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General Terms of Sale

1. Basis of Sale

(a) These General Terms of Sale apply to the Agreement for the sale of the Artwork.

(b) The Agreement is the Vendor's offer to sell the Artwork to the Customer on the terms of the Agreement.

(c) The execution of the Agreement, or acceptance of delivery of the Artwork, constitutes acceptance of the Agreement in full.

2. Price and payment

The Price

(a) The Customer must pay to the Vendor the Price in accordance with and by the dates or times specified in the Payment Terms.

Delivery Costs

(b) The Delivery Costs do not form part of, and must be paid by the Customer in addition to, the Price.

(c) The Customer must pay the Delivery Costs in full at the same time and in the same manner as the Price.

(d) If the Vendor determines or expects the Delivery Costs to exceed the amount specified in the Key Details or as previously notified to the Customer:

  (i) the Vendor must notify the Customer in writing of the revised amount; and

  (ii) the Customer must pay the revised amount within three (3) Business Days of being notified by the Vendor. The Vendor is not obliged to deliver the Artwork until the Delivery Costs have been paid in full.

The Deposit

(e) If a Deposit is specified in the Key Details, the Customer must pay to the Vendor the Deposit in accordance with the Payment Terms.

(f) The Deposit paid by the Customer under the Agreement is credited against the Price.

(g) The Deposit is not refundable where:

  (i) the Agreement is terminated by the Vendor under clause 9(a); or

  (ii) the Customer fails or refuses to complete the purchase of the Artwork,

and the parties agree that the Deposit is a genuine pre-estimate of the Loss the Vendor would suffer if the Customer failed to complete.

(h) The Deposit must be refunded to the Customer in full where the Vendor terminates the Agreement under clause 9(c).

Payment before delivery

(i) The Vendor is not obliged to deliver the Artwork to the Customer, and no title or entitlement to possession arises, until the Vendor has received the Total Amount Due in full.

Late payments

(j) If the Customer does not pay any amount owing or payable by the Customer to the Vendor under the Agreement on time, the Vendor may, without limiting other rights:

  (i) charge interest on the unpaid amount, calculated daily and **not** compounding, at the rate of 6% per annum, from the due date until payment in full;

  (ii) terminate the Agreement in accordance with clause 9(a); and/or

  (iii) recover the Vendor's costs of recovering the debt, including its legal costs.

Payment method

(k) In relation to the payment of the Total Amount Due by the Customer to the Vendor:

  (i) each payment must be in Australian dollars;

  (ii) each payment must be made without set-off, counterclaim or deduction;

  (iii) each payment must be made by way of electronic transfer in cleared funds to the Vendor Nominated Account; and

  (iv) the Customer bears all bank, transfer, currency conversion and intermediary fees and charges, so that the Vendor receives the full amount payable free of deduction.

3. Delivery

(a) The Vendor is to deliver the Artwork to the Customer in accordance with the Delivery Terms, subject always to prior receipt by the Vendor of the Total Amount Due in full.

(b) Delivery occurs, and the Vendor's delivery obligation is satisfied:

(i) on collection by or on behalf of the Customer; or

(ii) on the Artwork being handed to a carrier,

whichever is first. The Vendor is not responsible for any delay that may be caused by any carrier.

(c) If the Customer fails to take delivery or to give adequate delivery instructions, the Vendor may, on written notice to the Customer, store the Artwork at the Customer's risk and cost (including storage, handling and insurance charges) and charge those costs to the Customer, and risk passes as if delivery had occurred.

(d) The Customer must inspect the Artwork on delivery and notify the Vendor in writing of any defect, damage, shortage or non-compliance within three (3) Business Days of delivery, failing which the Artwork is deemed accepted.

(e) Any date or period for delivery is an estimate only and time is not of the essence for delivery. The Vendor is not liable for any Loss arising from late or delayed delivery, and no delay entitles the Customer to terminate the Agreement, withhold or defer payment, or claim any refund, set-off or compensation.

4. Risk and title

(a) Risk in the Artwork (including loss, damage or deterioration) passes to the Customer on delivery under clause 3(b), regardless of title.

(b) If the Vendor elects to deliver the Artwork to the Customer before receiving the Total Amount Due in full, title to the Artwork does not pass to the Customer until the Vendor has received the Total Amount Due in full. Until then:

(i) the Customer holds the Artwork as bailee for the Vendor and must store it separately, identifiable as the Vendor's property;

(ii) the Customer must not sell, charge, encumber or otherwise deal with the Artwork;

(iii) on giving the Customer prior notice, the Vendor or its authorised representative may enter, at any time, any premises where the Artwork is located in order to inspect, recover or repossess the Artwork, doing no more damage than is reasonably necessary, and the Customer licenses it to do so; and

(iv) if the Artwork is resold, the Customer holds the proceeds on trust for the Vendor to the extent owing.

(c) From the time risk passes until title passes, the Customer must:

(i) keep the Artwork insured with a reputable insurer for its full replacement value against all usual risks;

(ii) note the Vendor's interest on that insurance policy; and

(iii) produce evidence of the insurance to the Vendor on request.

5. Exporting the Artwork

(a) If the Artwork is to be exported from Australia, the Customer is responsible, at its own cost and risk, for obtaining all permits, licences, approvals and clearances required for the export of the Artwork from Australia and for its importation into the destination country, and for all customs duties, taxes, levies, brokerage and clearance charges imposed outside Australia. The Vendor will provide reasonable assistance at the Customer's cost.

(b) If the exportation or importation of the Artwork is delayed, restricted, refused or made subject to conditions:

(i) that does not affect the Customer's obligation to pay the Total Amount Due in full;

(ii) that does not entitle the Customer to any refund, rebate or set-off; and

(iii) the Vendor is not liable for any Loss resulting from any such delay, restriction, refusal or condition.

6. Intellectual property

(a) The Customer acquires the physical Artwork only. Copyright and all other intellectual property rights in the artistic work embodied in the Artwork are not transferred by the Agreement and remain with the artist or other owner of those rights. The Vendor is not the owner of those rights, makes no representation or warranty as to the identity of their owner or as to their existence, subsistence, validity or ownership, and does not grant, and is not able to grant, any licence in respect of them.

(b) The Customer must not reproduce, publish, adapt, communicate, licence, exhibit for commercial purposes or otherwise commercially exploit the Artwork or any image of it (including any use in advertising or merchandising, any digital token, or any use for the purpose of training a machine learning system) without the prior written consent of the owner of the relevant rights. The Customer must obtain that consent directly from the rights owner and must not represent that any consent, licence or authority has been given by the Vendor.

(c) Clause 6(b) does not restrict the Customer's private and non-commercial use and enjoyment of the Artwork, or the use of images of the Artwork for insurance, valuation, cataloguing, security or condition purposes, or in connection with a resale of the Artwork or a loan of it to a public gallery or museum.

(d) The Customer acknowledges the artist's moral rights under Part IX of the *Copyright Act* 1968 (Cth) and must not subject the Artwork to any derogatory treatment or false attribution.

(e) If the Artwork is an Indigenous Artwork, the Customer acknowledges that it may embody ICIP which is held collectively by the artist's family, community or language group under customary law, which may exist independently of, and may not be fully protected by, Australian intellectual property law. The Customer agrees to comply with all cultural protocols that apply to the Artwork.

(f) The Customer acknowledges that the Vendor has provided such provenance and attribution information as is in the Vendor's possession, that the Vendor is not the owner or custodian of any ICIP in the Artwork, and that the Vendor gives no warranty as to any cultural protocols that apply to the Artwork.

(g) The Parties acknowledge that the Price is inclusive of any resale royalty (and any related interest, administration charge, penalty and cost of recovery) payable under the *Resale Royalty Right for Visual Artists Act 2009* (Cth) in respect of any commercial resale of the Artwork.

(h) The Customer indemnifies the Vendor against any Loss the Vendor suffers or incurs arising from a claim by the artist, the artist's estate or successors, an art centre, a collecting society or any other person, to the extent that the claim arises from the Customer's breach of this clause 6 or from the Customer's reproduction, adaptation, communication, treatment or use of the Artwork or its imagery after delivery.

7. Warranty

Vendor Warranty

(a) The Vendor warrants that it has the right, power and authority to deal with the Artwork as contemplated by the Agreement.

(b) The only warranties, guarantees and conditions given by the Vendor in respect of the sale of the Artwork are the Non-Excludable Rights. The Vendor gives no other warranty of any kind.

(c) To the maximum extent permitted by law, and without limiting clause 7(b):

(i) the Vendor gives no warranty, guarantee or representation as to the authenticity, authorship, attribution, provenance, description, catalogue reference, age, origin, condition, quality, value, insurability, exportability or fitness for any purpose of the Artwork; and

(ii) the description of the Artwork in the Key Details, and any provenance or attribution information provided by the Vendor, is given in good faith on the basis of the information available to, and reasonably believed to be correct by, the Vendor.

Customer Warranty

(d) The Customer warrants and confirms that:

(i) it has full power and authority to enter into, and perform, the Agreement;

(ii) it has inspected, or had the opportunity to inspect, the Artwork;

(iii) it relies solely on its own inspection, examination, judgement and enquiries (including as to authenticity, attribution, provenance, condition and value);

(iv) any catalogue entry, certificate of authenticity, condition report, provenance material, valuation or other statement provided by or on behalf of the Vendor is provided as a statement of opinion or belief only and not as a warranty or representation; and

(v) it has not relied on any representation made by the Vendor which is not expressly set out in the Agreement.

(e) Except as expressly set out in the Agreement, or as cannot lawfully be excluded (including non-excludable consumer guarantees under the Australian Consumer Law), all conditions, warranties, guarantees and representations relating to the Artwork are excluded to the fullest extent permitted by law.

(f) To the extent a Non-Excludable Right cannot be excluded but the Vendor's liability for it may be limited, that liability is limited, at the Vendor's option, to the replacement of the Artwork, the supply of an equivalent artwork, or the refund of the Price paid for the Artwork.

(g) Nothing in this clause 7 operates to exclude, restrict or modify a Non-Excludable Right.

8. Limitation of liability

(a) The Vendor is not liable for any indirect, special or consequential loss, or loss of profits, revenue, business opportunity, savings or data, arising out of the Agreement.

(b) The Vendor's total aggregate liability arising out of the Agreement is limited to the Price actually paid by the Customer for the Artwork.

(c) Nothing in the Agreement excludes any right that cannot lawfully be excluded, including consumer guarantees under the Australian Consumer Law.

(d) The Customer indemnifies the Vendor against all Loss arising from the Customer's breach of the Agreement, from the Customer's use, resale, export, import, storage or handling of the Artwork after delivery, or from any third party claim arising from the Customer's acts or omissions, except to the extent that the Loss is caused or contributed to by the Vendor or its personnel.

(e) Nothing in this clause 8 operates to exclude, restrict or modify a Non-Excludable Right.

9. Termination

Breach of agreement by Customer

(a) The Vendor may terminate the Agreement immediately by written notice if:

(i) the Customer fails to pay any money owing by the Customer to the Vendor when due,

(ii) the Customer commits any breach of the Agreement which the Customer has failed to remedy (if remediable) within five (5) Business Days of written notice requiring it to do so; or

(iii) the Customer suffers any Insolvency Event.

(b) If the Vendor terminates the Agreement in accordance with clause 9(a), the Vendor may:

(i) retain the Deposit and any other amounts paid by the Customer on account of the Vendor's Loss;

(ii) resell the Artwork, acting reasonably, to any person; and

(iii) recover from the Customer (giving credit for the amounts so retained) any shortfall between the Price and the net proceeds of that resale, together with the Vendor's costs of resale, provided that the Vendor may not recover more than its actual Loss.

<u>Termination for convenience</u>

(c) The Vendor may, at any time before any delivery of the Artwork, terminate the Agreement by written notice to the Customer if the Vendor is unable or unwilling to complete the sale, including:

(i) where the Artwork is lost, damaged or destroyed;

(ii) where the Vendor's right or title to sell the Artwork is disputed; or

(iii) where the artist, the artist's estate or the relevant art centre raises a cultural or other objection to the sale.

(d) If the Vendor terminates under clause 9(c), the Vendor must refund to the Customer, within five (5) Business Days of the notice of termination, all amounts actually paid by the Customer under the Agreement (including the Deposit). That refund is the Customer's sole remedy for the termination, except in respect of a Non-Excludable Right.

<u>Surviving provisions</u>

(e) On termination of the Agreement, all amounts that have accrued and are owing to the Vendor become immediately due and payable.

(f) On termination of the Agreement, the following clauses survive:

(i) clause 2 (Price and payment), in respect of any amount that accrued before termination;

(ii) clause 4 (Risk and title);

(iii) clause 6 (Intellectual property);

(iv) clause 7 (Warranty);

(v) clause 8 (Limitation of liability);

(vi) clause 9 (Termination);

(vii) clause 10 (GST);

(viii) clause 11 (General); and

(ix) clause 12 (Definitions).

10. GST

(a) All amounts under the Agreement are expressed to be **exclusive** of GST. The Customer must pay to the Vendor any GST payable on a taxable supply made under the Agreement, in addition to and at the same time as the consideration for that supply, against a valid tax invoice.

(b) If the supply of the Artwork is treated as a GST-free export supply and the Artwork is not exported from Australia within the period required by section 38-185 of the GST Act for any reason other than an act or omission of the Vendor, the Customer must pay to the Vendor on demand an amount equal to the GST payable on that supply, together with any related penalties, interest and costs.

11. General

(a) Time is of the essence in respect of the Customer's obligation to pay the Total Amount Due.

(b) The Customer has no right to cancel or rescind the Agreement, to return or reject the Artwork, or to withhold, defer or reduce payment of any part of the Total Amount Due, except as expressly provided in the Agreement or to the extent of a Non-Excludable Right.

(c) The parties must not assign, novate or deal with their rights or obligations under the Agreement without the other party’s prior written consent.

(d) Neither party is liable for any failure or delay in performing its obligations (other than an obligation to pay money) caused by an event beyond its reasonable control, including natural disaster, industrial action, shortage of materials, transport disruption or government action. Those obligations are suspended, and timeframes extended, for the duration of that event.

(e) The Customer must keep confidential, and use only for the Agreement's purposes, any pricing, know-how or other non-public information disclosed by the Vendor. This clause does not apply to information that is or becomes public other than through the Customer's breach, or to disclosure required by law or made to the Customer's professional advisers, insurer, financier or a prospective purchaser of the Artwork under an equivalent obligation of confidence.

(f) A notice must be in writing and is validly given if delivered by hand, prepaid post, or email, to the address in the Key Details or as notified.

(g) The Agreement is the entire agreement and supersedes all prior discussions. Nothing in this clause limits any liability for fraud or for misleading or deceptive conduct.

(h) No variation is effective unless in writing signed by both parties.

(i) An invalid or unenforceable provision is severed in that jurisdiction only, without affecting the rest.

(j) If a term of the Agreement is unfair within the meaning of section 24 of the Australian Consumer Law, that term is void and the remainder of the Agreement continues in force.

(k) A failure or delay in exercising a right is not a waiver of it.

(l) The Agreement does not create a partnership, joint venture, agency or employment relationship.

(m) Neither party may bind the other except as expressly permitted.

(n) The Agreement is governed by the laws of the Governing Jurisdiction, and each party submits to the exclusive jurisdiction of its courts.

12. Definitions

In the Agreement, unless the context otherwise requires, capitalised words have the meanings given to them in the Key Details and below:

(a) **Agreement** means the Artwork Sale Agreement comprising the Key Details, these General Terms of Sale and any Special Conditions.

(b) **Artwork** means the artwork described in the Key Details, being the sole subject of the Agreement.

(c) **Australian Consumer Law** means Schedule 2 to the Competition and Consumer Act 2010 (Cth).

(d) **Business Day** means a day that is not a Saturday, Sunday or public holiday in the capital city of the Governing Jurisdiction.

(e) **Delivery Costs** means all costs, charges and expenses of rolling, packing, crating, handling, freight, transit insurance, customs brokerage and delivery of the Artwork to the Delivery Address, being the amount specified in the Key Details or, if no amount is specified, the amount notified by the Vendor to the Customer in writing. The Delivery Costs do not form part of the Price.

(f) **Deposit** means the amount (if any) specified as the Deposit in the Key Details.

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

(h) **Governing Jurisdiction** means the state of New South Wales Australia.

(i) **ICIP** means Indigenous Cultural and Intellectual Property, being the rights and interests of Aboriginal and Torres Strait Islander peoples in their cultural heritage, including traditional designs, symbols and iconography, Dreaming and creation stories, ceremonial, sacred and secret material, languages and traditional knowledge, whether or not protected by Australian law.

(j) **Indigenous Artwork** means an Artwork created by an Aboriginal or Torres Strait Islander artist, or an Artwork that embodies ICIP.

(k) **Insolvency Event** means a party being unable to pay its debts as they fall due, or entering administration, receivership, liquidation or an arrangement with creditors.

(l) **Key Details** means the ‘Key Details’ section of the Agreement.

(m) **Loss** means loss, damage, cost, charge, expense or liability, including legal costs on a full indemnity basis.

(n) **Non-Excludable Right** means a guarantee, condition, warranty, right or remedy conferred by the Australian Consumer Law or any other law that cannot lawfully be excluded, restricted or modified by agreement.

(o) **Price** means the price for the Artwork specified in the Key Details, which is exclusive of the Delivery Costs, GST and any other amount payable by the Customer under the Agreement.

(p) **Total Amount Due** means the aggregate of**:**

   (i) the Price (against which any Deposit paid by the Customer is credited);

   (ii) the Delivery Costs;

   (iii) all other amounts owing or payable by the Customer to the Vendor under the Agreement; and

   (iv) any GST in respect of the above amounts.

12.2 Interpretation

In the Agreement, unless expressly provided otherwise:

(a) headings, sub-headings and bold type are for convenience only and do not affect the interpretation of the Agreement;

(b) the singular includes the plural and vice-versa;

(c) words of any gender include all genders;

(d) other parts of speech and grammatical forms of a word or phrase defined in the Agreement have a corresponding meaning;

(e) a reference to a person includes any company, partnership, joint venture, association, corporation or other body corporate and any government agency, as well as an individual;

(f) a reference to a clause, party, schedule, attachment or exhibit is a reference to a clause of, and a party, schedule, attachment or exhibit to the Agreement;

(g) a reference to any legislation includes all delegated legislation made under it and amendments, consolidations, replacements or re-enactments of any of them (whether passed by the same or another government agency with legal power to do so);

(h) a reference to a document (including the Agreement) includes all amendments or supplements to, or replacements or novations of, that document;

(i) a reference to ‘$’, AUD$, ‘A$’ or ‘dollar’ is to the lawful currency of Australia;

(j) a reference to any time is, unless otherwise indicated, a reference to that time in the Governing Jurisdiction;

(k) a reference to a party to a document includes that party's successors and permitted assignees;

(l) no provision of the Agreement will be construed adversely to a party because that party was responsible for the preparation of the Agreement or that provision;

(m) any agreement, representation, warranty or indemnity by two or more parties (including where two or more persons are included in the same defined term) binds them jointly and severally;

(n) any agreement, representation, warranty or indemnity in favour of two or more parties (including where two or more persons are included in the same defined term) is for the benefit of them jointly and severally;

(o) a reference to a body (including an institute, association or authority), other than a party to the Agreement, whether statutory or not:

    (i) which ceases to exist; or

    (ii) whose powers or functions are transferred to another body,

    (iii) is a reference to the body which replaces it or which substantially succeeds to its powers or functions;

(p) a reference to an agreement other than the Agreement includes a deed and any legally enforceable undertaking, agreement, arrangement or understanding, whether or not in writing;

(q) if a period of time is specified and dates from a given day or the day of an act or event, it is to be calculated exclusive of that day;

(r) a reference to a day is to be interpreted as the period of time commencing at midnight and ending 24 hours later;

(s) a reference to something being 'reasonably likely' (or to a similar expression) is a reference to that thing being more likely than not to occur when assessed objectively;

(t) specifying anything in the Agreement after the words 'include' or 'for example' or similar expressions does not limit what else is included; and

(u) where the day on or by which any thing is to be done is not a Business Day, that thing must be done on or by the next Business Day.