

1 PRIMARY OBLIGATIONS

- 1.1 During the Term of this Agreement, Downer must supply the Asphalt:
- in the quantity ordered by the Customer;
 - at the Price listed in the Price List;
 - subject to clause 18.2, to the quality set out in the Specification; and
 - by the Delivery Time required by the Customer.

1.2 The Customer must pay the Price for the Asphalt by the time stipulated in this Agreement.

2 ORDERING PROCESS

2.1 The Customer may order Asphalt from Downer by giving a Purchase Order to Downer.

2.2 The Customer's Purchase Order must:

- state the quantity, grade and relevant rate from the Price List;
- nominate a proposed Delivery Time;
- specify whether the order is for Site Delivery or Ex-Bin Delivery;
- specify truck types for Ex-Bin Delivery;
- a purchase order number;
- the Customer's name, ABN and account number; and
- the Customer's Representative

2.3 The Purchase Order may be given by the Customer in writing by email, or orally by phone.

2.4 The Purchase Order must not attach any of the Customer's terms and conditions, or any variation or special conditions to this Agreement, and if it does, the Customer agrees that those terms and conditions will have no effect, and that the terms and conditions of this Agreement will prevail and take precedence.

2.5 The Customer must give the Purchase Order to Downer no less than 24 hours prior to its proposed Delivery Time.

2.6 Downer may reject any Purchase Order which does not comply with this clause 2, and will have no obligation to supply any Asphalt to the Customer, in those circumstances.

2.7 Notwithstanding any other provision of this Agreement, Downer, in its absolute discretion, may elect to reject any Purchase Order by the Customer at any time.

3 AGREED DELIVERY TIME

3.1 Downer may reject the Delivery Time proposed by the Customer and specify another time.

3.2 The Customer may withdraw the Purchase Order if the new Delivery Time is not acceptable or negotiate with Downer to agree an acceptable Delivery Time.

3.3 Downer may take into account any relevant factor in negotiating the new Delivery Time with the Customer including:

- Trucking Distance;
- air temperature at Site or weather conditions expected at the Delivery Time;
- whether the route to Site may be affected by Unexpected Traffic or during Peak Hour;
- a contingency to allow for Peak Hour or Unexpected Traffic;
- any normal operational delays specific to the Site, including any inductions required, Site sign in requirements or any other Customer requirements related to entry onto Site;
- previous experience with the Customer and any delays suffered at Site or in taking Delivery;
- Downer's other customers' delivery requirements including the most efficient delivery route and order; or
- any other relevant consideration.

3.4 Downer's determination as to the Delivery Time is final.

3.5 If either:

- the Delivery Time nominated by the Customer is during Peak Hour;
- there is Unexpected Traffic during the course of Site Delivery;
- the Customer accepts Asphalt at Site after the Delivery Window; or
- the Customer insists on a Delivery Time that Downer does not agree to,

the Customer assumes all risk associated with any quality issues that may arise with the Asphalt and Downer's warranties are limited to those that are applicable if the Asphalt is taken by the Customer as an Ex-Bin Delivery.

4 ORDER CONFIRMATION

4.1 If Downer accepts the Purchase Order, it will issue an Order Confirmation confirming the details of the order including:

- the Delivery Time;
- the quantity of Asphalt;
- the Specification of Asphalt to be supplied; and
- the applicable Price.

4.2 Where a Purchase Order has been given by:

- email, the Order Confirmation will be issued by email; and
- phone, the Order Confirmation may be given orally or by way of SMS text from Downer to the Customer. Where an Order Confirmation is given orally, it must be confirmed in an SMS text by Downer to the Customer prior to Delivery.

4.3 The agreement for the supply of Asphalt will be evidenced by:

- this Agreement;
- the Purchase Order; and
- the Order Confirmation

(Agreement Documents).
5 CANCELLATION OF PURCHASE ORDER

5.1 The Customer may only cancel a Purchase Order by giving written notice to Downer not less than 24 hours prior notice to the Delivery Time.

5.2 If the Customer fails to give notice in accordance with 5.1, Downer may charge the Customer the Cancellation Fee.

5.3 If Downer is unable to Deliver at the Delivery Time then Downer will endeavour in good faith to coordinate with the Customer to provide a Delivery Time as soon as possible to Deliver in accordance with the Purchase Order.

6 DELIVERY

6.1 Downer must deliver the Asphalt by the expiry of the Delivery Time.

6.2 Downer may vary the Delivery Time by up to 24 hours by giving not less than 3 hours' notice prior to the expected Delivery Time.

6.3 Where the Purchase Order specifies:

- Ex-Bin Delivery, the Customer or the Customer's Personnel must arrive and take Delivery of the Asphalt at the Plant; or
- Site Delivery, the Customer (or the Customer's Personnel) must:
 - give Downer and Downer's Personnel sufficient access to the Site; and
 - direct Downer to the location or area at Site as directed by the Customer's Personnel;

within the Delivery Window, unless otherwise expressly varied by Downer.

6.4 Any direction given by apparently authorised Customer Personnel in connection with clause 6.3 will be binding on the Customer.

6.5 The Customer will be liable to pay any additional costs or charges associated with any waiting incurred by Downer or Downer's Personnel during Site Delivery as stipulated within the Price List.

6.6 If the Customer fails to take Delivery within the Delivery Window, either:

- Downer may cancel the Purchase Order and the Cancellation Fee will be payable by the Customer in accordance with clause 5.2; or
- the Customer may accept the Asphalt, on an as is where is basis, and Downer has no obligations and gives no warranty (under clause 18 or otherwise) as to the Asphalt quality.

6.7 If Downer fails to make the Asphalt available for the Customer:

- in the quantity shown in the Order Confirmation;
- to the quality required by clause 18 (provided that the Customer has complied with the clause 7); or
- within the Delivery Window, the Customer may either:
 - take delivery of the reduced quantity of Asphalt available, in which case it shall only be required to pay for what it has taken;
 - take delivery of the Asphalt, as is where is, in accordance with clause 3.5; or
 - cancel the Purchase Order.

6.8 Downer will have no liability to the Customer for a Delay Event including for any delay damages, breach of contract or Consequential Loss.

6.9 The Customer's sole remedy for any Delay Event is as contained in clauses 6.3 and 6.7.

6.10 If more than 3 Delay Events occur in a given Agreement Year, the Customer may exercise its termination rights pursuant to clause 21.1(c).

7 INSPECTION AND ACCEPTANCE

7.1 The Customer may test or inspect of a small shovel quantity sample of Asphalt prior to Delivery of the full quantity of Asphalt.

7.2 Downer will provide a Delivery Docket prior to Delivery for approval by the Customer.

7.3 The Customer may reject the Asphalt after Inspection if the information provided on the Delivery Docket is incorrect or if the quality of the Asphalt does not comply with the warranties provided in clause 18, by giving immediate written notice to the Downer Representative before taking Delivery.

7.4 If the Customer:

- accepts the Asphalt and takes Delivery;
- does not inspect the Asphalt but takes Delivery;
- does not reject the Asphalt by notifying the Downer Representative immediately after Inspection but before taking Delivery of the Asphalt;
- takes Delivery of the Asphalt after the Inspection; or
- signs the Delivery Docket and takes Delivery, then the Customer:
 - shall be deemed to accept that the Asphalt complies with the warranties given by Downer under this Agreement; and
 - will release Downer from any Quality Dispute in respect of the Asphalt supplied.

8 TITLE

8.1 Title in any Asphalt supplied under this Agreement will remain with Downer until payment is received in full for the Asphalt from the Customer (**ROT Clause**).

8.2 Until title in the Asphalt has passed to the Customer, the Customer:

- holds the Asphalt as fiduciary, agent and bailee of Downer;
- it must not encumber or grant any security interest in the Asphalt;
- may sell the Asphalt but only at arm's length, in the ordinary course of business, on market terms, and only as the fiduciary, agent and bailee of Downer; and
- where it is paid for the Asphalt by the third party, must receive all proceeds from the sale in trust for Downer, and must hold those proceeds on trust and in a separate account until the liability of Downer has been discharged and must account to Downer for the proceeds.

8.3 If the Customer fails to pay the Price or if the Customer is otherwise in breach of this Agreement, or Insolvent, Downer may retake possession of the Asphalt.

8.4 Downer may enter any premises occupied by the Customer and remove the Asphalt, even if the removal of the Asphalt will cause significant damage or destruction of other works, land, improvements or the pavement itself. The Customer acknowledges that Downer is entitled to mitigate its loss flowing from the breach of this Contract, and may benefit from the exercise of this right to reclaim the Asphalt, as it may use it in Recycled Asphalt Products (RAP) or for other purposes.

8.5 The Customer agrees to provide any assistance which may be required by Downer for the purposes of Downer protecting or perfecting any security interest arising under this Agreement.

8.6 For the purposes of enabling Downer to inspect the Asphalt or retake possession of the Asphalt, Downer and its representatives are irrevocably authorised to enter (forcibly, if necessary) into any premises owned or occupied by the Customer on or in which the Asphalt may be located from time to time, and to recover and do all things necessary to recover the Asphalt, and the Customer appoints Downer as its agent to enter any premises not owned by the Customer and on or in which the Asphalt may be located from time to time.

9 PPSA

9.1 Downer may register:

- the security interest created pursuant to the ROT Clause; or
- any other security interest that arises in connection with this Agreement,

on the PPSR.

9.2 The Customer waives its right to receive notice of the registration on the PPSR.

10 RESTRICTIONS ON RE-SALE

10.1 The Customer may not on-sell, transfer or assign any Asphalt supplied by Downer, except to the Customer's own Related Bodies Corporate for the express purpose of laying the Asphalt.

10.2 Downer's legitimate commercial interest to be protected by this restraint of trade is, among other things, to:

- stop the Customer flooding the market with Downer Asphalt;
- prevent the Customer taking margin on margin on the supply of Downer's Asphalt;
- avoid Quality Disputes due to the laying or on-supply of Asphalt by third party contractors; and
- protect the public interest in the laying of Asphalt on public roads by suitably qualified and competent pavement contractors.

10.3 The Customer must provide on request from Downer evidence of the Customer's projects where the Asphalt supplied by Downer has been placed by the Contractor to ensure compliance with the terms of this clause.

11 RISK

11.1 Risk in the Asphalt will pass to the Customer on Delivery.

11.2 The Customer and the Customer's Personnel enter the Plant at their own risk.

11.3 The Customer indemnifies Downer against any claim made by the Customer's Personnel or Downer's Personnel for personal injury, death or property damage that may occur during Delivery, whether due to an act or omission or negligence or any other cause of Downer, Downer's Personnel, the Customer or the Customer's Personnel, including:

- property damage to Downer's Plant or personal injury to Downer's Personnel;
- damage to the Customer's or the Customer's Personnel's trucks, tankers, augers, pumps tanks or any other associated transport vehicle during Delivery of the Asphalt; and
- personal injury to the Customer's Personnel.

11.4 The Customer must hold and maintain public liability insurance, plant and equipment and motor vehicle insurance and produce evidence to Downer's satisfaction of those policies.

11.5 The Customer's Personnel must undertake any safety or workplace inductions directed by Downer as a condition of entry onto the Plant.

11.6 Downer may refuse entry to the Plant to the Customer's Personnel if they do not have the relevant inductions or current insurances.

11.7 Any direction given under this clause will not be a Delay Event, but may constitute a breach by the Customer of its obligation to take Delivery within the Delivery Window, and may be subject to the Cancellation Fee payable by the Customer if the Asphalt is wasted.

- 12 FORECASTING**
- 12.1 Notwithstanding anything else in this Agreement, the Customer to provide 36h hours' prior notice for Ex-Bin delivery exceeding 500 tonnes or more.
- 13 SCHEDULED PLANT MAINTENANCE**
- 13.1 Downer's obligations to supply Asphalt to the Customer are suspended for the duration of any Planned Shutdown.
- 13.2 Downer will provide the Customer with a written schedule of dates for Planned Shutdowns on an as needed basis. Downer will use its reasonable endeavours to give as much notice of the Planned Shutdowns as is reasonably practicable.
- 13.3 Downer may reduce any quantity contained within a Purchase Order supplied by the Customer or an Order Confirmation on a pro-rata basis for the duration of the Planned Shutdown, by giving notice to that effect to the Customer.
- 13.4 The Customer acknowledges that Downer has competing demands for supply from the Plant during Planned Shutdowns and Downer may prioritise and allocate its limited Asphalt production capacity during a Planned Shutdown in its sole discretion. Downer has no obligation of good faith in exercising this discretion.
- 13.5 Downer's Maximum Supply Obligation will be reduced on a pro-rata basis for the duration of the Planned Shutdown.
- 14 FORCE MAJEURE**
- 14.1 If Downer suffers an FM Event, its obligations under this Agreement will be suspended for the duration of the FM Event.
- 14.2 Downer will use its reasonable endeavours to provide written notice of the FM Event to the Customer as soon as reasonably practicable after Downer becomes aware of any delay in its obligations that might be caused by the FM Event.
- 14.3 Downer will use all reasonable endeavours to overcome or avoid the FM Event but will have no liability whatsoever to the Customer in connection with an FM Event.
- 14.4 The Customer acknowledges that Downer has competing demands for supply from the Plant during FM Events and Downer may prioritise and allocate its limited Asphalt production capacity during an FM Event, in its sole discretion.
- 15 PAYMENT TERMS**
- 15.1 Downer will give the Customer a Tax Invoice for the Asphalt after Delivery.
- 15.2 The Customer must pay the Tax Invoice within 30 days of the date of the Tax Invoice.
- 16 DISPUTED INVOICES**
- 16.1 If the Customer disputes any part of the Tax Invoice (**Payment Dispute**) it must give Downer written notice within 3 days of the date of the Tax Invoice containing sufficient particulars of the dispute to enable Downer to make assessment of the dispute.
- 16.2 If the Customer raises a Payment Dispute, Downer may require the Customer to:
- pay an amount equal to the disputed amount into Court or Downer's solicitor's trust account;
 - provide additional security in accordance with clause 17; or
 - provide a personal guarantee and indemnity from a director or other third party in respect of the Payment Dispute.
- 16.3 If the Customer:
- does not give notice of its Payment Dispute within the time stipulated; or
 - fails to comply with 16.2, it will be deemed to:
- not to have any Payment Dispute in respect of any aspect of the Tax Invoice;
 - accept the validity of the Tax Invoice; and
 - be absolutely barred from bringing any further Payment Dispute, claim for set-off or deduction in relation to the amount outstanding, the quantities or the rates applied in the Tax Invoice.
- 16.4 The Customer must pay the non-disputed amount of the Tax Invoice by the due date for payment, notwithstanding the existence of the Payment Dispute.
- 16.5 If the Customer has received payment from its Client for any amount included in the Payment Dispute or otherwise included in a Tax Invoice, the Customer hereby assigns that amount directly to Downer.
- 16.6 The Customer must do all things necessary to give effect to the assignment in clause 16.5, and hereby appoints Downer as its power of attorney to give notice to the Client and or the End User of the assignment and to direct payment to Downer.
- 16.7 If, despite the assignment clause 16.5, the Client or End User makes a payment directly to the Customer, the Customer must make payment to Downer of the disputed amount in full, whether subject to a Payment Dispute or otherwise, within 3 days of receipt from the Client. The Customer agrees in those circumstances to pay the amount in full to Downer as a liquidated debt.
- 16.8 The Customer must produce copies of its books and accounting records to verify any amount received in connection with Asphalt recorded in a Tax Invoice and Downer may appoint an independent auditor at the Customer's cost to verify whether a payment has been received by the Client in relation to the disputed amount. The Customer also appoints Downer as its agent to discuss the Payment Dispute and the Tax Invoice with the Client.
- 16.9 Notwithstanding any other rights Downer may have under this Agreement, the Customer agrees to grant a first ranking charge over the monies it holds as a result of the payment in 16.7 to Downer. Downer may enforce its security interest created under this clause in any way permitted by the PPSA or at law as a secured creditor and notwithstanding the
- existence or otherwise of Payment Dispute relating to the monies over which the charge has been granted.
- 17 SECURITY**
- 17.1 Downer may require the Customer to pay a security deposit, or provide Downer with another form of security, up to the amount Downer estimates as the aggregate value of three (3) months of the Customer's offtake (**Security**) if:
- the Customer fails to pay any three Tax Invoices, or two consecutive Tax Invoices, on time; or
 - at any time, Downer reasonably forms the view that the Customer's creditworthiness is not satisfactory.
- 17.2 The Customer must comply with Downer's request within 3 days. Downer may suspend supply of Asphalt if the Security is not provided.
- 17.3 Downer will release the Security after this Agreement ends and all outstanding amounts owing under this Agreement have been paid.
- 17.4 Downer may have recourse to the Security if:
- any Tax Invoice remains unpaid for more than 30 days after it falls due for payment;
 - the Customer raises a Payment Dispute in relation to a Tax Invoice;
 - the Customer raises a Quality Dispute, but has not paid Downer for the amount outstanding in relation to the Asphalt forming the basis of the Quality Dispute;
 - the Customer has completed the assignment of the End Client's payment to Downer for its Asphalt supplied under this Agreement or otherwise; or
 - the Customer is otherwise in breach of this Agreement.
- 18 ASPHALT WARRANTIES**
- 18.1 Subject to clause 18.2, Downer warrants that the Asphalt will comply with the Specification at the time of Delivery.
- 18.2 The Customer acknowledges that:
- the Asphalt may contain Minor Defects at the time of Inspection or Delivery;
 - the Customer has no right to refuse Delivery of the Asphalt as a result of the Asphalt containing Minor Defects; and
 - Downer has no liability to the Customer, whether under this Agreement, at law or otherwise in relation to Minor Defects.
- 18.3 To the maximum extent permitted by law, any other warranties imposed or implied by law are excluded.
- 18.4 Downer gives no warranty about fitness for purpose of the Asphalt for any application. The Customer has made its own decision about the selection of the Asphalt and has not relied on any advice, opinion or recommendation provided by Downer in respect of the Asphalt.
- 18.5 The Customer acknowledges that Downer has no control over:
- the moderation of Asphalt temperature during transport of the Asphalt to the Site;
 - the weather conditions at or around the Site;
 - Peak Hour traffic, the Trucking Distance or Unexpected Traffic between the Plant and the Site;
 - the Customer's workmanship when placing the Asphalt at Site, including compaction and temperature; or
 - the Client or End User's requirements, the pavement design or any other requirement, and in the circumstances, Downer has no liability for and the Customer releases Downer against any claim for any loss or damage in relation to any:
- fitness for purpose warranty;
 - any defect or issue in the final pavement in which the Asphalt was placed where Downer is not in breach of the warranty in clause 18.1; and
 - failure of the Asphalt to meet the Customer's requirements, including any contractual specification, pavement design or other criteria of the End User or the Client.
- 18.6 The Customer agrees that Downer's sole responsibility is to ensure that the Asphalt meets the Specification at the time of Delivery. The Customer therefore agrees that the sole and decisive evidence of whether Downer has complied with the Specification will be:
- where the Asphalt is subject to Ex-Bin Delivery, Asphalt production test report on requested Customer designed batch; and
 - where the Asphalt is subject to Site Delivery, the signed Delivery Docket evidencing Inspection and acceptance at Site.
- 18.7 The Customer acknowledges that a statutory declaration or affidavit signed or sworn by the Plant's manager:
- attaching the Asphalt Production Test Report or a copy of the Delivery Docket; and
 - stating that the Asphalt was compliant to Specification at the time of Delivery,
- will be the determinative evidence in deciding any Quality Dispute about the Asphalt supplied by Downer.
- 18.8 The Customer hereby releases and indemnifies Downer in respect of any claim howsoever arising in connection with the use of the Asphalt by the Customer or any claim made by any third party in connection with Asphalt supplied under this Agreement.
- 18.9 The release in clause 18.8 may be pleaded by Downer as a complete defence to any claim, counter-claim, defence, set-off or deduction made by the Customer in respect of the Asphalt supplied by Downer. The Customer must pay Downer's legal costs on a solicitor-own client basis in connection with any proceedings where the Customer makes a claim, counter-
- claim, defence, or set-off in respect of the quality of the Asphalt where Downer has produced the statutory declaration and supporting evidence stipulated in clause 18.7 that the Asphalt met Specification at the time of Delivery.
- 19 LIMITATION OF LIABILITY**
- 19.1 Downer has no liability to the Customer where it has been established that Downer has complied with its obligations under clause 18.1.
- 19.2 Where Downer is in breach of clause 18.1, the sole remedy and entitlement for the Customer is cost of replacement or repair of the Asphalt supplied.
- 19.3 Downer has no liability to the Customer for any Consequential Loss.
- 19.4 Notwithstanding any other clause of this Contract or any legislation, legal or equitable principle, or any other circumstance, Downer's liability to the Customer shall in no circumstances exceed the lesser of:
- \$100,000; or
 - the total value of Asphalt supplied in the Agreement Year to the date of the incident or event giving rise to the liability.
- 20 DISPUTE RESOLUTION**
- 20.1 Downer may commence debt recovery proceedings or enforce any other action or right it may have under this Agreement without the requirement to comply with any contractual dispute resolution procedure.
- 20.2 The Customer must give Downer written notice within 3 days of becoming aware of any grounds which may give rise to a Quality Dispute.
- 20.3 As a condition precedent to commencing any Quality Dispute proceedings, the Customer must pay all amounts outstanding to Downer. If the dispute process resolves that Downer is at fault, an appropriate refund, adjustment or credit note may be issued by Downer.
- 20.4 Within 30 days of giving the initial notice, the Customer must provide a detailed further notice which must:
- be written and addressed to the Downer Dispute Representative;
 - provide full and proper particulars of all the facts and circumstances giving rise to the Quality Dispute;
 - provide pictures, written statements or any other evidence that supports the Quality Dispute; and
 - be supported by a signed report from an independent registered engineer with relevant industry experience recognised by the state or territory industry body, or AAPA, supporting the Customer's position.
- (Dispute Notice).**
- 20.5 If the Customer:
- does not give notice of its Quality Dispute within the time stipulated;
 - fails to serve a compliant Dispute Notice within the time stipulated; or
 - fails to pay all outstanding amounts in accordance with 20.3, it will be deemed to:
- not to have any Quality Dispute in respect of any aspect of the Asphalt supplied;
 - accept the quality of the Asphalt; and
 - be absolutely barred from bringing any further claim, proceedings or action in relation to the same facts and circumstances giving rise to the Quality Dispute.
- 20.6 On receipt of the Dispute Notice, Downer may elect to either:
- nominate a good faith negotiation of the parties' Dispute Representatives by giving notice to that effect to the Customer (**Negotiation**);
 - refer the matter to Expert Determination in accordance with clause 20.10 below; or
 - determine that it has no liability in respect of the Quality Dispute.
- 20.7 If the Customer raises a Quality Dispute or Payment Dispute after Downer commences debt recovery proceedings, the Customer must immediately pay Downer the amount outstanding as a liquidated debt and follow the Payment Dispute and Quality Dispute Resolution Procedures under this Agreement.
- 20.8 If Downer elects to hold a Negotiation:
- the Dispute Representatives must meet at least once within 14 days of Downer's election notice to attempt to resolve the Quality Dispute in good faith; and
 - if, following the meeting, the Dispute Representatives cannot resolve the Quality Dispute, the Customer may elect to escalate the Quality Dispute to senior management of each party, provided that they meet within 30 days of the first meeting.
- 20.9 If either:
- Downer exercises its discretion in 20.6(c); or
 - no resolution is reached during Negotiation,
- the Customer may commence litigation.
- 20.10 If Downer elects Expert Determination the Expert shall be appointed:
- by agreement between the parties; or
 - failing agreement, as selected by the chairman of the Australian Asphalt Pavement Association (acting independently and in good faith).
- 20.11 The Expert must follow the IAMA Expert Determination Rules (**Expert Rules**) however, notwithstanding any provision of the IAMA Rules, the Expert may inform him or herself

about any matter, fact or circumstance or may call for evidence or input from any party (including the Customer's End User or Client).

20.12 The Expert's determination of the Quality Dispute will be the final determination of the facts and issues arising out of the Quality Dispute, and the parties agree to be bound by the Expert's determination and not commence or pursue litigation in respect of the Expert's determination.

20.13 The only basis upon which a party may take commence litigation in respect of the Expert's determination is if:

- (i) the Expert has not afforded one or both of the parties natural justice or has so grossly departed from the Expert Rules as to have denied a party due process; or
- (ii) the Expert has made a gross error in law or a gross error of fact,

but in either case, neither party may introduce any new evidence, arguments or facts in litigation that differ from the evidence, arguments or facts introduced under the Expert Rules in the original Expert's determination.

20.14 Unless determined otherwise by the Expert, the parties will share the Expert's costs equally.

21 TERMINATION

21.1 If a party:

- (a) is Insolvent;
- (b) commits a fundamental breach of this Agreement; or
- (c) commits any other breach of this Agreement and fails to rectify it to the Innocent Party's reasonable satisfaction within 7 days of receipt of a notice to remedy the breach,

the Innocent Party may terminate this Agreement by giving written notice to the Defaulting Party.

22 CUSTOMERS' TERMS AND CONDITIONS

22.1 This Agreement constitutes the only agreement governing the supply of the Asphalt to which it relates, and supercedes all previous communications, negotiations and agreements in connection with the supply of the Asphalt between the parties.

22.2 This Agreement supercedes any prior conduct between the parties, accepted industry practices, policies, procedures or any other earlier representations made prior to the Commencement Date.

22.3 Except to the extent the parties agree otherwise under a separate written contract executed by both parties, any contract for the supply of Asphalt between any Downer entity and any Customer entity during the Term will be governed by and subject to the terms and conditions of this Agreement.

22.4 If there is any formal defect, irregularity, omission, handwritten amendments or if any of the Agreement Documents are incomplete, not signed by a party, or if there is any ambiguity or conflict between the contract documents and any extrinsic documents or any written or verbal representations made by either party prior to the submission of a Purchase Order, the terms and conditions of this Agreement will prevail and must be used to determine the issue.

22.5 A failure by Downer or the Customer to submit Agreement Documents strictly in accordance with the processes outlined in this Agreement, including if Downer fails to submit an Order Confirmation or submits those documents after taking delivery of the Asphalt, will not disentitle Downer from relying on the terms of this Agreement.

22.6 Downer will not be taken to have waived any of its rights under this Agreement unless the Downer Dispute Representative has given the the Customer Dispute Representative an express written notice to that effect.

23 GENERAL

23.1 Notices

- (a) A notice under this Agreement:
 - (i) must be in writing;
 - (ii) must be addressed to the relevant party's Representative and may be signed for the party giving it by the party's authorised officer, attorney or solicitor; and
 - (iii) may be:

(A) sent by pre-paid post ; or

(B) sent by email,

- (iv) to the party's Representative in accordance with the contact details provided by each party for their Representatives from time to time.

(b) A notice is taken as given by the sender and received by the intended recipient:

- (i) if posted, 3 Business Days after posting; or
- (ii) if sent by email, at the time it is actually received into the recipient's email server and the sender may rely on a delivery receipt as evidence of delivery to the recipient.
- (c) A party giving notice of termination or of a Quality Dispute or Payment Dispute, must give notice by post or deliver it personally.

23.2 Assignment

The Customer must not transfer or assign any of its liabilities or rights under this Agreement to any other person without the prior written consent of Downer (which consent may be withheld at Downer's absolute discretion).

23.3 Waiver

No waiver of any breach, or failure to enforce any provision, of this Agreement at any time by either party will in any way limit or waive the right of such party to subsequently enforce and compel strict compliance with the provisions of this Agreement.

23.4 Publicity

Parties may only release publicity or advertising relating to this Agreement or the collaboration of the parties if the releasing party receives prior written approval from the other.

23.5 Further Assurances

Each party will make all applications, do all things and execute all documents reasonably required in order to give effect to the provisions and intent of this Agreement.

23.6 Amendments

No amendment to this Agreement will be valid unless recorded in writing and signed in accordance with Section 127 of the Corporations Act 2001 (Cth) by each party.

23.7 Severance

If any part of this Agreement is, or becomes illegal, invalid or unenforceable, the legality, validity or enforceability of the remainder of this Agreement will not be affected and shall be read as if that part had been severed.

24 PARTNERSHIP AND TRUSTS

24.1 If you are a partner in a partnership, each partner is jointly and severally liable under this Agreement.

24.2 If you enter this Agreement as a trustee, you represent and warrant in your own right and as trustee of the Trust, that as at the date of this Agreement and until such time as all your obligations under this Agreement are discharged:

- (a) you are the sole trustee of the Trust;
- (b) you have the requisite capacity and authority to enter this Agreement on behalf of, and to bind the beneficiaries of, that Trust and to perform all obligations under this Agreement pursuant to the documents governing that Trust; and
- (c) you have the right to be fully indemnified out of the assets of the Trust in relation to this Agreement and the assets of the Trust are sufficient to satisfy all obligations of the Trust under this Agreement.

25 DEFINITIONS

25.1 In this Agreement, capitalised words have the following meanings:

AAPA means Australian Asphalt Pavement Association.

Agreement means this Agreement evidenced by the Agreement Documents.

Agreement Documents means the documents set out in clause 4.2.

Agreement Year means the 12 month period commencing on the Commencement Date, or anniversary of the Commencement Date as applicable, in which the relevant Date of Delivery falls.

Asphalt means asphalt produced by Downer at its Plant.

Asphalt Production Test Report means laboratory report of Customer's requested Asphalt mix conducted on orders of 30 tonnes and above.

Business Day means a day which is not a Saturday, Sunday or public holiday in the State or Territory in which the Plant is located.

Cancellation Fee means an amount equal to 10% of the Purchase Order value.

Client means the party the Customer may on-sell to or supply and lay Asphalt for.

Consequential Loss means any special, indirect or consequential loss, and includes loss of profit or goodwill (or similar financial loss), any payment made or due to any third party and any loss or damage caused by delay in the supply of Asphalt.

Customer has the meaning given to it on the Purchase Order.

Customer's Dispute Representative means the person nominated ...

Customer Personnel means any employees, contractors, agents or other personnel engaged by the Customer in connection with the transport, delivery or placement of the Asphalt, including any transport contractors, labour hire staff, crews, drivers or operators.

Customer Representative means means the person identified as such in the Purchase Order or otherwise nominated by the Customer to Downer as being the Customer's representative from time to time. Where the Purchase Order does not identify the Customer's Representative and the Customer

Delay Event means delays stipulated in Clause 7.7

Defaulting Party means the party in breach of the relevant agreement.

Delivery means:

- (a) where the Customer collects the Asphalt via Ex-Bin Delivery from the Plant, the point at which Asphalt has commenced loading into the Customer's trucks;
- (b) where Downer agrees to Site Delivery, the point at which the Asphalt is unloaded from the Downer truck at the Site as directed by the Customer.

Delivery Docket means a standard form document provided by Downer containing relevant information regarding the Asphalt delivered, including:

- (a) the information contained in the Purchase Order or the Order Confirmation; and
- (b) data in relation to the quality of the Asphalt Delivered, including temperature, density, grade;

Delivery Time means:

- (a) where Downer agrees to Delivery to Site, the allocated timeslot within which Downer must deliver the Asphalt to the Site; and
- (b) for Ex-bin sales, the allocated time slot by which the Customer must be at the front gate of the Plant ready to collect

Delivery Window means a time which is no more than 15 minutes after the designated Delivery Time.

Dispute Notice has the meaning given in clause 20.4.

Dispute Representatives means the Downer Dispute Representative and the Customer Dispute Representative.

Downer Dispute Representative means the person nominated by Downer to act in this role, as notified by Downer to the Customer from time to time.

Downer's Personnel means any employees, contractors, cartage contractors, agents or other personnel engaged by the Downer in connection with the manufacture, sale and delivery of Asphalt at the Plant.

Downer Representative means the person nominated by Downer to be their representative as notified to the Customer from time to time.

End User means the party which the Customer supplies the Asphalt to, either directly or through a chain of intermediaries.

Ex-Bin Delivery means collection of the Asphalt by the Customer from the Plant.

Expert means the person appointed in accordance with clause 20.10 to 20.14.

Expert Determination means the procedure set out in clauses 20.10.

Expert Rules has the meaning given in clause 20.11.

FM Event means any event outside Downer's control and includes:

- (a) An unscheduled, unplanned or unexpected Plant breakdown;
- (b) unavailability of feedstock for the Plant;
- (c) a workplace health and safety incident at the Plant or effecting the Plant;
- (d) inclement weather events, including flood, rain, hail, cyclones, snow, fire, earthquake

Innocent Party means that party that is not the Defaulting Party under the relevant agreement.

Insolvent means where a party is a corporation, it becomes an externally administered body corporate under the Corporations Act 2001 (Cth), or where it is an individual, a similar event occurs under the Bankruptcy Act.

Inspect means to look at, examine and/or test and **Inspection** has a corresponding meaning.

Maximum Supply Obligation is defined in the Agreement Details on an annual basis, and may be referred to by Downer on a pro-rata basis to determine Downer's Maximum Supply obligation on a daily, weekly or monthly basis. If no amount is specified, the Maximum Supply Obligation shall be zero tonnes

Minor Defects means a defect or non-conformance that is only minor in nature.

Negotiation has the meaning given in clause 20.6(a).

Order Confirmation means a written notice given by email or other means confirming acceptance of the Purchase Order together with the other matters listed in clause 4.1, or a verbal confirmation, provided that the verbal confirmation is later ratified in writing by Downer and Downer may retract the verbal confirmation until such time as it is ratified.

Payment Dispute has the meaning given in clause 16.1.

Peak Hour means Monday to Friday between the hours of:

- (a) 6AM and 10AM;
- (b) 3PM and 7PM.

Planned Shutdowns means any planned shutdown of the Plant for any reason including scheduled maintenance, Downer safety days, industry or union mandated events, Christmas or other annual holidays, public holidays.

Plant means the asphalt plant located at the address identified in the Agreement Details and the land, buildings, access roads, weigh bridges and any other infrastructure connected to the Plant or associated with the production of Asphalt on the premises where the Plant is located.

PPSA means the Personal Property and Securities Act 2009 and security interest and associated terminology from the PPSA will have the same meanings where the context requires.

PPSR means the Personal Property Securities Register under the PPSA.

Price means the price for the asphalt calculated by Downer with reference to the Price List.

Price List means the price list, schedule of rates, quotation or any other pricing schedule provided by Downer to the Customer.

Purchase Order means the document of that name given by the Customer to Downer and which meets the requirements of clause 2.2.

Quality Dispute means any claim, set-off, dispute or allegation relating to the quality or Specification of Asphalt supplied by Downer.

Related Body Corporate has the meaning in the Corporations Act 2001 (Cth).

ROT Clause has the meaning given in clause 8.1.

Security has the meaning given in clause 17.1.

Site means the work site where the Customer intends to place the Asphalt.

Site Delivery means delivery of the Asphalt by Downer to the Site.

Specification means the Asphalt specification requested by the Customer to Downer.

Tax Invoice means a Downer issued tax invoice containing particulars of the Asphalt supplied to the Customer.

Trucking Distance means the actual distance travelled between the Plant and the Site.

Unexpected Traffic means any unforeseeable increase in volume in traffic, car accident or other delay on the normal route between the Plant and the Site.