any Defective Goods or Services; or
 - (ii) it could have been protected against, prevented, or overcome by the Vendor had it acted as would ordinarily be expected of a Relevant Subcontractor.

Good Industry Practice means:

- (a) the practices, methods, and acts engaged in or approved by a person who, in the conduct of that person's undertaking, exercises that degree of diligence, prudence and foresight reasonably and ordinarily exercised by skilled and experienced persons; and
- (b) in respect of the Vendor, performance as would ordinarily be expected of a Relevant Subcontractor.

Goods or Services means all goods to be supplied or services to be performed (or both) by the Vendor in accordance with this Agreement including:

- (a) all goods or services set out in any applicable Purchase Order;
- (b) the provision of any Hired Equipment;
- (c) other services, functions, responsibilities, and obligations that the Vendor is to perform under this Agreement; and
- (d) all responsibilities and functions not specifically described in this Agreement that are incidental to, or otherwise necessary for, the Vendor to provide the Goods or Services under this Agreement.

Government Authority means a national, state, regional, local, territorial or municipal government, ministry, governmental department or legislative, judicial or administrative body having jurisdiction over the Parties, the Goods or Services, or the Site.

GST Law means has the meaning given in A New Tax System (Goods and Services Tax) Act 1999 (Cth).

Head Contract means a contract between Whittens (or a Whittens Related Body Corporate) and a Principal.

Hired Equipment has the meaning set out in clause 8(a) of this Agreement.

HSES Legislation means all relevant laws relating to health and safety, including:

- (a) the *Mines Safety and Inspection Act 1994* (WA);
- (b) the *Work Health and Safety Act 2020* (WA);
- (c) any other applicable Legislation relating to health and safety on the Site;
- (d) all relevant health and safety regulations, codes of practice of safety standards made pursuant to the Acts referred to in paragraphs (a) and (b), and the Legislation referred to in paragraph (c); and

- (e) any other Legislation dealing with workplace health and safety that may apply from time to time.

Insolvency and Insolvent has the meaning given to it in the *Corporations Act 2001* (Cth).

Intellectual Property Rights means all copyright and analogous rights, all rights in relation to inventions (including patent rights), plant varieties, registered and unregistered trademarks (including service marks), registered designs, confidential information (including trade secrets), know-how, circuit layouts, and all other rights throughout the world resulting from intellectual activity in the industrial, scientific or artistic fields.

Intended Purpose means the intended purpose of the Goods or Services as stated in this Agreement or as could be reasonably inferred from this Agreement by a Relevant Subcontractor.

Legislation means:

- (a) any Act of Parliament in any Australian jurisdiction (including the Commonwealth) for the time being in force, and all proclamations, regulations, by-laws, orders, notices, rules of court, town planning schemes, resolutions, or other instruments made under any or by the authority of any such Act of Parliament and having legislative effect; and
- (b) all licences, qualifications, registrations and other statutory requirements necessary for supply of the Goods or Services under this Agreement,

and **Legislative** has the corresponding meaning.

Modern Slavery has the meaning given in the *Modern Slavery Act 2018* (Cth).

Moral Rights has the meaning given in Part IX of the *Copyright Act 1968* (Cth).

Net Amount means the net amount payable for the Goods or Services set out in the Purchase Order.

Party means the Vendor or Whittens, and **Parties** means both of them.

Personnel means:

- (a) in relation to Whittens, any of Whittens' or its Related Bodies Corporates' employees, contractors, agents, consultants or representatives; and
- (b) in relation to the Vendor, any of the Vendor's Related Bodies Corporates' employees, contractors, agents, consultants or representatives;

PPS Law means:

- (a) the PPSA;
- (b) any regulations made at any time under the PPSA; and
- (c) any amendment to any of the above.

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

Principal means any party so named:

- (a) in a notice given by Whittens to the Vendor; and
- (b) as being the counterparty to Whittens (or a Whittens Related Body Corporate) under a Head Contract.

Project IP means all Intellectual Property Rights (present or future) created, discovered or coming into existence as a result of, for the purpose of, or in connection with, the provision of any Goods, Services, or this Agreement.

Proof of Delivery means:

- (a) in respect of Goods, a delivery document which evidences the delivery of the Goods and includes as a minimum, the freight provider's details, the packing list, and name and signature of the recipient; or
- (b) in respect of Services, a time sheet, service log, or such other document, signed by the Whittens, which evidences the performance of the Services.

Purchase Order means the document entitled 'Purchase Order' issued by Whittens to the Vendor for the supply of Goods or Services in accordance with this Agreement, and includes any schedules attached to the relevant Purchase Order.

Related Body Corporate means any related body corporate as defined in the *Corporations Act 2001* (Cth).

Relevant Subcontractor means a subcontractor that exercises the degree of skill, quality, care, diligence and prudence that would reasonably be expected of a competent, expert and experienced subcontractor undertaking work, tasks, services, functions, responsibilities and obligations required for the provision of goods or services of a similar nature to the Goods or Services contemplated under this Agreement.

Scope of Work means the scope of the Services to be performed or the Goods to be supplied as specified in the Purchase Order including documents annexed to the Purchase Order or incorporated in the Purchase Order by reference.

Site means the land (including any structure or other facility on the land) so specified on the Purchase Order or in the Scope of Work.

Site Manager means, in respect of:

- (a) a Site which is a 'mine' as that term is defined in the *Mines Safety and Inspection Act 1994* (WA), the person appointed from time to time as the registered mine manager at the Site for the purposes of section 33 of the *Mines Safety and Inspection Act 1994* (WA); or
- (b) any other Site, any person appointed by Whittens from time to time as the manager of the Site.

Subcontract means any permitted contract or other arrangement between the Vendor and any subcontractor in relation to the performance of the Vendor's obligations under this Agreement.

Tax Invoice has the same meaning as in the GST Law.

Term means the period from the date of the Purchase Order until the Expiry Date (unless extended by the agreement of the Parties).

Third Party Claim means any claim in respect of:

- (a) loss or destruction of, or injury or damage to, or loss of use of any real or personal property; or
- (b) any personal injury to or death of any person arising out of, or caused by, any act or omission, or the supply or non-supply of the Goods or Services, by the Vendor or its Personnel.

Variation means any addition, reduction or change to the Scope of Work.

Variation Proposal means a written proposal provided by the Vendor addressing the particulars of any Variation.

Vendor Insurance means each of the insurances the Vendor is required to effect and maintain in accordance with clause 20.1 of this Agreement.

Vendor's Background IP means the Vendor or its Personnel's Intellectual Property Rights, which:

- (a) are in existence at the date of the Purchase Order; or
- (b) come into existence after the date of the Purchase Order otherwise than in connection with this Agreement.

Vendor's Representative means the person appointed by the Vendor to act on its behalf in relation to this Agreement as notified to Whittens.

Warranty Period means the period commencing on the first date of delivery of Goods or performance of Services under this Agreement, ending:

- (a) 12 months; or
- (b) such other period stated in the Purchase Order, after the Expiry Date.

Whittens' Background IP means Whittens' Intellectual Property Rights which:

- (a) are in existence at the date of the Purchase Order; or
- (b) come into existence after the date of the Purchase Order otherwise than in connection with this Agreement,

which Whittens makes available, contributes, brings to, or uses in connection with this Agreement.

Whittens' Policies and Procedures means all Whittens' policies and procedures provided by Whittens to the Vendor from time to time, as amended or replaced by Whittens.

Whittens' Premises means the land or premises on or in which Whittens' Property is situated prior to it being provided to the Vendor.

Whittens' Property means any plant, equipment, tools, appliances, materials, drawings, data, specifications or other property and items that Whittens

or the Principal provides to the Vendor to enable the Vendor to perform its obligations under this Agreement.

Whittens' Representative means the person appointed by Whittens to act on its behalf in relation to this Agreement as notified to the Vendor.

1.2 Interpretation

In this Agreement:

- (a) headings, tables of contents, indexes and words in brackets are for convenience only and do not affect the interpretation of this Agreement; and
- (b) no rule of construction applies to the disadvantage of a Party on the basis that the Party put forward this Agreement or any part of it,

and unless otherwise stated or the context otherwise indicates:

- (c) words in the singular include the plural, words in the plural include the singular and words importing a gender include all genders;
- (d) where a word or phrase is defined, other grammatical forms of that word or phrase have a corresponding meaning;
- (e) a reference to any legislation or to any section or provision of any legislation includes any:
 - (i) statutory amendment or re-enactment of, or any statutory provision substituted for, that legislation, section or provision; and
 - (ii) ordinances, by-laws, regulations, subordinate and delegated legislation and other statutory instruments, issued under that legislation, section or provision;
- (f) the word:
 - (i) **day** means calendar day and **month** means calendar month;
 - (ii) **document** (as a noun) includes a design, drawing, specification, schedule, manual, description or other document required to provide the Goods or Services; and
 - (iii) **person** includes an individual, firm, unincorporated association, corporation, company and a Government Authority;
- (g) the words **include**, **including** and **includes** and the expressions **for example** and **such as**, are not words or expressions of limitation;
- (h) references to parts, clauses, schedules, exhibits and annexures refer to them of, in and to this Agreement;
- (i) a reference to **\$**, **AUD** or **dollar** is to the lawful currency of the Commonwealth of Australia, are deemed to exclude GST; and
- (j) a reference to any Party includes that Party's executors, administrators, substitutes, successors and permitted assigns.

2. NATURE OF AGREEMENT

- (a) The Vendor agrees to diligently commence the supply of the Goods or performance of the Services from:
 - (i) the date set out in the relevant Purchase Order; or
 - (ii) if there is no date set out in the Purchase Order, the date of the Purchase Order, to ensure it supplies the Goods to the Site or completes the Services:
 - (iii) by the Delivery Date; and
 - (iv) in accordance with the terms of this Agreement.
- (b) This Agreement does not confer upon the Vendor any exclusivity in respect of the supply of any Goods or Services at the Site or otherwise.
- (c) The Vendor agrees to notify Whittens if it finds any errors, omissions or inconsistencies in information provided by Whittens. Except as prescribed by Legislation, Whittens gives no warranty of accuracy, sufficiency or otherwise in relation to information provided to the Vendor and disclaims all responsibility for such information.
- (d) Where Goods or Services are provided pursuant to a contract that is already in effect between Whittens and the Vendor, the terms of that contract continue to apply and the terms of this Agreement do not apply.
- (e) Any terms and conditions created or supplied by the Vendor, in respect of the Goods or Services, will be of no legal effect and will not constitute part of this Agreement.

3. REPRESENTATIONS AND WARRANTIES

- (a) The Vendor represents and warrants that:
 - (i) the Goods or Services will:
 - (A) match the description and specification in this Agreement;
 - (B) be supplied in accordance with Good Industry Practice;
 - (C) be fit for their Intended Purpose; and
 - (D) comply with all applicable Legislation;
 - (ii) all Goods supplied will be:
 - (A) of merchantable quality;
 - (B) manufactured strictly in accordance with any manufacturing drawings, Scope of Work or descriptions supplied to the Vendor by Whittens;
 - (C) free from any encumbrance, lien, mortgage, security or charge in favour of a third party or any other third-party interest, from the time of delivery to Whittens; and
 - (iii) all Equipment used by the Vendor in the supply of the Goods or Services will be

maintained in safe working condition, will comply with all Legislation applicable to such Equipment, and be maintained and operated by suitably qualified and competent Personnel.

- (b) These warranties remain unaffected notwithstanding any information which Whittens provides to the Vendor.
- (c) The Vendor is deemed to have:
 - (i) satisfied itself as to the nature and extent of the risks assumed by it under this Agreement; and
 - (ii) gathered all information necessary to perform its obligations under this Agreement.

4. SITE ACCESS AND SAFETY

- (a) Whittens grants to the Vendor a non-exclusive and non-assignable licence to access the Site during the Term to perform its obligations under this Agreement.
- (b) The Vendor must obtain all applicable permits, licences, exemptions, consents and approvals required for the Vendor to supply the Goods or perform the Services.
- (c) The Vendor must, and must ensure its Personnel:
 - (i) carry out the Services in a safe manner and use best endeavours to achieve zero classified injuries;
 - (ii) not interfere with Whittens' activities or the activities of any other person at the Site;
 - (iii) be aware of and comply with, and ensure that its Personnel are aware of and comply with, all:
 - (A) applicable Legislation (including HSES Legislation);
 - (B) Whittens' Policies and Procedures (to the extent they are applicable to this Agreement); and
 - (C) directions given by Whittens' Representative and the Site Manager.
- (d) Without limiting the Vendor's other obligations under this Agreement, the Vendor must notify Whittens' Representative as soon as practicable, but in any event pursuant to Whittens' Policies and Procedures, of any accident, injury, loss or damage which occurs at the Site.

5. VENDOR'S PERSONNEL

- (a) The Vendor must engage all personnel necessary for the supply of the Goods or performance of the Services under this Agreement.
- (b) The Vendor must employ or cause to be employed only personnel that are careful, skilled and experienced to the degree ordinarily expected of personnel engaged in the supply of goods or services similar to the Goods or

performance of Services acting in accordance with Good Industry Practice.

- (c) No Vendor's Personnel may commence work on Site unless that person has attended, at the Vendor's expense, the induction courses required by Whittens or any Principal to be attended by all persons engaged at the Site.
- (d) Whittens will provide accommodation and messing facilities at no cost to the Vendor for its Personnel engaged in the supply of the Goods or Services at the Site.
- (e) To the extent permitted by Legislation, during the Term and extending for a period of 6 months after the Expiry Date, Whittens' Personnel are not to be engaged or offered employment by the Vendor, without the prior written approval of Whittens.

6. INDUSTRIAL RELATIONS

- (a) The Vendor is responsible for conducting its industrial and employee relations with its Personnel in a manner conducive to preventing any delay or disruption in the provision of the Goods or Services, including by taking all prudent steps to maintain harmonious and productive relations with its Personnel.
- (b) The Vendor must ensure that the terms and conditions of employment of all of its Personnel engaged in the supply of Goods or Services under this Agreement are at all times regulated by an agreement made under the *Fair Work Act 2009* (Cth).
- (c) Whittens may, at any time in its absolute discretion, direct the Vendor to withdraw any of its Personnel from providing any part of the Goods or Services, and the Vendor must promptly arrange for the person to cease being involved in any way in the provision of the Goods or Services despite any provision in any other contract. If so directed by Whittens, the Vendor must replace the person with a person of suitable ability, experience and qualifications within a time period specified by Whittens.

7. EQUIPMENT

- (a) The Vendor agrees to supply the Equipment at its own risk and expense, and to maintain such Equipment on Site and in safe, operable, good working condition throughout the Term.
- (b) Whittens may reject any item of Equipment which it determines is unsafe or unsuitable for the purposes of this Agreement. If any Equipment is so rejected then it must be either repaired or replaced to the satisfaction of Whittens within a time period specified by Whittens in writing. The Vendor must provide all spare parts and consumable items for the Equipment.
- (c) The Vendor agrees Whittens' Property may only be used for the purposes of fulfilling the Vendor's obligations under this Agreement, and the Vendor

is liable to Whittens for any loss or damage to Whittens' Property by the Vendor's Personnel.

- (d) The Vendor must not remove Whittens' Property from Whittens' Premises without Whittens' prior written consent.
- (e) Subject to clause 7(d), if the Vendor removes any Whittens' Property from Whittens' Premises, then it must:
 - (i) ensure that Whittens' Property is serviced and maintained in good working order, repair and condition (fair wear and tear excepted) and is capable of being used for the purpose which it was intended; and
 - (ii) return Whittens' Property to Whittens' Premises promptly after it is no longer required by it to fulfil its obligations under this Agreement.

8. EQUIPMENT HIRE

- (a) This clause 8 only applies if, pursuant to the Scope of Work, Whittens requires the Vendor to lease items of equipment to Whittens on Site (**Hired Equipment**).
- (b) The Vendor will lease the Hired Equipment to Whittens for the duration set out in the Scope of Work.
- (c) Unless otherwise directed by Whittens, the Vendor must perform all maintenance of the Hired Equipment at its own cost and risk to ensure that the Hired Equipment is in good operating condition at all times.
- (d) The Vendor warrants that:
 - (i) it has the necessary rights, title and interest in all Hired Equipment to enable it to lease the Hired Equipment to Whittens on the terms of this Agreement;
 - (ii) it has insured the Hired Equipment for its full value and such insurance covers Whittens and its Personnel operating the Hired Equipment;
 - (iii) the Hired Equipment is in good, proper and safe working order and complies with all Legislation; and
 - (iv) the Hired Equipment has been properly maintained by the Vendor and has all necessary guards and safety equipment fitted.
- (e) Any Personnel provided by the Vendor to operate Hired Equipment must be suitably qualified and trained, and formally inducted to work at the Site in accordance with clause 5(c).
- (f) Unless the Hired Equipment is being operated by or at the direction of the Vendor or its Personnel (including any commissioning of the Hired Equipment), Whittens will be responsible for loss or damage that it causes to the Hired Equipment from the later of its delivery to the Site or its commissioning, until the Hired Equipment is

returned to the Vendor at its relevant return point, as nominated in the Scope of Work. If no return point is nominated in the Scope of Work, the relevant return point shall be the area on Site where the Vendor first provided the Hire Equipment to Whittens.

- (g) At Whittens' request, the Vendor must conduct any commissioning of the Hired Equipment or supervise Whittens' commissioning of the Hired Equipment, to Whittens' satisfaction.

9. INSPECTION AND REPORTING

- (a) The Vendor must keep Whittens' Representative fully informed of all aspects of the provision of the Goods or Services.
- (b) Subject only to providing reasonable notice, at any time during the supply of the Goods or Services, Whittens may inspect, examine, review and witness tests on the Goods or Services or their results at the Site, the Vendor's premises or at the premises of a subcontractor.
- (c) If, as a result of any review, inspection, examination, or witnessing of testing, Whittens is not satisfied that the Goods or Services will comply in all respects with this Agreement, Whittens may exercise its rights to terminate under clause 17(c).

10. DEFECTIVE GOODS OR SERVICES

- (a) If upon inspection or testing during the Term, and until the end of the Warranty Period, Whittens identifies Defective Goods or Services, it may at its election:
 - (i) reject the Defective Goods or Services by notifying the Vendor that it is rejecting them;
 - (ii) direct the Vendor to make good the Defective Goods or Defective Services; or
 - (iii) make good the Defective Goods or Services itself,and the Vendor must:
 - (iv) refund to Whittens any payments made by Whittens in respect of any Defective Goods or Services that Whittens rejects;
 - (v) make good free of charge any Defective Goods or Services as per Whittens' request; or
 - (vi) reimburse Whittens for any expenses Whittens incurs in making good any Defective Goods or Services itself.
- (b) The remedies provided in this clause do not exclude any other remedies provided by law.
- (c) If the Vendor identifies Defective Goods, Defective Services, or carries out a product or safety recall or equivalent process in respect of any Goods, it must promptly notify Whittens' Representative in writing.

11. FEES

- (a) In consideration for the supply of the Goods or Services, Whittens will pay the Vendor the Net Amount.
- (b) The rates set out in this Agreement will be the sole consideration payable to the Vendor under this Agreement, and are deemed to include all risks, liabilities and obligations expressed or implied in this Agreement or incurred in the course of the supply of the Goods or Services.
- (c) The Vendor will pay all costs, taxes, expenses and liabilities incurred by the Vendor in the course of the supply of Goods or Services under this Agreement.

12. INVOICING AND PAYMENT

- (a) The Vendor must submit a Tax Invoice to Whittens (accounts@whittensgroup.com.au) at the end of each calendar month for the Goods or Services supplied in that month.
- (b) The Tax Invoice must:
 - (i) refer to a valid Purchase Order;
 - (ii) set out:
 - (A) particulars of all Goods or Services supplied by the Vendor in accordance with the Purchase Order text;
 - (B) the amount payable by Whittens under this Agreement in respect of those Goods or Services; and
 - (C) how the amount of the Tax Invoice was calculated; and
 - (iii) be accompanied by Proof of Delivery or such other evidence as Whittens may require.
- (c) Subject to clause 13 and the Vendor's compliance with clause 12(b), Whittens will pay all Tax Invoices submitted by the Vendor by the end of the month following the month in which the Tax Invoice was received (or such other period required by Legislation).
- (d) To the full extent permitted by law, Whittens will have no liability to pay any amount for Goods provided or Services performed, where an invoice is not presented to Whittens from the earlier of six (6) months from the completion of the Services or supply of the Goods, or where contemplated by building and construction payment legislation two (2) years after performance or provision of the relevant Services or Goods. Any invoices presented after the applicable period after performance or provision of the Services or Goods are time-barred, and the Vendor releases and discharges Whittens from any and all liability to pay for those Services or Goods.

13. WITHHOLDING FEES

Whittens may deduct from any money due or becoming due to the Vendor under this Agreement any money

due from the Vendor to Whittens, including but not limited to:

- (a) all debts, damages, costs, expenses or any other moneys due from the Vendor or its subcontractors to Whittens under or by virtue of any provision of this Agreement, the supply or non-supply of the Goods or Services, or the Vendor's presence on the Site; and
- (b) all costs, losses, charges, damages, liquidated sums and expenses which Whittens may have paid or incurred and which, or for which, the Vendor or its Personnel is or are liable to bear, pay or make reimbursement to Whittens.

14. REPRESENTATIVES

- (a) Unless expressly provided otherwise, all directions or any permission given on behalf of Whittens to the Vendor will be given by Whittens' Representative (or Whittens' Representative's delegate notified to the Vendor).
- (b) The Vendor must comply, and ensure its Personnel comply, with the directions of Whittens' Representative and Site Manager in relation to the Vendor providing the Goods or Services at the Site. In any matter pertaining to the safety of persons or property or the proper compliance with any Legislation which it is the Site Manager's duty to enforce, the Site Manager's decision will be final and any directions the Site Manager may give must be obeyed in the manner directed.
- (c) The Vendor's Representative will represent and act for the Vendor at all times during the Term. The Vendor is bound by the actions of the Vendor's Representative. Matters within the knowledge of the Vendor's Representative are deemed to be within the knowledge of the Vendor.
- (d) The Vendor must nominate an appropriate person to receive access to Whittens' extranet site and notify Whittens in writing including the person's contact details.

15. EXTENSION OF TIME

- (a) The Vendor must immediately give Whittens written notice of all incidents, circumstances or events of any nature affecting or likely to affect the Vendor's ability to deliver the Goods or perform the Services by the Delivery Date.
- (b) Within 14 days after the date of the notice issued under clause 15(a), the Vendor must give a further notice to Whittens which must include all material details of the event and mitigating actions taken by the Vendor.
- (c) Whittens may grant an extension of time to the Delivery Date if the supply of the Goods or Services has been delayed by:
 - (i) Force Majeure; or
 - (ii) any act or omission of Whittens' Representative, Whittens or its Personnel, but excluding acts or omissions authorised or permitted under this Agreement, and

which are done or omitted in accordance with this Agreement.

- (d) If Whittens grants the Vendor an extension of time to the Delivery Date under clause 15(c)(ii) only, Whittens will reimburse the Vendor for its costs necessarily, actually, reasonably and properly incurred as a direct consequence of the delay (evidenced on an open book basis).
- (e) Whittens may, in its absolute discretion at any time by written notice to the Vendor, unilaterally extend the Delivery Date. Whittens is not required to exercise its discretion under this clause for the benefit of the Vendor.

16. ACCELERATION

If, in the opinion of Whittens, the Goods or Services will not be supplied by the Delivery Date, Whittens may direct the Vendor to increase its manning levels, Equipment, number of shifts or to take other action. The Vendor may claim all necessarily, actually, reasonably and properly incurred costs as a result of the direction unless the direction was issued as a consequence of an act or omission of the Vendor.

17. DEFAULT AND TERMINATION

- (a) Subject to clause 34(e), if at any time a Party becomes Insolvent, the other Party may terminate this Agreement with immediate effect by giving written notice.
- (b) Whittens may, at any time, terminate this Agreement in whole or in part without cause at its absolute discretion by giving the Vendor written notice.
- (c) Whittens may terminate this Agreement in whole or in part and with immediate effect, by notice to the Vendor, if:
 - (i) the Vendor does not remedy, or provide an acceptable plan to remedy, any identified instances of Modern Slavery within the time frame specified by Whittens;
 - (ii) the Vendor or any of its Personnel commits an act of gross negligence, wilful misconduct, fraud or dishonesty in respect of any matter in connection with this Agreement;
 - (iii) the Vendor is in breach of any provision of this Agreement and Whittens determines that the breach is not capable of remedy;
 - (iv) the Vendor is in breach of any provision of this Agreement that is capable of remedy and fails to remedy that breach at its own expense and to the satisfaction of Whittens within 14 days after receipt of a notice from Whittens specifying the breach; and
 - (v) Whittens is expressly entitled to exercise a right of termination under any other provision of this Agreement.

- (d) The Vendor may terminate this Agreement upon 30 days' written notice to Whittens if Whittens has not paid the undisputed portion of a Subcontractor's Tax Invoice for a period of 60 days or longer after the Tax Invoice became due under clause 12(c).
- (e) Without prejudice to any other rights of Whittens under this Agreement, in the event of termination under clause 17(b) only, Whittens will pay to the Vendor:
 - (i) the Net Amount for Goods or Services provided to Whittens prior to the effective date of termination, and not included in any previous payment by Whittens;
 - (ii) the cost of materials reasonably ordered by the Vendor for the purpose of providing the Goods or Services prior to the date of termination, which the Vendor is legally liable to accept and cannot otherwise utilise, but only if the materials become the property of Whittens upon payment;
 - (iii) reasonable and substantiated costs of demobilisation; and
 - (iv) necessary and reasonable costs incurred as a result of complying with any directions given by Whittens upon, or subsequent to, termination.
- (f) On the expiration or earlier termination of this Agreement, the Vendor must:
 - (i) cease supply of the Goods or performance of the Services;
 - (ii) take such action as necessary or as Whittens directs, for the transfer, protection and preservation of Whittens' Property;
 - (iii) use its best endeavours to mitigate and minimise the cost of termination to Whittens;
 - (iv) immediately cease using all items of applicable Whittens' Property, Whittens' Background IP and Project IP; and
 - (v) within 14 days after termination or expiration, return to Whittens (or if requested, erase or destroy) all copies in any form of Whittens' Background IP and Project IP in the possession or control of the Vendor or its Personnel.

18. VARIATION TO THE SCOPE OF WORK

- (a) A Variation must be agreed to in writing by the Parties in order for it to be valid and legally binding.
- (b) Whittens may request that the Vendor prepare a Variation Proposal in accordance with this clause. The Vendor must as soon as practicable (but no later than seven days) after receiving such request, submit the Variation Proposal to Whittens addressing the effect on the supply of the Goods or performance of the Services, and the value of the proposed Variation.

- (c) The Vendor may initiate and submit a Variation Proposal to Whittens.
- (d) Following receipt of a Variation Proposal under this clause, Whittens may either:
 - (i) direct the Vendor to perform the Variation in accordance with the Variation Proposal and the value in the Variation Proposal will be added to or deducted from the Net Amount;
 - (ii) advise the Vendor that it does not accept the value in the Variation Proposal, and direct the Vendor to perform the Variation to be valued in accordance with clause 18(e); or
 - (iii) advise the Vendor that it does not wish to proceed with the Variation.
- (e) If, under clause 18(d)(ii), Whittens directs the Vendor to perform a Variation, the Vendor's costs necessarily, actually, reasonably and properly incurred or saved as a result of the Variation (evidenced on an open book basis) will be added to or deducted from the Net Amount.

19. SUSPENSION

- (a) Whittens has the right, at any time and for any reason, to suspend this Agreement or any part of this Agreement immediately. When the Vendor receives a notice of suspension from Whittens, it must suspend the performance of its obligations until such time as Whittens directs that this Agreement is no longer suspended.
- (b) Either Party may terminate this Agreement upon 30 days' written notice to the other Party if Whittens suspends this Agreement for a period of three consecutive months or longer.

20. INSURANCE

20.1 Generally

The Vendor must, before commencing the supply of Goods or Services, effect and maintain the following insurances:

(a) Workers' Compensation insurance

- (i) The Vendor must insure its liability against all Employees Claims and the insurance must, unless otherwise prohibited by the Legislation in the relevant legal jurisdiction:
 - (A) comply with all Legislative requirements including providing any compulsory statutory workers' compensation benefits, as required by law in the relevant legal jurisdiction applicable to the Vendor and all subcontractors;
 - (B) provide common law liability as required by law in the relevant legal

jurisdiction applicable to the Vendor and all subcontractors;

- (C) be extended to include a principal's indemnity extension in favour of Whittens for statutory and common law benefits including a waiver of subrogation in favour of Whittens and its Related Bodies Corporate; and
- (D) where the Goods or Services require any of the Vendor's Personnel to attend Site, extend to include Industrial Disease Common Law.

- (ii) Unless otherwise prohibited by the Legislation applicable to the Relevant Subcontractors or their subcontractors in

the applicable legal jurisdiction, the Vendor must ensure that all subcontractors and their subcontractors take out Workers' Compensation insurance which is extended to include a principal's indemnity extension in favour of Whittens including a waiver of subrogation (whether in addition to or in the place of Subcontractor). The Vendor must keep copies of its subcontractor's and their subcontractor's Worker's Compensation insurance certificates of currency which clearly demonstrate a principal's indemnity extension in favour of Whittens, and provide a copy of the certificates of currency to Whittens within seven days of Whittens' written request;

- (b) **Industrial Disease insurance.** Where the Goods or Services requires any of the Vendor's Personnel to attend any Site, the Vendor must have in force an Employers Liability Industrial Disease policy covering specified diseases arising from employment in any mine or mining operation pursuant to the *Workers' Compensation and Injury Management Act 1981* (WA);
- (c) **Public and product liability insurance.** The Vendor must insure against all Third Party Claims and the insurance must:

- (i) provide cover for general public and products liability to a limit of not less than \$20,000,000 in respect of any one occurrence arising out of the same or original cause and unlimited in the aggregate for public liability as to the number of claims but limited in the aggregate to \$20,000,000 for products liability;
- (ii) include a principal's indemnity extension in favour of Whittens with respect to the liability incurred as a result of the acts or omissions of the Vendor; and
- (iii) provide a waiver of subrogation in favour of Whittens;

- (d) **Motor vehicle insurance.** If the Scope of Work requires the Vendor to use or provide use of motor vehicles (including hire vehicles), the Vendor must:
 - (i) ensure that all motor vehicles used or brought

onto the Site are kept licensed in accordance with any Legislation;

- (ii) insure against Third Party Claims under a motor vehicle third party liability policy with a limit of liability not less than \$30,000,000;
- (iii) include a principal's indemnity extension in favour of Whittens with respect to the liability incurred as a result of the acts or omissions of the Vendor; and provide a waiver of subrogation in favour of Whittens;
- (e) **Professional indemnity insurance.** Where the Services include professional services as nominated in this Agreement, the Vendor must take out professional indemnity insurance in respect of the supply of the Services to cover for liability to a limit of not less than \$5,000,000 (with a maximum deductible of \$100,000) in relation to any one claim, and \$10,000,000 in the aggregate;
- (f) **Equipment insurance.** The Vendor must insure all items of the Equipment that the Vendor brings onto Site for an amount of not less than its market value. Where the Vendor is attending the Site, the insurance must:
 - (i) include a principal's indemnity extension in favour of Whittens with respect to the liability incurred as a result of the acts or omissions of the Vendor; and
 - (ii) provide a waiver of subrogation in favour of Whittens;
- (g) **Marine transit insurance.** If the Scope of Work provides that the Vendor is responsible for transportation of Goods to the Site (or another delivery point as nominated by Whittens in writing), the Vendor must effect goods in transit (carrier) insurance to cover all liabilities for loss or damage to such Goods for 100 per cent of the replacement value; and
- (h) any other insurances required by Legislation or regarded as Good Industry Practice.

20.2 Other Insurance Requirements

- (a) The Vendor must provide evidence of the currency of insurance to Whittens at any time upon request.
- (b) The Vendor must ensure any subcontractor engaged by the Vendor in relation to the Goods or Services effects and maintains the insurances nominated in clause 20.1 and provides current and compliant certificates of insurance to the Vendor for its records.
- (c) The Vendor is responsible for paying the deductible for any of the Vendor Insurance in the event that:
 - (i) there is a deductible payable; and
 - (ii) Whittens was not responsible for the loss or

damage giving rise to the insurance claim.

- (d) If the Vendor fails to effect or maintain any of the Vendor Insurance, or have any subcontractor effect or maintain any insurances, as specified in this clause, then Whittens may at the Vendor's cost:
 - (i) effect and maintain that insurance;
 - (ii) pay the necessary premiums; and
 - (iii) recover from the Vendor the amount paid by Whittens under this clause.

21. TITLE AND RISK

- (a) Title in any Goods passes to Whittens on the earlier of when Whittens pays for the relevant Goods or when such Goods are delivered to the Site.
- (b) To the extent permitted by law, the Vendor enters onto the Site and supplies the Goods or Services under this Agreement at its own risk. Risk in any Goods remains with the Vendor until delivery to Whittens.

22. LIABILITY AND INDEMNITIES

- (a) The Vendor is liable for and must hold harmless and indemnify on demand Whittens, its Personnel, and its Related Bodies Corporate, from and against any and all suits, actions or administrative proceedings, claims, demands, losses, damages, defects and costs and expenses of any nature, including legal fees and expenses, arising in any manner out of or in any way in connection with the acts or omissions of the Vendor or its Personnel under or in connection with the provision of the Goods or Services or this Agreement (including the infringement of any third party's Intellectual Property Rights), whether or not the acts or omissions are in tort (including negligence), breach of contract or otherwise regarding this Agreement, except to the extent that the loss is caused by the negligence, acts or omissions of Whittens or its Personnel.
- (b) Despite anything in this Agreement to the contrary, but subject to clause 22(c), neither Party will be liable to the other for any Excluded Loss.
- (c) The exclusion of liability in clause 22(b) does not apply in relation to liability of the Vendor:
 - (i) in respect of the injury or death of any person;
 - (ii) in respect of any Third Party Claims;
 - (iii) in respect of any Employee Claims;
 - (iv) for any act or omission of fraud, criminal act, dishonesty, wilful misconduct or misrepresentation of the Vendor or any of its Personnel;
 - (v) for any penalty imposed for breach of Legislation or licence in connection with the supply of the Goods or Services by the Vendor;

- (vi) for breach of clauses 23, 24, or 30;
- (vii) for any loss arising from an occurrence which should be covered by a policy of insurance in the name of the Vendor required under this Agreement; or
- (viii) which, by law, the Vendor cannot contract out of.

23. INTELLECTUAL PROPERTY

- (a) Whittens acknowledges that the Vendor remains the owner of the Vendor's Background IP.
- (b) The Vendor acknowledges that Whittens remains the owner of Whittens' Background IP.
- (c) The Vendor grants to Whittens a perpetual, irrevocable, non-exclusive and royalty free licence for Whittens and Whittens' Personnel to use, adapt, modify and copy the Vendor's Background IP to the extent necessary to:
 - (i) complete the installation of, maintain, operate, make improvements to, repair and alter the Goods; and
 - (ii) exercise Whittens' rights with respect to the Project IP.
- (d) Whittens may assign or grant a sub-licence of the licence granted to it under clause 23(c).
- (e) The Vendor acknowledges and agrees that all Project IP is vested in Whittens and is Whittens' property as and when created and the Vendor hereby assigns all rights, title and interest in and to the Project IP to Whittens.
- (f) Whittens grants to the Vendor a non-exclusive, non-transferable, revocable and royalty free licence to use Whittens' Background IP and Project IP for the sole purpose of providing the Goods or Services.
- (g) The Vendor must not disclose, reproduce or otherwise deal with the Project IP or Whittens' Background IP, or allow any other person to do so, for any purpose other than to provide the Goods or Services.
- (h) The Vendor agrees that any Subcontract it enters into in relation to this Agreement must contain a condition that the Vendor agrees to assign to Whittens:
 - (i) use of any Vendor's Background IP as stipulated in clause 23(c); and
 - (ii) all Intellectual Property Rights in any Project IP created by it for the purposes of this Agreement.
- (i) The Vendor agrees to:
 - (i) notify Whittens as soon as it becomes aware of any suspected, threatened or actual infringement of any Intellectual Property Rights in the Project IP or Whittens' Background IP;

- (ii) provide all assistance Whittens may request to protect the Intellectual Property Rights in the Project IP or Whittens' Background IP; and
- (iii) provide all assistance in defending or prosecuting (as the case may be) any such infringement.
- (j) To the extent that any person has Moral Rights in the Vendor's Background IP or the Project IP, the Vendor must obtain or procure all consents or waivers from the individual creator necessary to ensure that Whittens may do or authorise any acts or omissions consistent with:
 - (i) the licence granted in relation to the Vendor's Background IP under clause 23(c); and
 - (ii) Whittens' ownership of the Project IP under clause 23(e), without infringing any Moral Rights.
- (k) The Vendor warrants that:
 - (i) it owns the Intellectual Property Rights in the Vendor's Background IP and that the use of the Vendor's Background IP does not and will not infringe any rights of third parties (including any Intellectual Property Rights);
 - (ii) the provision of the Goods or Services, or the use of the Goods (incorporated with Whittens' Property, or otherwise) by or on behalf of Whittens, does not and will not infringe the rights (including Intellectual Property Rights) of any third party;
 - (iii) it will, at no further cost to Whittens, procure all licences and consents to use any Intellectual Property Rights of a third party which are necessary to provide the Goods or Services or enable the Goods (incorporated with Whittens' Property, or otherwise) to be used by or on behalf of Whittens;
 - (iv) the Project IP does not and will not infringe any rights of third parties (including, without limitation any Intellectual Property Rights); and
 - (v) the Vendor has the right to assign all Project IP to Whittens in accordance with clause 23(e).
- (l) The Vendor's obligations set out in this clause 23 survive the suspension, termination, expiry or completion of this Agreement. If the Vendor sells any of the Vendor's Background IP or any enhancement to the Vendor's Background IP then the Vendor must ensure that these obligations bind each successor in title to the Vendor's Intellectual Property Rights, so far as is relevant to, or required by, this Agreement.

24. CONFIDENTIALITY

- (a) The Vendor acknowledges:
 - (i) the Confidential Information is valuable to Whittens and has commercial value;
 - (ii) Whittens will suffer loss if the Vendor discloses, or permits the disclosure of, any of the Confidential Information in contravention of this Agreement; and
 - (iii) that the Confidential Information remains the property of Whittens at all times and the Vendor's Personnel do not have any proprietary or other interest in the Confidential Information.
- (b) The Vendor must, subject to the terms of this Agreement, at all times:
 - (i) keep the Confidential Information secret and preserve its confidential nature;
 - (ii) not use Confidential Information for any purpose other than the purpose of performing the Services;
 - (iii) not reverse engineer, decompile or disassemble any Confidential Information; and
 - (iv) only copy or reproduce Confidential Information for the purpose of performing the Services, or with the written consent of Whittens.
- (c) The Vendor must not disclose any Confidential Information to any person except:
 - (i) with the prior written approval of Whittens, which consent may be withheld in its discretion;
 - (ii) to its Personnel, its Related Bodies Corporate and their Personnel but only to the extent necessary for the performance of the Services;
 - (iii) to its legal advisors, financial advisors or legal advisors of its financial advisors;
 - (iv) if it is required to do so by Legislation, a Government Authority or by a stock exchange; or
 - (v) to any third party but only to the extent necessary for the performance of the Services.
- (d) The Vendor must ensure that any Vendor's Personnel directly or indirectly involved in any capacity in the performance of the Services or that has, or may have, access to any Confidential Information must, prior to being provided with access to any such Confidential Information, execute an undertaking in a form approved by Whittens and deliver the executed undertaking to

Whittens before the information is provided to or accessed by the Vendor's Personnel.

- (e) The Vendor must ensure that any of its Personnel or any third party receiving Confidential

Information under this clause 24 from the Vendor does not disclose that information. The Vendor is, and remains, liable for any breaches of confidentiality by the Vendor's Personnel.

- (f) If the Vendor becomes aware of any unauthorised access to, use or disclosure of Confidential Information, or any suspected or possible breach of this Agreement, the Vendor must do the following:
 - (i) immediately notify Whittens in writing giving details of the suspected or possible breach;
 - (ii) do everything necessary to remedy the unauthorised access to, use or disclosure of the Confidential Information, or to prevent the suspected or possible breach of the confidentiality provisions in this Agreement;
 - (iii) comply with all lawful written directions from Whittens in relation to the actual, suspected or possible breach of this Agreement; and
 - (iv) give Whittens all assistance required in connection with proceedings which the Principal may institute against any person for breach of confidence or otherwise.
- (g) Whittens may disclose this Agreement, the Fees and all information relating to this Agreement without the consent of the Vendor to:
 - (i) any professional advisors of Whittens including to its legal advisors or financial advisors;
 - (ii) the professional advisors of Whittens' financial advisors;
 - (iii) Whittens' Financiers, potential Financiers and any advisors to Whittens' Financiers or potential Financiers;
 - (iv) the auditor of Whittens; or
 - (v) a bona fide prospective purchaser of Whittens or the business of Whittens provided that such bona fide prospective purchaser agrees to keep the terms of this Agreement confidential in accordance with this clause 24.

25. CONFLICT OF INTEREST

The Vendor must, and must ensure its Personnel, declare any Conflict of Interest prior to entering into any agreements with Whittens, and in any event as soon as a Conflict of Interest comes to

the attention of the Vendor.

26. TAXES

- (a) If GST has application to any supply made by the Vendor under or in connection with this Agreement, the Vendor may, in addition

to the consideration payable or to be provided for the supply, subject to issuing a Tax Invoice, recover from Whittens an

additional amount on account of GST, such amount to be calculated by multiplying the amount or consideration payable or to be provided by Whittens for the supply by the prevailing GST rate.

Should any taxes (other than GST) be levied on, in respect of, or in relation to, the Goods or Services these will be to the Vendor's account. The Vendor will be responsible for the payment of those taxes and will provide documentary evidence of the payment of those taxes if made on Whittens' behalf.

27. ASSIGNMENT AND SUBCONTRACTING

The Vendor must not assign or subcontract any part or the whole of its obligations under this Agreement except with the prior written consent of Whittens (which must not be unreasonably withheld).

28. FORCE MAJEURE

- (a) If a Party is prevented from carrying out the whole or any part of its material obligations under this Agreement by reason of Force Majeure, that Party must immediately give written notice to the other Party. The affected Party must keep the other Party informed of any changes in the circumstances causing the Force Majeure.
- (b) The obligations of the affected Party, so far as they are materially affected by Force Majeure, will be suspended for the period that the Force Majeure persists and the affected Party will not be in default under this Agreement. The affected Party must use its best endeavours to remedy or mitigate the effect of any Force Majeure and comply with its obligations under this Agreement.
- (c) Where the affected Party is the Vendor, Whittens is not liable or obliged to provide any financial relief to the Vendor as a result of a Force Majeure.
- (d) Despite any provision of this Agreement, if the Force Majeure causes the suspension of the Vendor's obligations for a continuous period of 3 months or a cumulative period of 6 months in any 12-month period, either Party may terminate this Agreement by written notice to the other Party.

29. MODERN SLAVERY

- (a) Whittens works to comply with the requirements of the *Modern Slavery Act 2018* (Cth) and expects the same of its subcontractors.
- (b) The Vendor warrants that:
 - (i) it investigates the risk of Modern Slavery within its operations, and those of its supply chain;
 - (ii) it assesses and addresses risks regarding Modern Slavery, including implementing appropriate due diligence and remediation programs;
 - (iii) it will notify Whittens as soon as possible of any confirmed instances of Modern Slavery and the actions undertaken by the Vendor to remedy the issue;
 - (iv) it has all the necessary processes, procedures, investigations and compliance systems in place to undertake the actions in clauses 29(b)(i) to 29(b)(iii);
 - (v) upon request, the Vendor will provide evidence to the satisfaction of Whittens which validates the Vendor's compliance with this clause;
 - (vi) upon request, the Vendor will permit Whittens' Personnel or its nominated representatives to undertake verification activities to validate the Vendor's compliance with this clause, including access to the Vendor's premises and records as required; and
 - (vii) it will include a clause similar to this clause 29(b) in all contracts it enters into with its suppliers.
- (c) In the event that the Vendor does not remedy, or provide an acceptable plan to remedy, any identified instances of Modern Slavery within the time frame specified by Whittens, Whittens reserves the right to terminate this Agreement in accordance with clause 17(c)(i).

30. BRIBERY AND CORRUPTION

- (a) The Vendor must not, and must procure that its Personnel do not:
 - (i) pay or accept any commissions or fees, or make or accept any payments or rebates to or from any employee or officer of Whittens or its Related Bodies Corporate, or favour any of those persons with gifts or entertainment of unusual or substantial value, or enter into any business arrangements with any of those persons, that would result in a detriment to Whittens or is contrary to fair dealing; and
 - (ii) provide or offer to provide a benefit (which is not legitimately due) to a public official (including a foreign public official) in order to retain or obtain a business advantage.

- (b) The Vendor must, and must ensure that its Personnel, immediately report to Whittens any offer, payment, rebate or other benefit, or any receipt of any payment, benefit or rebate of the kind referred to in clause 30(a).

31. DISPUTE RESOLUTION

- (a) If an issue or dispute arises in connection with this Agreement, the Parties agree, prior to the initiation of any legal proceedings, to use their reasonable endeavours to reach a resolution of the dispute.
- (b) If the dispute has not been resolved within 30 days after the Parties first convene to resolve the dispute, either Party may commence legal proceedings in connection with that dispute in any court of competent jurisdiction.
- (c) Despite the existence of a dispute, the Vendor must continue without delay to perform its obligations under this Agreement.

Nothing in this clause prevents either Party from applying to a court for urgent injunctive relief.

32. NOTICES

- (a) Any notice, approval, consent or other communication in relation to this Agreement must:
 - (i) be in writing and signed by the Party sending it (or on that Party's behalf);
 - (ii) be marked for the attention of:
 - (A) in the case of a notice to Whittens, Whittens' Representative;
 - (B) in the case of a notice to the Vendor, the Vendor's Representative; and
 - (C) be left at or sent by prepaid ordinary post to the last notified address of the Party, or sent by email to the last notified email address of the Party.
- (b) A notice, approval, consent or other communication is taken to be received by the addressee:
 - (i) upon actual receipt when hand delivered;
 - (ii) in the case of email, at the time in the place to which it is sent equivalent to the time shown on the automatic receipt notification received by the Party sending the email; or

- (iii) in the case of posting, three business days after posting to an address within Australia and on the fifth business day after the date of posting by airmail to an address outside of Australia.

33. PERSONAL PROPERTY AND SECURITY

- (a) Unless the context otherwise requires, terms and phrases defined in the PPSA have the same meaning in this clause 33.
- (b) The Vendor must not assign all or any of its rights under this Agreement, or create or allow any security interest under the PPS Law to subsist over this Agreement, without the prior written approval of Whittens.
- (c) Whittens is not obliged to give the Vendor notice under the PPS Law (including notice of a verification statement) unless Whittens is required by the PPS Law to provide the notice.
- (d) Neither Whittens nor the Vendor will disclose information of the kind mentioned in section 275(1) of the PPSA and the Vendor will not authorise, and must ensure that its Personnel do not authorise, the disclosure of such information.
- (e) Clause 33(d) does not prevent disclosure where such disclosure is required under section 275 of the PPSA because of the operation of section 275(7) of the PPSA.
- (f) Whenever Whittens reasonably requests, the Vendor must promptly take all steps under or in relation to the PPS Law which would be prudent for a Subcontractor in the position of the Vendor to take in connection with the supply of Goods or carrying out of the Services.
- (g) Where there is a security interest (as defined in the PPSA) under this Agreement:
 - (i) to the extent permitted, all provisions of the PPSA listed in sections 115(1) or 115(7) of the PPSA except sections 117, 134(1) and 135 are excluded in full and will not apply to that security interest and any other provision of the PPSA notified to the grantor of the security interest by the secured party after the Execution Date; and
 - (ii) the Vendor waives its right to receive from Whittens any notice required under section 157 of the PPSA or the provisions of the PPSA referred to in section 144 of the PPSA.
- (h) This does not affect any rights a person has or would have other than by reason of the PPSA.

34. OTHER MATTERS

- (a) **Survival** – Clauses 3, 10, 20, 22, 23, 24, 30, 32 and 33 survive the expiry or earlier termination of this Agreement.
- (b) **Agreement terms** – The terms and conditions of

- this Agreement may not be varied, unless agreed upon by both Parties and documented in writing.
- (c) **Waiver** – Waiver of any right arising from a breach of this Agreement must be in writing and executed by the Party granting the waiver. Failure by Whittens to exercise a right, remedy or power at any time will not be construed in any way to affect the enforceability of that right, remedy or power in any other instance, or the enforceability of this Agreement as a whole.
 - (d) **Governing law and jurisdiction** – The Parties accept the laws of the State or Territory in which the Goods are supplied or Services are performed, unless the Goods are supplied or Services are performed in more than one State or Territory in which case the jurisdiction shall be Western Australia.
 - (e) **Ipsa Facto Amendments** –
 - (i) For the purpose of this clause 34(e), Ipsa Facto Amendments means:
 - (A) the amendments to the *Corporations Act 2001* (Cth) set out in Part 2 of the *Treasury Laws Amendment (2017 Enterprise Incentives No.2) Act 2017* (Cth); and
 - (B) any regulations, declarations or legislative instruments, prescribed, made or declared pursuant to sections 415D, 434J or 451E of the *Corporations Act 2001* (Cth).
 - (ii) Clause 17(a) is subject to the Ipsa Facto Amendments to the extent that they apply to this Agreement. In the event the Ipsa Facto Amendments apply, Whittens may withhold or deny any advance payment or other form of credit to which the Vendor would otherwise be entitled.
 - (f) **Entire Agreement** – This Agreement as amended or varied from time to time represents the entire agreement between the Parties and supersedes all prior arrangements whether written or oral in relation to the Services.
 - (g) **Relationship between the Parties** –
 - (i) Whittens and the Vendor are independent contracting parties and nothing in this Agreement will make either Party an agent or legal representative of the other for any purpose whatsoever, and this Agreement does not grant either Party any authority to assume or to create an obligation on behalf
- or in the name of the other Party.
- (ii) Whittens is not responsible to the Vendor or any of its Personnel for any payments in respect of any employment related expenses including wages, annual leave, sick leave, long service leave, superannuation, workers' compensation, accidents, sickness, or life insurance.
 - (h) **Severability** – If any provision of this Agreement is or becomes voidable, invalid, illegal or unenforceable in any jurisdiction, that will not affect or impair the validity, legality or enforceability of the remainder of this Agreement in that jurisdiction and this Agreement shall be read and construed and take effect for all purposes as if that provision were not contained in this Agreement.