

ECN TRADE PTY LTD

# TERMS AND CONDITIONS

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Wholesale Sophisticated Investor

24<sup>th</sup> Aug 2022

ECN Trade Pty Ltd  
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Enclosed is a document you must read and understand as it forms part of the Agreement between you and ECN Trade Pty Ltd. You should obtain your own independent financial advice as to whether Margin Contracts are appropriate for you.

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## 1. INTRODUCTION

These are the Terms you are bound by in relation to the Account you create with ECN Trade Pty Ltd, (ECN Trade, we, our or us), and is one of the documents which forms part of the Agreement between you and ECN Trade. You should carefully read these terms in its entirety, as well as:

- (a) the Wholesale Investor Acknowledgement form (Application);
- (b) the Wholesale Information Disclosure;
- (c) the written confirmation of the transactions entered by you (the **Confirmation**)

The following documents are also important for you to read, as they explain the basis of our dealings with you:

- (a) Our Privacy Policy;
- (b) Our website, which includes the ECN Trade Platform.

### Applying for an Account

**1.1** You must complete a Wholesale Investor Acknowledgement Form in order to apply for an Account. We, in our sole discretion, will decide whether to accept a Wholesale Investor Acknowledgement Form after doing our due diligence.

**1.2** Unless we agree otherwise, you agree to pay to us, and maintain at all times with us, cleared funds. These funds will be held in accordance with clause 3.5.

**1.3** If we accept your Wholesale Investor Acknowledgement Form,

- (a)** we will establish the Account via a welcome email with instructions on how you can start the process;
- (b)** if you are required to pay an initial amount under clause 1.2:
  - (i)** transfer the amount to our client segregated bank account. The segregated bank account details will be available to you after we approve your Application; and
  - (ii)** once the funds have been cleared, we will credit the Account with the initial amount;
  - (iii)** note that the funds will be returned after 5 days if the account is not fully compliant with the Anti-Money Laundering / Know Your Client regulations and is not fully Identity Verified by us.

**1.4** The Account is active once the steps in clause 1.3 have been completed.

**1.5** You may apply for more than one Account.

**1.6** The Agreement commences once the steps in clause 1.3 have been completed and continues until it is terminated in accordance with these Terms.

## 2. OUR SERVICE

### Entry into Contracts

**2.1** Subject to you fulfilling your obligations under the Terms, if we accept an Order, we will enter into a Contract with you.

**2.2** A notice given by us stating any amount or rate for the purpose of these Terms and any Contract or Order is sufficient evidence of the amount or rate, unless it is proved to be incorrect.

**2.3** We enter into each Contract as a principal. You enter into each Contract as principal (unless we otherwise agree in writing). If you act as an agent on behalf of a principal, whether or not you identify that principal to us, we will not accept that principal as a 'client' (as defined in the Corporations Act), unless otherwise agreed in writing.

#### Financial product advice

**2.4** Any information or general financial product advice that we give you does not take into account your financial situation, needs or personal objectives. In particular, we do not give you advice about whether you should open, hold or Close-Out a Contract. You must consider the appropriateness of entering into a Contract having regard to your own financial situation, needs or personal objectives and obtain your own independent financial advice. We provide general advice only.

#### How we provide services

**2.5** We quote Underlying Instrument Prices which provide an indication of the prices at which we are prepared to deal with you.

#### Our trading hours

**2.6** Our office and trading hours and general financial practices are set out on our website, subject to public holidays, to service your account. We quote Underlying Instrument Prices and accept Orders during those hours. However, subject to the ECN Trade Platform being operational, you may place orders at any other time.

**2.7** We are under no obligation to quote Underlying Instrument Prices or accept Orders on a public holiday in any jurisdiction which, in our reasonable opinion, affects the relevant Underlying Instrument. We give notice of such public holidays and the Underlying Instruments affected on the ECN Trade Platform.

### **3. THE ACCOUNT**

#### Nature of Account

**3.1** The Account is a record, or a series of records, maintained by us (or on our behalf) that shows, at any point in time, the net position of the payments you have made or are required to make to us and the payments we have made or are required to make to you. The Account is not a deposit account with us and no money is held in the Account.

#### Adjustments to amount on the Account

**3.2** You authorise and direct us to:

- (a) debit to the Account any Free Balance you withdraw and any amounts payable by you under the Terms;
  - (b) credit to the Account any amounts deposited by you and any amounts payable by us under these Terms; and
  - (c) designate the amounts in the Account as either Free Balance or Actual Margin depending on the amounts you deposit with us, your Orders, Contract positions and market movements in accordance with the Terms.
- 3.3** We are not required to notify you before debiting, crediting or designating amounts on the Account. You agree to maintain sufficient funds on the Account.
- 3.4** You agree to deposit with us sufficient funds at all times to satisfy all amounts payable by you under these Terms. It is your responsibility to ensure that the funds you transfer are cleared in sufficient time to meet all the payment obligations you have under these Terms.

#### Use of funds deposited with us

**3.5** We deposit all money paid by you into our segregated bank account if you are a Sophisticated Wholesale Investor, which is an account operated in accordance with the Corporations Act. If you are a Wholesale non Sophisticated Investor; refer to the note below. As a Wholesale Sophisticated client you agree and acknowledge that we may hold your funds in the following ways:

Your money in our segregated bank account, if you are a Wholesale Sophisticated Investor, is not kept separate from the money of other clients and we may withdraw your money from the segregated bank account in any of the following circumstances:

- a) making a payment to, or in accordance with your written directions for purposes of entering into Contracts (including but not limited to Mark to Market Payments);
- b) Paying to us money to which we are entitled;
- c) making a payment that is otherwise authorised by law;
- d) paying to us money to which we are entitled pursuant to the operating rules of a financial market; and
- e) making a payment to another licensee provided that the receiving licensee is notified that the money has been withdrawn from the segregated bank account and pays it into its their segregated bank account;
- f) we are entitled to invest the money in the segregated bank account in accordance with the Corporations Act and Corporations Regulations including in:
- g) Investment on deposit at interest with any Australian ADI;
- h) we are solely entitled to any interest or earnings derived from your money being deposited in our segregated bank account. Such interest or earnings are payable to us from the relevant segregated bank account, as the case requires, as and when we determine;
- i) we will not charge a fee for investing your money in accordance with the Corporations Act.

**Note:** If you are classified as a non Sophisticated Wholesale Investor we may also at our discretion invest your funds in other ways, i.e use the funds for margining purposes at our counterparties as allow by the Australian Client Money Rules.

#### Account Closure and Withdrawals of Free Balance

**3.6** If the Account shows that you have a Free Balance, you may request us to send to you any payment by alternative means in respect of such amount as you may specify. However, we may at our discretion elect to withhold any payment requested (in whole or in part) due to you if:

- (a) an amount is required to be maintained with us at all times under clause 1.2; or
- (b) we are entitled to withhold an amount under the Corporations Act.
- (c) the account is being closed, we reserve the right to investigate the trading history for any anomalies or breach of contract. This may delay the return of your funds to your nominated bank account for up to 7 days.

We will notify you as soon as reasonably practicable if we decide to withhold any part of your Free Balance under clauses 3.6(a) or 3.6(b).

#### Accounts treated separately

**3.7** Except as otherwise expressly provided in the Agreement, where you have opened more than one Account with us, we treat the Accounts as entirely separate. Therefore, any amount standing to your credit on one Account does not, except where we exercise our rights under clause 14 and clause 19.3, discharge any of your liabilities in respect of another Account.

**3.8** Where you request in writing, we may, in our absolute discretion, agree to treat the Accounts as one Account. In this case, all references to the Account in the Agreement are taken to be the Accounts as so aggregated. Such request, if agreed by us, takes effect on the date we notify you, which is to be no later than 7 days from the date of actual receipt of the request by us.

## 4. ORDERS

#### Quotation of Underlying Instrument Prices

**4.1** You may obtain a quote from us for an Underlying Instrument Price.

**4.2** You acknowledge that:

- (a) Any quote provided by us in accordance with this clause is indicative only; and
- (b) No Contract is entered into until your Order is accepted by us in accordance with these Terms.

#### Placing of Orders

**4.3** You may, by placing an Order with us:

- (a) offer to enter into a new Contract with us; or
- (b) request us to Close-Out an open Contract.

**4.4** You may provide us with oral or written Orders (which includes Orders provided via telephone and/or the ECN Trade Platform as described below). We may acknowledge instructions orally or in writing, as appropriate at our total discretion.

#### An Order may be:

- (a) a day Order: An Order which will be cancelled at the end of the day per server time or
- (b) a good 'til cancelled Order: An Order you place will remain capable of being accepted by us, until you cancel the order or we accept it; or

**(c)** OCO (one-cancels-the-other): An OCO order is the simultaneous placement of two linked orders above and below the current market price. If either one of the orders is executed in the specified time period, the remaining order will automatically be cancelled.

**4.5** Before placing an Order, you are responsible for ensuring that:

the Actual Margin is equal to or more than the Required Margin, as set out in clause 5 of these Terms; and

**(a)** you can comply with the requirements of clause 3.4.

**4.6** When placing an Order, you must set out details of

**(a)** whether you intend to be the Long Party or the Short Party under the Contract;

**(b)** the Contract Quantity; and

**(c)** the Underlying Instrument, and other information applicable to the Order as we may require from time to time.

#### Acceptance of Order

**4.7** We may in our sole discretion accept an Order in whole or in part. An Order is accepted by us when we record the transaction concerning the Contract in our records.

**4.8** An Order is binding on you when we accept the Order. You acknowledge that we may accept an Order without any notice of acceptance, aside from giving you the Confirmation.

**4.9** We will inform you if we decide not to accept an Order.

**4.10** Orders may be placed as:

**(a)** market Orders to buy or sell an Underlying Instrument as soon as possible at the price obtainable in the market; or

**(b)** limit and stop Orders to trade when the price reaches a predefined level, as applicable to the various Underlying Instruments offered (or a combination of these types of Orders). Limit Orders to buy and stop Orders to sell must be placed below the current market price, and limit Orders to sell and stop Orders to buy must be placed above the current market price. If the bid price for sell Orders or ask price for buy Orders is reached, the Order is filled as soon as possible at the price obtainable in the market. Limit and stop Orders are therefore not guaranteed executable at the specific level or amount.

**4.11** Where your request to cancel an Order is not received by us prior to acceptance of that Order, the Contract or Close-Out resulting from the acceptance of the Order is valid and binding on you and us under these Terms.

**4.12** You acknowledge that any action by you to modify or cancel an Order is ineffective

unless:

**(a)** we have received from you a cancellation notice in a form acceptable to us; or

**(b)** we have cancelled the order in our books and records.

**4.13** Errors in Pricing.

- (a) It is possible that errors, omissions or misquotes (“Material Error”) may occur in the pricing of Margin FX Contracts or CFDs quoted by us, which by fault of either of us or any third party, is materially incorrect when taking into account market conditions and quotes in Underlying Instruments which prevailed at the time. A Material Error may include an incorrect price, date, time or Margin FX Contract or CFD or any error or lack of clarity of any information. If a trade is based on a Material Error, we reserve the right without your consent to:
- (i) amend the terms and conditions of the Margin FX Contract or CFD to reflect what we consider to have been the fair price at the time the Margin Contract or CFD was entered into and there had been no Material Error;
  - (ii) close the trade and any open Positions resulting from it;
  - (iii) void the Margin Contract or CFD from the outset; or
  - (iv) refrain from taking action to amend or void the Margin FX Contract or CFD.
- (b) We will exercise the right in paragraph 4.13(a) reasonably, in good faith and as soon as realistically practicable after we become aware of the Material Error. To the extent practicable, we will give you prior notice of any action we take under this clause; but if it is not practicable, we will give you notice as soon as possible afterwards. In the absence of fraud or gross negligence on our part, we are not liable to you for any loss, cost, claim, demand or expense that you incur or suffer (including loss of profits or indirect or consequential losses), arising from or connected with the Material Error including where the Material Error arising from an information service on which we rely.
- (c) In the event that a Material Error has occurred and we exercise our rights under paragraph 4.14(a), we may, without notice, adjust your Account or require that any moneys paid to you in relation to the Margin FX Contract or CFD the subject of the Material Error be repaid to us as a debt due payable to us on demand.

#### 4.14 Price, execution process and trading platform manipulation.

If we reasonably believe that you have manipulated our prices, our execution processes or the ECN Trade Platform, we may in our sole and absolute discretion, subject to paragraph 4.13(b) without notice to you:

- (a) enforce the trade(s) against you if it is a trade(s) which results in you owing money to us;
- (b) treat all your trades as void from the outset if they are trades which result in us owing money to you, unless you produce conclusive evidence within 30 days of us giving you notice under this clause that you have not committed any breach of warranty, misrepresentation or undertaking in this Agreement;
- (c) withhold any funds suspected to have been derived from any such activities;
- (d) make any resultant corrections or adjustments to your Account;
- (e) Reverse any and/or all of your transactions;
- (f) close your Account; and/or
- (g) take such other action as we consider appropriate.

#### 4.15 Scalping Rules

Scalping is a trading strategy through which one attempts to make many small transactions on small price changes by:

- Closing positions in less than 3 minutes.



You are prohibited from Scalping on your ECN Trade Account. If we find any accounts which are found to be Scalping accounts, it will be closed within 24 hours. ECN Trade reserves the right to cancel, reverse and delete any transactions/pending orders executed via Scalping without prior notice to you under clause 11 of the Terms and Conditions.

Note: an alert message will be sent to the client that is using Scalping strategies and will notify him/her to close all positions within 24 hours or else the system will automatically close all his/her positions.

#### **4.16 No Transfer**

A Contract does not transfer the legal or beneficial interest in any Underlying Instrument to you and neither party has any right or obligation to acquire or deliver the Underlying Instruments.

### **5. REQUIRED MARGIN**

Obligation to have Required Margin

**5.1** Our margin requirements apply throughout the term of each Contract. It is your responsibility to ensure that the Required Margin is available on the Account at all times. We may or may not notify you that the Actual Margin is less than the Required Margin. If, at any time during the term of a Contract, the Actual Margin is not sufficient to cover the Required Margin, you must Close-Out Open Contracts or transfer adequate funds to us. Such transfer must be effected and documented immediately. Even if you effect such transactions, we may do one or both of cancel any Orders or Close-Out One or more Contracts or part of a Contract at our sole discretion without assuming any responsibility towards you for such action.

**5.2** If, at any time during the term of a Contract, the Actual Margin is less than the Required Margin, the shortfall is immediately due and payable, and, if not paid, constitutes an Event of Default.

**5.3** We provide to you through the ECN Trade Platform access to information about the Account to enable you to calculate the Required Margin.

**5.4** Where we are not able to provide you on-line access through the ECN Trade Platform to information on the Account due to circumstances out of our control, we use reasonable endeavors to contact you to request additional funds so that Actual Margin Equals Required Margin. You accept that in extreme circumstances where your Contracts are moving or have moved particularly quickly against you, we may not be able to contact you before exercising our rights to Close-Out your Contracts under these Terms. No demands, contact, calls or notices made or given by us to you in any one or more instances invalidates the waiver given by you under this clause.

### **6. COMMISSIONS, CHARGES AND OTHER COSTS**

**6.1** You must pay to us the applicable commissions and charges as set out in the commissions and charges schedule which is available on our website.

**6.2** We may vary these commissions and charges without notice when changes are to your advantage, or are due to external circumstances beyond our control. Such circumstances include:

- (a)** changes in the relationship with our counterparties, which affect our cost structures;
- (b)** changes in commissions and charges from exchanges, clearing houses, information providers or other third-party providers that are passed on to you by us;
- (c)** market conditions, including competitive behavior, mean that it is prudent for us to change our conditions;
- (d)** for commercial reasons we wish to change our general cost and pricing structure; or
- (e)** significant particulars of your individual circumstances have changed.

**6.3** Amounts due under this clause 6 are debited from your Account on the on confirmation of the contract or Close of Business on the day the commission, charge or other Cost is incurred by you.

## **7. INTEREST ON OPEN POSITIONS**

No interest paid on amounts we hold for you

**7.1** Unless otherwise agreed in writing, we are not liable to:

- (a)** pay interest to you on any Free Balance in any Account or any other sum held by us; or
- (b)** account to you for any interest we receive on such sums or in connection with any Contract.

### **7.2 Default interest**

If you fail to pay an amount payable to us under the Agreement, we may charge you interest on the unpaid amount at the default interest rate. The default interest rate will be central bank target cash rate for the relevant Underlying Instrument plus 3% as determined by us. The amount of default interest will be debited from the Account daily until the amount owed to us is paid.

Changes to interest rates

**7.3** We may vary such interest rates without notice when changes are to your advantage, or are due to external circumstances beyond our control. Such circumstances include:

- (a)** changes in the monetary or credit policies domestic or abroad that affect the general interest level in a way that is of importance to us;
- (b)** other developments in the general interest level, including in the money and bond markets, in a way that is of importance to us;
- (c)** changes in the relationship with our counterparties, which affect our cost structures;
- (d)** market conditions, including competitive behavior, mean it is prudent for us to change our conditions;
- (e)** for commercial reasons we wish to change our general cost and pricing structure; or
- (f)** significant particulars of your individual conditions have changed.

## 8. CURRENCY CONVERSIONS

- 8.1** all amounts can be paid by you to us from most widely available currencies and will be converted into a bank account of your choice, either AUD or USD. Transfers to you will be made from our bank accounts in the currency that you nominated to a bank account in the same name/s of the account holder. External fees may apply.
- (a)** funds transferred to you from our bank accounts (being either Australian dollars or US Dollars) will be converted at the our current spot rate for the conversion of the relevant funds into your nominated currency bank account minus a conversion calculation fee of up to 0.5 per cent, which we will charge you; and
- (b)** where you deal in a Contract denominated in a currency other than Australian dollars or US Dollars , realized profits and losses will be converted to your nominated currency (being either Australian dollars or US Dollars) immediately on closing of the position at the current spot rate minus a conversion calculation fee of up to 0.5 per cent, which we at our discretion may charge you.
- 8.2** Amounts due under this clause 8 are debited from your Account at the time the conversion occurs.
- 8.3** We may waive or defer the conversion calculation fee at our discretion.

## 9. CLOSE-OUT OF CONTRACTS

### Close-Out of a Contract

- 9.1** You may instruct us to enter into a position which is opposite to one or more of your open positions to close out a position.
- 9.2** An open Contract is Closed-Out:
- (a)** on acceptance by us of your Order requesting Close-Out of your Contract (including where the Order is deemed to be a Close-Out under clause 9.1);
- (b)** by us under clause 19.

### Settlement following Close-Out

- 9.3** If a Contract is Closed-Out under clause 9.2, any realised Profit will be added to the Account Balance and any realised Loss will be deducted from the Account Balance.

## 10. CONFIRMATIONS

### Reporting to you

- 10.1** If we accept an Order, we will send you a Confirmation.
- 10.2** If we fail to send you a Confirmation, it does not affect the validity of the Order or the Contract.
- 10.3** If there is a conflict between:
- (a)** the Agreement; and

- (b) our records of the transaction concerning a Contract or an Order, our records of the transaction concerning a Contract or an Order prevail.

Standing facility

**10.4 You acknowledge that:**

- (a) we may establish a standing facility over the internet that allows you to view, download and print the Confirmations and other reports that we provide;
- (b) we are authorized to use the standing facility as the means of providing the Confirmations and other reports from us;
- (c) you access and use such standing facility to:
  - (i) receive the Confirmations and other reports we provide;
  - (ii) confirm all Contracts; and
  - (iii) monitor your obligations under the Agreement; and
- (iv) the Confirmations and other reports are made available to you as at the time the relevant document is posted by us on the standing facility.

**10.5** We may send Confirmations and other reports that we provide, in addition to making them available using the standing facility.

Errors

**10.6** You must verify the contents of each document received from us. Such documents are, unless incorrect, conclusive unless you notify us in writing to the contrary within 3 Business Days of receiving the document.

**11. OUR RIGHTS**

**11.1** We may, with or without notice, and in addition to any other rights we may have under these Terms:

- (a) Close-Out or Cancel all or part, as we reasonably consider appropriate, the Contracts; or
- (b) reduce your Position Limit; or
- (c) refuse or reverse Orders; or
- (d) terminate the Agreement; or
- (e) adjust the price, size or value of the Contract; or
- (f) adjust the margin requirement (leverage); or
- (g) restrict your Account's access to streaming, instantly tradeable quotes, including and without limitation providing manual quotations only and requiring any submitted orders to require our prior approval.

**11.2** We may exercise our rights in clause 11.1 if:

- (a) an Event of Default has occurred; or
- (b) we reasonably consider that there are abnormal trading conditions; or
- (c) we reasonably consider it necessary for the protection of our rights under the Agreement; or

- (d) we are unable to make prices in the relevant Contract due to the unavailability of the relevant market information for reasons beyond our control; or
- (e) we so decide in our absolute discretion and, in this case only, give written notice of such decision to you; or
- (f) we consider that you may be in possession of 'insider information' within the meaning of section 1042A of the Corporations Act; or
- (g) we consider that you may be in breach of any applicable law; or
- (h) either party is so requested by the Australian Securities and Investments Commission or any other regulatory agency or authority; or
- (i) your Actual Margin is less than the Required Margin; or
- (j) the aggregate of the Contract Value for your Orders and the Contract Value for all other orders for an Underlying Instrument is below the minimum or above the maximum values that we reasonably consider appropriate in the market.

**11.3** If we exercise our right to Close-Out all or part of any Contract, clause 12 applies except that we determine, in our sole discretion, the Close-Out Value for the affected Contract.

**11.4** You accept that we may Close-Out any of your Contracts and in what proportion that we decide in our absolute discretion.

**11.5** Swap charge if applicable for contracts held until the specified date

**11.5.1** Where a Contract is held at the Close of Business on the day before its Specified Date, it is rolled over to a new Specified Date. On re-opening, the Contract is subject to a Swap Charge determined by us in accordance with this clause:

- (a) if you are the Long Party and the Bought Swap Rate is higher than the Sell Swap Rate, we must pay you interest on the Contract Value of the open position at the rate that is the Bought Swap Rate minus the Sell Swap Rate;
- (b) if you are the Long Party and the Bought Swap Rate is less than the Sell Swap Rate, you must pay us interest on the Contract Value of the open position at the rate that is the Bought Swap Rate minus the Sell Swap Rate;
- (c) if you are the Short Party and the Sell Swap Rate is higher than the Bought Swap Rate, we must pay you interest on the Contract Value of the open position at the rate that is the Bought Swap Rate minus the Sell Swap Rate; and
- (d) if you are the Short Party and the Sell Swap Rate is lower than the Bought Swap Rate, you must pay us interest on the Contract Value of the open position at the rate that is the Bought Swap Rate minus the Sell Swap Rate.

**11.5.2** The Swap Charge is paid by adjusting the Underlying Instrument Price by an amount equal to the amount of the Swap Charge calculated in accordance with this clause.

## **12. SUSPENSION AND MARKET DISRUPTION**

**12.1** If, at any time:

- (a) trading in an Underlying Instrument on any exchange is limited or suspended; or

**(b)** trading is limited or suspended on any exchange so as to restrict trading within any relevant Index, such that we are prevented from determining the Underlying Instrument Price of an Underlying Instrument, then the Underlying Instrument Price of such Underlying Instrument is to the Underlying Instrument Price immediately preceding such limitation or suspension.

**12.2** If the limitation or suspension continues for 5 Business Days, we may Close-Out the Contract and if we do so we will determine the Close-Out Date and the Close-Out Value acting in good faith. We reserve the right at all times during the term of any such limitation or suspension to adjust the Underlying Instrument Price of any affected Underlying Instrument in our reasonable discretion but having regard to the then prevailing market conditions affecting trading as a whole or trading in such Underlying Instrument and the Underlying Instrument Price immediately preceding such limitation or suspension.

### **13. CLIENT'S WARRANTIES AND REPRESENTATIONS**

**13.1** You and each Guarantor (as applicable) warrant and represent that:

- (a)** if a body corporate:
  - (i)** it is duly authorized and validly existing under the laws of its jurisdiction of incorporation;
  - (ii)** it is properly empowered and has obtained necessary corporate or other authority pursuant to its constitutional and organizational documents;
- (b)** If you completed the Wholesale Investor Acknowledgement Form in the name of a trustee:
  - (i)** You are the only trustee/s of the trust; and
  - (ii)** No action has been taken or proposed to remove you as trustee of the trust; and
  - (iii)** You have power under the trust deed to enter into and comply with your obligations under the Agreement and any Contract or Order; and
  - (iv)** you have in full force and effect the authorizations necessary to enter into the Agreement or any Contract and make an Order, perform obligations under them and allow them to be enforced (including under the trust deed and its constitution (if any) and
  - (v)** you have a right to be fully indemnified out of the assets of the trust in respect of obligations incurred by you under the Agreement and any Contract or Order; and
  - (vi)** the trust fund is sufficient to satisfy that right of indemnity and all other obligations in respect of which you have a right to be indemnified out of the trust fund; and
  - (vii)** you have not, and never have been, in default under the trust deed; and
  - (viii)** no action has been taken or proposed to terminate the trust; and
  - (ix)** you and your directors and other officers have complied with their obligations in connection with the trust; and
  - (x)** you have carefully considered the purpose of the Agreement and any Contract or Order and consider that entry into the Agreement and any Contract or Order is for the benefit of the beneficiaries and the terms of the trustee documents are fair and reasonable;
- (c)** all necessary consents required in order for it to conduct its business and relevant to the performance, validity or enforceability of the Agreement and any Contract or Order have been obtained and are in full force and effect;
- (d)** you are not under any legal disability with respect to, and is not subject to any law or regulation which prevents its performance according to the Agreement or any Contract or transaction contemplated by the Agreement;
- (e)** it is in compliance with all laws to which it is subject including, without limitation, all tax laws and regulations, exchange control and registration requirements;

- (f) the information you give us is complete, accurate and not misleading in any material respect;
- (g) unless stated in the Wholesale Investor Acknowledgement Form , you are not acting as trustee of a trust;
- (h) all funds deposited in the Account are not subject to an Encumbrance;
- (i) no Event of Default continues un remedied;
- (j) there are no actions or claims pending the adverse determination of which might have a Material Adverse Effect on your ability or the Guarantor's ability to perform its obligations under the Agreement any Contract or Order, or on the rights granted to us;
- (k) it is not entitled to claim for itself or any of its assets or revenues any right of general immunity or exemption on the grounds of sovereignty or otherwise from suit, execution, attachment or other legal process in respect of its obligations under the Agreement any Contract or Order; and
- (l) the information contained in the Wholesale Investor Acknowledgement Form is complete and accurate.

**13.2** The above warranties and representations are deemed to be repeated each time you place an Order.

**13.3** You and the Guarantor acknowledge that we have entered into the Agreement in reliance on the representations and warranties in this clause 13.

## **14. REFUNDS AND RETURNS**

**14.1** Due to the nature of ECN Trade business it is not possible to offer returns and/or refunds

## **15. UNDERTAKINGS AND ACKNOWLEDGMENTS**

You and the Guarantor undertake to:

- (a) notify us if any warranty or representation made by you or the Guarantor is or becomes incorrect or misleading;
- (b) do everything necessary to ensure that no Event of Default occurs;
- (c) supply to us when requested to do so such financial or other information relating to you or the Guarantor as we may from time to time reasonably request.

## **16. DISPUTE RESOLUTION**

**16.1** ECN Trade Australia has an internal dispute resolution process in place to resolve clients' complaints timely and fairly. Clients who wish to file a formal complaint must do so by contacting us through our "[Contact Us](#)" page on our website along with any relevant attachments.

We will seek to resolve your complaint within prescribed timeframes that may reasonably be required given the nature of the complaint. We will investigate your complaint and provide you with our decision and the reason on which it is based, in writing.

**16.2** Following the investigation of your complaint, if the issue has not been resolved to your satisfaction within 30 days after submitting the complaint, you may wish to contact the Australian Financial Complaints Authority (AFCA). AFCA is an external dispute resolution (EDR) scheme established to resolve disputes between financial institutions and their customers. The service provided to you by AFCA is free and our membership number is

31298. Note as a classified Wholesale Investor AFCA may, on a case by case basis, not except your complaint.

### **16.3 Australian Financial Complaints Authority (AFCA):**

Website: [www.afca.org.au](http://www.afca.org.au)

Email: [info@afca.org.au](mailto:info@afca.org.au)

Telephone: 1800 931 678 (free call)

In writing to: Australian Financial Complaints Authority, GPO Box 3, Melbourne VIC 3001

**16.4** Without prejudice to any rights, you may have to refer a complaint to AFCA, as set out in this section of these terms and conditions, each of the parties irrevocably:

- Agrees that the courts of New South Wales will have jurisdiction to settle any proceedings and submits to the jurisdiction of such court (provided that this will not prevent us from bringing any proceedings against you in the court of any other jurisdiction); and
- Waive any objection which may have at any time to proceeding brought in any such court and agrees not to claim that such proceeding has been brought in an inconvenient for that such court does not have jurisdiction over it.

If AFCA accepts your complaint, A determination by AFCA will be binding on ECN Trade only if you accept the decision.

## **17. INDEMNITY AND EXCLUSION OF LIABILITY**

### Indemnity

**17.1** You indemnify us against any liability or loss arising from, and any Costs incurred in connection with:

- (a)** us acting in connection with the Agreement or any Contract or Order in good faith on , telephone, email or written instructions purporting to originate from your offices or to be given by an Authorized Person; or
- (b)** an Event of Default; or
- (c)** the Agreement or any Contract or Order; or
- (d)** us acting in accordance with any direction, request or requirement of any regulatory authority or government body; You agree to pay amounts due under this indemnity on demand from us.

**17.2** This indemnity survives any termination of the Agreement.

### Exclusion of Liability

**17.3** We are not liable for loss or Costs caused by:

- (a)** the exercise or attempted exercise of, failure to exercise, or delay in exercising, a right or remedy under the Agreement;



- (b) not accepting your Orders or delay in accepting your Orders;
- (c) not designating or delay in designating amounts as either Actual Margin or Free Balance on the Account.

## **18. DEALINGS BETWEEN YOU AND US**

**18.1** We are entitled to act on the oral or written Orders:

- (a) of any Authorized Person;
- (b) of any person who appears to us to be an Authorized Person, notwithstanding that the person is not, in fact, so authorized; and
- (c) transmitted using your username, account number, user ID and/or password.

**18.2** You agree to promptly provide any instructions to us which we may require. If you do not provide the instructions promptly, we may, in our absolute discretion, take such steps at your cost, as we consider necessary or desirable for our own protection or your protection. This provision is similarly applicable in situations when we are unable to contact you.

**18.3** We may (but we are not obliged to) require confirmation in such form as we may reasonably request if an instruction is to remit money due to you or if it appears to us that such confirmation is necessary or desirable.

**18.4** If you are more than one person (for example, joint account holders):

- (a) the liabilities of each such person are joint and several;
- (b) we may act upon instructions received from any one person who is, or appears to us to be, such a person, whether or not such person is an Authorized Person;
- (c) any notice or other communication provided by us to one such person is deemed to have been provided to all such persons; and
- (d) our rights under clause 20 apply if an Event of Default occurs in respect of any one of such persons.

## **19. GUARANTEE AND INDEMNITY**

Requirement for a Guarantor

**19.1** Your obligations under the Agreement must be guaranteed:

- (a) where you (including a trustee) are a company, by each director of the Company; and
- (b) in any other circumstance, where we determine, in our absolute discretion, that such a guarantee is required.

Consideration

**19.2** The Guarantor acknowledges that we are acting in reliance on the Guarantor incurring obligations and giving rights under this guarantee and indemnity.

## Guarantee

**19.3** The Guarantor unconditionally and irrevocably guarantees to us your compliance with your obligations in connection with the Agreement, including each obligation to pay money.

**19.4** If you do not comply with those obligations on time and in accordance with the Agreement, then the Guarantor agrees to comply with those obligations on demand from us. A demand may be made whether or not we have made demand on you.

## Indemnity

**19.5** The Guarantor indemnifies us against any liability or loss arising from, and any Costs it incurs, if:

- (a)** you do not, or are unable to, comply with an obligation you have (including an obligation to pay money) in connection with the Agreement; or
- (b)** an obligation you would otherwise have under the Agreement (including an obligation to pay money) is found to be unenforceable; or
- (c)** an obligation the Guarantor would otherwise have under clause 19.3 is found to be unenforceable; or
- (d)** a representation or warranty by you in the Agreement is found to have been incorrect or misleading when made or taken to be made.

**19.6** The Guarantor agrees to pay amounts due under clause 19.3 on demand from us.

**19.7** We need not incur expense or make payment before enforcing this right of indemnity.

## Extent of guarantee and indemnity

**19.8** The guarantee in clause 19.3 is a continuing obligation despite any intervening payment, settlement or other thing and extends to all of your obligations in connection with the Agreement. The Guarantor waives any right it has of first requiring us to commence proceedings or enforce any other right against you or any other person before claiming from the Guarantor under this guarantee and indemnity.

## Acknowledgment

**19.9** The Guarantor acknowledges that, before entering into this guarantee and indemnity, it:

- (a)** was given a copy of the Agreements (and all documents giving rise to your obligation in connection with the Agreements) and had full opportunity to consider their provisions; and
- (b)** is responsible for making itself aware of your financial position and any other person who guarantees any of your obligations in connection with the Agreement.

## Payments

**19.10** The Guarantor agrees to make payments under this guarantee and indemnity:

- (a)** in full without set-off or counterclaim, and without any withholding or deduction unless prohibited by law; and
- (b)** in the currency in which the payment is due, and otherwise in Australian dollars, in immediately available funds.

**19.11** If the Guarantor makes a payment that is subject to any withholding or deduction, the Guarantor agrees to pay us such additional amount to ensure that the amount actually received by us equals the full amount we would have received had no withholding or deduction been made.

Our rights are protected

**19.12** The rights given to us under this guarantee and indemnity, and the Guarantor's liabilities under it, are not affected by any act or omission of us or any other person. For example, those rights and liabilities are not affected by:

**(a)** any act or omission:

- (i)** varying or replacing the Agreement;
- (ii)** releasing you or giving you a concession (such as more time to pay);
- (iii)** releasing any person who gives a guarantee or indemnity in connection with any of your obligations;
- (iv)** by which a person becomes a Guarantor after the date of this guarantee and indemnity;
- (v)** by which the obligations of any person who guarantees any of your obligations (including obligations under this guarantee and indemnity) may become unenforceable;
- (vi)** by which any person who was intended to guarantee any of the obligations does not do so, or does not do so effectively;
- (vii)** by which a person who is co-surety or co-indemnifier is discharged under a Wholesale Investor Acknowledgement or by operation of law;
- (viii)** a person dealing in any way with the Agreement or this guarantee and indemnity;
- (ix)** the death, mental or physical disability, or liquidation, administration or insolvency of any person including you or the Guarantor;
- (x)** changes in the membership, name or business of any person; or
- (xi)** Acquiescence or delay by us or any other person.

Guarantor's rights are suspended

**19.13** As long as any obligation is required, or may be required, to be complied with in connection with this guarantee and indemnity, the Guarantor may not, without our consent:

- (a)** reduce its liability under this guarantee and indemnity by claiming that your or it or any other person has a right of set-off or counterclaim against us; or
- (b)** exercise any legal right to claim to be entitled to the benefit of another guarantee, indemnity, mortgage, charge or other encumbrance given in connection with the Agreement or any other amount payable under this guarantee and indemnity; or

- (c) claim an amount from you, or another guarantor (including a person who has signed the Wholesale Investor Acknowledgement Form as a “Guarantor”), under a right of indemnity; or
- (d) claim an amount in your liquidation, administration or insolvency or of another guarantor of any of your obligations (including a person who has signed the Wholesale Investor Acknowledgement Form as a “Guarantor”).

## **20. TERMINATION**

**20.1** If all of a Client’s Contracts have been Closed-Out, you may terminate the Agreement, including your rights associated with the use of the ECN Trade Platform, immediately by giving written notice to us.

**20.2** We may:

- (a) Close-Out any Contracts; and
- (b) terminate the Agreement, including your rights associated with the use of the ECN Trade Platform, either:
  - (i) at any time on giving you 7 days’ notice; or
  - (ii) immediately, following an Event of Default or to otherwise protect our interests, without notice to you.

**20.3** On termination by any party, we may consolidate all Accounts held by you, and deduct all amounts due to you from any Account, before transferring any credit balances on any Account to you, this process may take up to 7 Business Days.

**20.4** After the Agreement has been terminated, in addition to the rights set out in clause 20.3:

- (a) any indemnity granted by you;
- (b) the guarantee and indemnity granted under clause 19;
- (c) all of your and the Guarantor’s confidentiality obligations;
- (d) your obligations in relation to the ECN Trade Platform in clause 21;
- (e) the representations and warranties given by you and the Guarantor; and
- (f) any exclusion of our liability, under the Agreement, and any other rights or obligations you have which arose before the Agreement is terminated, continue to have full force and effect.

## **21. ECN TRADE PLATFORM**

**21.1** The following Terms and Conditions apply to Contracts executed through the ECN Trade Platform:

- (a) We are not liable to you for any loss, expense, cost or liability suffered or incurred by you due to failure of the system, transmission failures or delays, or similar technical errors whether or not the error might be due to factors under our control;

- (b) We are not liable to you or any removal of profits or losses you might suffer due to errors in quotes which are the result of typing errors or feed errors committed or your erroneous perception of information entered into the systems by you;
- (c) We are entitled to make the necessary corrections in your Account according to the market value of the Underlying Product in question at the time when the error occurred;
- (d) We may offer real-time tradeable prices to you. Due to delayed transmission between you and us, the price offered by us may have changed before an Order from you is received by us. If automatic Order execution is offered to you, we are entitled to change the price on which the Order is executed to the market value at the time at which the Order from you was received;
- (e) You are responsible for the installation and proper use of any virus detection/scanning program we require from time-to-time and we will not be liable for any damage/losses due to computer viruses, worms, software bombs or similar items introduced to your computer;
- (f) You are responsible for all Orders, and for the accuracy of all information sent via the ECN Trade Platform including your name password or any other personal identification means implemented to identify you;
- (g) You are obliged to keep passwords secret and ensure that third-parties do not obtain access to your Account;
- (h) Regardless of the fact the ECN Trade Platform may confirm that a Contract is executed immediately when you transmit instructions via the ECN Trade Platform, the Confirmation forwarded by us or made available to you on the ECN Trade Platform constitutes our confirmation of a Contract;
- (i) You must inform us if you become aware of a material defect, malfunction or virus in the ECN Trade Platform and cease all use of the ECN Trade Platform until you have received permission from us to resume use.

**21.2** All rights in patents, copyrights, design rights, trademarks, and any other intellectual property rights (whether registered or unregistered) relating to the ECN Trade Platform remain vested in us or our licensors. You will not copy, interfere with, tamper with, alter, amend or modify the ECN Trade Platform or any part of parts thereof unless expressly permitted by ECN Trade in writing.

Any copies of the ECN Trade Platform made in accordance with law are subject to these Terms and Conditions. You must ensure that all the licensor's trademarks and copyright and restricted rights notices are reproduced on these copies. You must maintain an up-to-date written record of the number of copies of the ECN Trade Platform made by you. If we so request, you must as soon as reasonably practical, provide to us a statement of the number and whereabouts of copies of the ECN Trade Platform.

## **22. GENERAL**

How we may exercise our rights

**22.1** We may exercise a right or remedy or give or refuse its consent in any way we consider appropriate (including by imposing clauses).

**22.2** If we do not exercise a right or remedy fully or at a given time, we may still exercise it later.

**22.3** Our rights and remedies under the Agreement are in addition to other rights and remedies given by law independently of the Agreement. We may enforce our rights and remedies in any order we choose.

#### Set-off

**22.4** We may set off any amount owing by us to you (whether or not due for payment) against any amount due for payment by you to us under the Agreement, any Contract or an Order.

**22.5** We may do anything necessary to effect any set-off under this clause (including varying the date for payment of any amount owing by us to you). This clause applies despite any other agreement between you and us.

#### Reinstatement of rights

**22.6** Under law relating to liquidation, administration, insolvency or the protection of creditors, a person may claim that a transaction (including a payment) in connection with the Agreement is void or voidable. If a claim is made and upheld, conceded or compromised, then:

- (a)** We are immediately entitled as against you and the Guarantor to the rights under the Agreement to which it was entitled immediately before the transaction; and
- (b)** on request from us, you and the Guarantor agree to do anything (including signing any document) to restore to us any rights (including the Guarantee) held by it immediately before the transaction.

#### No merger

**22.7** Our rights under the Agreement are additional to and do not merge with or affect and are not affected by any mortgage, charge or other encumbrance held by us or any of your other obligations of or obligations of the Guarantor to us, despite any rule of law or equity or any statutory provision to the contrary.

#### Further steps

**22.8** You agree to do anything we ask (such as obtaining consents, signing and producing documents and getting documents completed and signed):

- (a)** to bind you and any other person intended to be bound under the Agreement;
- (b)** to show whether you are complying with this Agreement.

#### Amendment

**22.9** We may vary the Agreement at any time. In doing so we must comply with any applicable law.

**22.10** We may, following 3 days' notice to you, charge you additional fees and/or commissions or increase the current fees and/or commissions) under the Agreement.

#### Waivers

**22.11** A provision of the Agreement, or right created under it, may not be waived or varied except in writing signed by the party or parties to be bound.

#### Assignment

**22.12** You may not assign or otherwise deal with its rights under the Agreement or a Contract or allow any interest in them to arise or be varied, in each case, without our consent.

**22.13** We may assign or otherwise deal with our rights under the Agreement or a Contract (including by assignment or participation) without the consent of any person. You agree that we may disclose any information or documents we consider necessary to help us exercise this right.

#### Inconsistent law

**22.14** To the extent permitted by law, the Agreement prevails to the extent it is inconsistent with any law.

**22.15** A provision of the Agreement that is void, illegal or unenforceable is ineffective only to the extent of the voidness, illegality or unenforceability, but the remaining provisions are not affected.

**22.16** Rights given to us under the Agreement and your liabilities under it are not affected by anything which might otherwise affect them at law.

**22.17** Any present or future legislate; on which operates to vary your obligations in connection with an Agreement with the result that our rights, powers or remedies are adversely affected (including by way of delay or postponement) is excluded except to the extent that its exclusion is prohibited or rendered ineffective by law.

#### Notices and other communications

**22.18** Unless expressly stated otherwise in the Agreement, all notices, certificates, consents, approvals, waivers and other communications in connection with the Agreement:

- (a)** must be in writing or such other means as we specify from time to time;
- (b)** must be signed by the sender (if an individual) or an Authorized Officer of the sender;
- (c)** will be taken to be received:
  - (i)** if delivered by person, by post or when delivered, received or left at the last notified address of the recipient;
  - (ii)** if sent by email when the sender receives an automated message confirming delivery or four hours after the time sent (as recorded on the device from which the sender sent the email) unless the sender receives an automated message that the email has not been delivered;

**22.19** We may, to the extent of your authorization, give a communication under the Agreement to your Authorized Person.

**22.20** Communications take effect from the time they are received unless a later time is specified in them.

#### Applicable law

**22.21** The Agreement is governed by the law in force in New South Wales and you submit to the non-exclusive jurisdiction of the courts of that place.

**22.22** Without preventing any other method of service, any document in a court action may be served on a party by being delivered to or left at that party's address for service of notices as notified to the other party from time to time.

#### Confidentiality

**22.23** Each party agrees not to disclose information provided by any other party that is not publicly available (including the existence or contents of the Agreement) except:

- (a)** with the consent of the party who provided the information (such consent not to be unreasonably withheld); or
- (b)** if allowed or required by law or the Agreement or required by the respective Regulators or Stock Exchanges;
- (c)** in connection with any legal proceedings relating to the Agreement;
- (d)** to any person in connection with an exercise of rights or a dealing with rights or obligations under an Agreement (including in connection with preparatory steps such as negotiating with any potential assignee or potential sub-participant or other person who is considering contracting with us in connection with the Agreement).

#### Indemnities

**22.24** Any indemnity in the Agreement is a continuing obligation, independent of your other obligations under the Agreement and continues after the Agreement ends. It is not necessary for us to incur an expense or make a payment before enforcing a right of indemnity under the Agreement.

#### Counterparts

**22.25** This Agreement may consist of a number of copies each signed (physically or virtually per the website's registration process) by one or more parties to the Agreement. If so, the signed copies are treated as making up the one document.

#### Consent to Telephone Recording

**22.26** You agree that we may record all telephone conversations, internet conversations (chat), and meetings between you and us and use such recordings, or transcripts from such recordings, as evidence towards any party (including, but not limited to, any regulatory authority



and/or court of law) to whom we, in our entire discretion, see it to be desirable or necessary to disclose such data in any dispute or anticipated dispute between us and you.

#### Netting

- 22.27** If on any date the same amounts are payable under the Terms by each party to the other in the same currency, then, on such date, each party's obligations to make payment of any such amount will be automatically satisfied and discharged. If the amounts are not in the same currency, the amounts are converted by us in accordance with clause 8
- 22.28** If the aggregate amount that is payable by one party exceeds the aggregate amount that is payable by the other party, then the party by whom the larger aggregate amount is payable must pay the excess to the other party and the obligations to make payment of each party will be satisfied and discharged.
- 22.29** If the Agreement is terminated according to clause 19, you and we agree that the claims we have against each other are finally discharged by means of close-out netting. We will determine the Close-Out Values for each affected Contract in our sole discretion. The final amount to be paid by one of the parties will be the difference between the payment obligations of the parties.

#### Currency of payments

- 22.30** All payments under the Agreement must be made in Australian dollars or US dollars. Any default to make payments to us is deemed to be an application for credit.
- 22.31** Every failure by you to pay an amount payable to us under the Agreement is deemed to be an application for credit from us.

### **23. PRIVACY**

- 23.1** Before completing the Wholesale Investor Acknowledgement Form, you should read the Wholesale Investor Acknowledgement form, and the Agreements carefully. The Acknowledgement Form requires you to disclose personal information and explains how we collect personal information and then how we maintain, use and disclose this information.
- (a)** We collect personal information from you in order to process your Wholesale Investor Acknowledgement form and fulfil our Verify your Client duties, and if your Wholesale Investor Acknowledgement form is accepted, to administer your investment and to provide you with services related to your investment. If you do not provide us with your personal information we may not be able to process your Wholesale Investor Acknowledgement form.
- (b)** In order to do these things, we may disclose your personal information on a confidential basis to our agents, contractors or third party service providers to whom we outsource services (the Service Providers), to our related bodies corporate, our professional advisers, or to a proposed purchaser of the whole or any substantial part of our business, even if the disclosure is to an organization overseas which is not subject to equivalent privacy obligations as apply to us.
- (c)** We may also disclose your personal information to relevant regulators (such as the Australian Securities and Investments Commission or anti-money laundering regulators) as required or authorized by law.

**23.2** Please contact our Administration Team on 1300 733 452 if you do not consent to us using or disclosing your personal information in the ways described in clause 23.1(b) and (c) above. It is important that you contact us because, by applying for an Account, you will be taken to have consented to these uses and disclosures. To provide you with a Contract we must use and disclose your personal information in the ways disclosed in paragraphs 23.1(b) to (c).

**23.3** In most cases you can gain access to the personal information that we hold about you. We may charge you a fee for providing access, based on the cost of providing the information. We aim to ensure that the personal information we retain about you is accurate, complete and up-to-date. To assist us with this, please contact us if any of the details you have provided change.

If you have concerns about the completeness or accuracy of the information we have about you, we will take steps to correct it.

**23.4** Our full privacy policy is available from our website [www.ecntrade.com.au](http://www.ecntrade.com.au)

## **24. INTERPRETATION**

**24.1** In this Agreement, *unless* the context otherwise requires:

- (a) defined terms – defined terms used in this Agreement are capitalised and set out in clause 24.2 below;
- (b) references - a reference to:
  - i. *gender* - one gender *includes* the other;
  - ii. *number* - the singular *includes* the plural and the plural *includes* the singular;
  - iii. *provisions* - a recital, clause, schedule or annexure is a reference to a clause of or recital, schedule or annexure to this Agreement and references to this Agreement *include* any recital, schedule or annexure;
  - iv. *agreements* - any contract (*including* this Agreement) or other instrument *includes* any variation or replacement of it and as it may be assigned or novated;
  - v. *legislation* - a statute, ordinance, code or other law *includes* subordinate legislation (*including* regulations) and other instruments under it and consolidations, amendments, re-enactments or replacements of any of them;
  - vi. *entities* - a person or entity *includes* an individual, a firm, a body corporate, a trust, an unincorporated association or an authority;
  - vii. *persons* - a person *includes* their legal personal representatives (*including* executors), administrators, successors, substitutes (*including* by way of novation) and permitted assigns;
  - viii. *group* - a group of persons is a reference to any two (2) or more of them taken together and to each of them individually;
  - ix. *bodies* - an entity which has been reconstituted or merged means the body as reconstituted or merged, and to an entity which has ceased to exist where its functions have been substantially taken over by another body, means that other body;
- (c) no agency - *unless* expressly stated, no party enters into this Agreement as agent for any other person (or otherwise on their behalf or for their benefit);
- (d) inclusion - the meaning of any general language is not restricted by any accompanying example, and the words 'includes', 'including', 'such as', 'for example' or similar words are not words of limitation;
- (e) headings - headings and the table of contents are for convenience only and do not form part of this Agreement or affect its interpretation;
- (f) periods - 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;

- (g) timing - the time between two (2) days, acts or events *includes* the day of occurrence or performance of the second (2<sup>nd</sup>) but not the first (1<sup>st</sup>) day act or event;
- (h) action - if the last day for doing an act is not a Business Day, the act must be done instead on the next Business Day; and
- (i) examples – if an example is given of anything (including a right, obligation or concept) such as by saying it includes something else, the example does not limit the scope of that thing.
- (j) Inconsistency – if there is any inconsistency between a Confirmation and this Agreement, the Confirmation will prevail.
- (k) construction - a provision of this Agreement must not be construed to the disadvantage of a party merely because that party was responsible for the preparation of this Agreement or the inclusion of the provision in this Agreement.

## 24.2 Definitions

These meanings apply unless the contrary intention appears:

- **Account** means your account with us.
- **Actual Margin** means the amount standing to the credit of your Account and designated as Actual Margin.
- **Agreement/s** means collectively the Wholesale Terms and Conditions, the Wholesale Investor Acknowledgement Form, Wholesale Information Disclosure, Wholesale Trade Client Agreement and the Confirmations.
- Australian Client Money Rules relates to the Treasury Laws Amendment (2016 Measures No. 1) Act 2017 and the Corporations Amendment (Client Money) Regulations 2017
- **Wholesale Investor Acknowledgement Form** means your application to us for an Account on this Terms and Conditions, and the Wholesale Investor Acknowledgement Form.
- **Form** means the application form associated with this Terms and Condition, the Wholesale Investor Acknowledgement Form and documentation required to be returned for the purposes of complying with Anti-Money Laundering and Counter-Terrorism Financing legislation, completed by you and submitted to us whether electronically or in hard copy.
- **Australian ADI** means Australian authorised deposit-taking institution; a financial institution licenced by the Australian Prudential Regulatory Authority to carry on banking business, including accepting deposits from the public.
- **Authorized Person** means those persons you notify us as authorized by you to give instructions to us.
- **Bought Swap Rate** means LIBOR (London InterBank Offered Rate) for a currency minus or plus a margin as determined by us.
- **Business Day** means a day on which banks are open for general banking business in NSW (not being a Saturday, Sunday or public holiday in that place).
- **Close-Out Date** means the date on which all or part of a Contract is Closed-Out.
- **Close of Business** means End of day – close of server time per ECN Trade Platforms.
- **Close-Out or Closed-Out** means the termination of all or part of a Contract in accordance with clause 12.
- **Close-out Value** for a Contract means the amount calculated as follows: **Close-out** Underlying Instrument Price X Contract Quantity.
- **Confirmation** means a message from us to you confirming your transaction in respect of a Contract.
- **Contract** means an over the counter ‘contract for difference’ between you and us where the Underlying Instrument is a Derivative CFD which we nominate as available to underlie

an Order or Contract and where the settlement time is immediate when the Contract is opened or closed.

- **Contract Quantity** means the amount of units to be traded to which the instrument is composed of and the Contract or Order relates.
- **Contract Value** means for any contract or Order for any Contract the amount calculated by us in accordance with the following formula:

Underlying Instrument Price X Contract Quantity

- **Corporations Act** means the Corporations Act 2001 (Clth).
- **Corporations Regulations** means the Corporations Regulations 2001 (Clth).
- **Costs** include costs, charges and expenses, including those incurred in connection with advisers.

**Currency** means a currency which we nominate as being available to underlie a Contract;

- **Dividend Amount** means in respect of a Listed Entity, an amount equal to the gross amount of any ordinary cash dividend paid in respect of a relevant Underlying Instrument.
- **Encumbrance** means any mortgage, lien, charge, pledge, assignment by way of security, security interest, title retention, preferential right or trust arrangement, claim, covenant, profit a prendre, easement or any other security arrangement or any other arrangement having the same effect.
- **Each of the following is an Event of Default:**
  - (a) you do not pay on time any amount payable by it under the Agreement in the manner required under the Terms, including, for the avoidance of doubt, any situation where the Actual Margin on your Account at any time is less than the Required Margin; or
  - (b) you do not comply with any obligation under the Agreement (other than those covered by paragraph (a) and, if the non-compliance can be remedied, does not remedy the noncompliance within seven days;
  - (c) an event occurs which has or is likely to have (or a series of events occur which, together, have or are likely to have) a Material Adverse Effect; or
  - (d) any change in law or interpretation which makes it unlawful for us to give effect to any provision of the Agreement;
  - (e) we or you are requested to end a Contract (or any part of a Contract) by any regulatory agency or authority;
  - (f) you die or becomes of unsound mind;
    - a. ‘
  - (g) you exceed the Position Limit on your Account;
  - (h) you or a Guarantor becomes Insolvent; or
- i. where you are trustee of a trust you cease to be the trustee of the trust or any step is taken to appoint another trustee of the trust, in either case without your consent; or
- ii. an application or order is sought or made in any court for removal of you as trustee of the trust; or
- iii. property of the trust to be brought into court or administered by the court or under its control; or
- iv. a notice is given or meeting summoned for the removal of you as trustee of the trust or for the appointment of another person as trustee jointly with you; or
  - (i) the Agreement or a transaction in connection with the Agreement is or becomes (or is claimed to be) wholly or partly void, voidable or unenforceable (“claimed” in this paragraph means claimed by you or anyone on behalf of any of it); or
  - (j) distress, execution or other process is levied against any property of you and is not removed, discharged or paid within seven days; or
  - (k) any security created by any mortgage or charge becomes enforceable against you and the mortgagee or chargee takes steps to enforce the security or charge; or

- (l) we reasonably consider it necessary for its own protection or the protection of its associates.
- **Free Balance** means, at any time, the excess (if any) of the balance of your Account at that time over the Required Margin.
- **Guarantor** means any person(s) identified as such in the Application.
- **Hedging Partner** means any counterparty to which we have deemed suitable to form an agreement to pass all trades as back to back transactions to manage risk.
- **A person is Insolvent** if:
  - (a) it commits act of bankruptcy;
  - (b) a liquidator or trustee in bankruptcy or similar person is appointed to the person;
  - (c) it is (or states that it is) an insolvent under administration or insolvent (each as defined in the Corporations Act); or
  - (d) it is in liquidation, in provisional liquidation, under administration or wound up or has had a Controller appointed to its property; or
  - (e) it is subject to any arrangement, assignment, moratorium or composition, protected from creditors under any statute or dissolved; or
  - (f) an application or order has been made (and, in the case of an application, it is not stayed, withdrawn or dismissed within 30 days), resolution passed, proposal put forward, or any other action taken, in each case in connection with that person, which is preparatory to or could result in any of (a), (b) or (c)above; or
  - (g) it is taken (under section 459F (1) of the Corporations Act) to have failed to comply with a statutory demand; or
  - (h) it is the subject of an event described in section 459(C)(2)(b) or section 585 of the Corporations Act (or it makes a statement from which we reasonably deduce it is so subject); or
  - (i) it is otherwise unable to pay its debts when they fall due; or
  - (j) something having a substantially similar effect to (a) to (g) happens in connection with that person under the law of any jurisdiction.
- **Interest Period** means the number of calendar days between one Business Day and the next Business Day.
- **LIBOR** means the London Interbank Offered Rate.
- **Listed Entity** means in relation to a Security, the entity that is considered by the applicable market to be the issuer of that Security.
- **Long Party** means in respect of any Contract the party identified in the Confirmation as having notionally bought the Underlying Instrument.
- **Loss** means, the difference between the Opening Value of the Contract and the Close- Out Value of the Contract if you are:
  - (a) the Long Party and the Close-Out Value of the Contract is lower than the Opening Value of the Contract; or
  - (b) the Short Party and the Close-Out Value of the Contract is higher than the Opening Value of the Contract.
- Margin Percentage** means the percentage rate applicable to your Contract as specified by us in our sole discretion and published on our website.
- **Mark to Market Payments** means the payments calculated under clause 7.
- **Material Adverse Effect** means a material adverse effect on:
  - (a) your ability to comply with its obligations under the Agreement; or
  - (b) your rights under the Agreement; or
  - (c) the business or financial position of you.
- **Opening Value** means: Opening Underlying Instrument Price X Contract Quantity

- **Opening Underlying Instrument Price** means the Underlying Instrument Price on opening the Contract as agreed between us and you.
  - **Order** means an offer made by you under these Terms.
  - **ECN Trade Platform** means the ECN Trade Platform we make available to you by which you may trade with us online in our Margin FX Contracts and Margin Commodity Contracts;
  - **Position Limit** means a limit placed by us on the sum of the Contract Values for all **Contracts** between us and you.
  - **Previous Contract Value** means, the amount calculated as follows:
    - (a) where the Contract Value is being determined for the first time for a Contract, the Opening Value;
    - (b) in all other cases, the Contract Value at the most recent Valuation Time.
  - **Profit** means the difference between the Opening Value of the Contract and the Close- Out Value of the Contract if you are:
    - (a) the Long Party and the Close-Out Value of the Contract is higher than the Opening Value of the Contract;
    - (b) the Short Party and the Close-Out Value of the Contract is lower than the Opening Value of the Contract.
  - **Required Margin** means an amount that is required to be standing to the credit of your Account and which is calculated as follows:
    - (a) when an Order is placed to open a Contract, an amount that is: Opening Value X Margin Percentage
    - (b) throughout the term of an open Contract: Contract Value X Margin Percentage in respect of each such open Contract between you and us.
  - **Scalping** is trading strategy through which one attempts to make many small transactions on small price, defined in clause 4.15;
  - **Sell Swap Rate** means LIBOR for a currency plus a margin of markup as determined by us.
  - **Short Party** means the party identified in the Confirmation as having notionally sold the Underlying Instrument.
  - **Specified Date** means the future value date with reference to which that Contract was entered into.
  - **Swap Charge** means the charge calculated in accordance with clause 11
- Terms** means the terms and conditions in this document governing the relationship between you and us.
- **Underlying Instrument** means the instrument which we list as being available to underlie an Order or Contract being a unit of Currency.
  - **Underlying Instrument Price** means the rate at which a single unit of the first Currency, the subject of the Contract, may be bought with or, as the case may be, sold in, units of the second Currency the subject of the Contract.
  - **Valuation Time** means:
    - (a) the Close of Business on each Business Day; and
    - (b) any other time that we decide in our absolute discretion.

### 24.3 References to certain general terms

Unless the contrary intention appears, a reference in this Agreement to:

- (a) (singular includes plural) the singular includes the plural and vice versa;
- (b) (variations or replacement) a document (including this Agreement) includes any variation or replacement of it;

- (c)** (law) law means common law, principles of equity, and laws made by parliament (and laws made by parliament include State, Territory and Commonwealth laws and regulations and other instruments under them, and consolidations, amendments, re-enactments or replacements of any of them);
- (d)** (person) the word “person” includes an individual, a firm, a body corporate, a partnership, a joint venture, an unincorporated body or association, or any Government Agency;
- (e)** (two or more persons) an agreement, representation or warranty in favor of two or more persons is for the benefit of them jointly and each of them individually;
- (f)** (jointly and severally) an agreement, representation or warranty by two or more persons binds them jointly and each of them individually;
- (g)** (reference to a group of persons) a group of persons or things is a reference to any two or more of them jointly and to each of them individually;
- (h)** (dollars) Australian dollars, dollars, A\$ or \$ is a reference to the lawful currency of Australia;
- (i)** (calculation of time) if a period of time dates from a given day or the day of an act or event, it is to be calculated exclusive of that day;
- (j)** (reference to a day) a day is to be interpreted as the period of time commencing at midnight and ending 24 hours later;
- (k)** (accounting terms) an accounting term is a reference to that term as it is used in accounting standards under the Corporations Act, or, if not inconsistent with those standards, in accounting principles and practices generally accepted in Australia;
- (l)** (meaning not limited) the words “include”, “including”, “for example” or “such as” when introducing an example, does not limit the meaning of the words to which the example relates to that example or examples of a similar kind;
- (m)** (reference to anything) anything (including any amount) is a reference to the whole and each part of it.

**24.4** If an event under the Agreement must occur on a stipulated day which is not a Business Day, then the stipulated day will be taken to be the next Business Day.

**24.5** Headings (including those in brackets at the beginning of paragraphs) are for convenience only and do not affect the interpretation of the Agreement.