

# MACKAY CONSOLIDATED INDUSTRIES PTY LTD - TERMS & CONDITIONS OF TRADE

## 1. DEFINITIONS

- 1.1. ACL means the Australian Consumer Law Schedule of the Competition and Consumer Act.
- 1.2. Agreement means any agreement for the provision of Goods or Services by the Seller to the Buyer.
- 1.3. "Buyer" means the person, jointly or severally if more than one, acquiring Goods or Services from the Seller.
- 1.4. Consumer is as defined in the ACL and in determining if the Buyer is a consumer, the determination is made if the Buyer is a consumer under the Agreement.
- 1.5. "Goods" means Goods supplied by the Seller to the Buyer (and where the context so permits shall include any supply of Services as hereinafter defined).
- 1.6. GST means the Goods and Services tax as defined in A New Tax System (Goods and Services Tax) Act 1999 as amended.
- 1.7. "PPSA" means the Personal Property Securities Act 2009 (Cth).
- 1.8. "Price" means the cost of the Goods or Services as agreed between the Seller and the Buyer subject to clause 3 of this contract.
- 1.9. "Seller" means Mackay Consolidated Industries Pty Ltd (ABN 72 006 962 401) and its successors and assigns.
- 1.10. "Services" means all Services supplied by the Seller to the Buyer in relation to the Goods.
- 1.11. Terms means these Terms and Conditions of Trade.

## 2. ACCEPTANCE

- 2.1. Unless otherwise agreed by the Seller in writing, the Terms apply exclusively to every Agreement and cannot be varied or replaced by any other terms, including the Buyer's terms and conditions of purchase (if any).
- 2.2. The Agreement is accepted by the Seller when the Seller accepts, in writing or electronic means, an offer from the Buyer or provides the Buyer with the Goods or Services.
- 2.3. The Seller in its absolute discretion may refuse to accept any offer.
- 2.4. The Buyer must provide the Seller with its specific requirements, if any, in relation to the Goods or Services.

## 3. PRICE AND PAYMENT

- 3.1. At the Seller's sole discretion, the Price of the Goods or Services will be;
  - (a) the Seller's current price at the date of delivery of the Goods or completion of the Services according to the Seller's current Price list; or
  - (b) the Seller's quoted Price, which shall be binding upon the Seller provided that the Buyer shall accept in writing the Seller's quotation within thirty (30) days.

For orders under \$25 (excluding GST), a \$10 handling fee will apply, unless the parties otherwise agree. Please note that this \$10 handling fee is non-refundable and does not apply to orders over \$25 (excluding GST).
- 3.2. If the Buyer requests any variation to the Agreement, the Seller may increase the price to account for the variation.
- 3.3. Where there is any change in the costs incurred by the Seller in relation to the Goods or Services, the Seller may vary its price to take account of any such change, by notifying the Buyer.
- 3.4. Time for payment for the Goods or Services is of the essence.
- 3.5. Subject to clause 3.6, payment for the Goods or Services must be made in full on the due date as stated on the invoice, quotation or any other order forms. If no time is stated, then payment must be made on delivery of the Goods or completion of the Services.
- 3.6. At the Seller's sole discretion payment may be due at the date of this Agreement.
- 3.7. If payment is due prior to delivery, the Seller may withhold delivery of the Goods until the Buyer has paid for them.

- 3.8. Payment by cheque or by EFT is not deemed made until the proceeds of the cheque or EFT have cleared. If payment is made on delivery, payment must be made by cash.
- 3.9. The Prices quoted for the supply of Goods or Services exclude GST and any other taxes or duties imposed on or in relation to the Goods or Services, except to the extent that such taxes are expressly included in any quotation given by the Seller.
- 3.10. Payment terms may be revoked or amended at the Seller's sole discretion immediately upon giving the Buyer written notice.

## 4. DELIVERY OF GOODS / SERVICES

- 4.1. Subject to clause 4.7, the Seller will arrange for the delivery of the Goods to the Buyer's site address.
- 4.2. Delivery is deemed to occur when the Goods leave the Seller's premises to be transmitted to the Buyer's site address.
- 4.3. The Buyer is responsible for all costs associated with delivery, including freight, insurance and other charges arising from the point of dispatch of the Goods to the Buyer to the point of delivery.
- 4.4. The Seller may make part delivery of Goods or provision of Services and the Seller may invoice the Buyer for the Goods and Services provided.
- 4.5. The Buyer indemnifies the Seller against loss or damage suffered by the Seller, its sub-contractors or employees as a result of delivery, except where the Buyer is a consumer and the Seller has not used due care and skill.
- 4.6. If delivery is attempted and is unable to be completed the Buyer is deemed to have taken delivery of the Goods and is liable for storage charges monthly on demand.
- 4.7. If agreed that the Buyer will collect the Goods:
  - (a) the Buyer must collect the Goods within 7 days of being advised they are ready;
  - (b) if the Buyer does not collect the Goods within this time, the Buyer is deemed to have taken delivery of the Goods and is liable for storage charges payable monthly on demand.
- 4.8. Any period or date for delivery of Goods or provision of Services stated by the Seller is an estimate only and not a contractual commitment.
- 4.9. The Seller will use its reasonable endeavours to meet any estimated dates for delivery of the Goods but will not be liable for any loss or damage suffered by the Buyer or any third party for failure to meet any estimated date.
- 4.10. If the Seller cannot complete the Services by any estimated date, it will complete the Services within a reasonable time.

## 5. RISK

- 5.1. The risk in the Goods and all insurance responsibility for theft, damage or otherwise will pass to the Buyer immediately on the Goods being delivered to the Buyer.
- 5.2. The Goods are sold to the Buyer on the basis that the Buyer has obtained all necessary licenses or permits under all relevant laws and regulations in relation to the Goods.
- 5.3. The Buyer assumes all risk and liability for loss, damage or injury to persons or to property of the Buyer, or third parties arising out of the use or possession of any of the Goods sold by the Seller, unless recoverable from the Seller on the failure of any statutory guarantee under the ACL.

# MACKAY CONSOLIDATED INDUSTRIES PTY LTD - TERMS & CONDITIONS OF TRADE

## 6. BUYERS DISCLAIMER

- 6.1. The Buyer acknowledges that:
- (a) it has not relied on any service involving skill and judgement, or on advice, recommendation, information or assistance provided by the Seller in relation to the Goods or Service or their use or application.
  - (b) It has not made known, either expressly or by implication to the Seller any purpose for which it requires the Goods or Services and it has the sole responsibility of satisfying itself that the Goods and Services are suitable for the Buyer's use.

## 7. DEFECTS/RETURN OF GOODS

- 7.1. Subject to clauses 7.3 and 7.6, the Seller will not be liable for any shortages, damage or non-compliance with the specifications in the Agreement unless the Buyer notifies the Seller with full details and description within fourteen (14) days of delivery otherwise the Buyer is deemed to have accepted the Goods.
- 7.2. The Buyer shall afford the Seller an opportunity to inspect the Goods within a reasonable time following notification in clause 8.1.
- 7.3. When any shortages, claim for damaged Goods or non-compliance with the Agreement specifications is accepted by the Seller in writing, the Seller may, at its option, replace the Goods or repair the Goods.
- 7.4. Subject to clause 7.6, the Seller will not under any circumstances accept Goods for return that:
- (a) are not returned at the Buyer's cost within fourteen (14) days of the delivery date;
  - (b) have not been stored or used in a proper manner;
  - (c) have been specifically produced to fulfil the Agreement;
  - (d) have been altered in any way;
  - (e) are not in their original condition and packaging.
- 7.5. If the Buyer wishes to return the goods for reason of change of mind within 14 days of the delivery date, the Seller may at its absolute discretion accept the Goods for return and refund the Price of the Goods less a 20% handling fee. The goods must be unused and in their original condition. The cost of return freight is the Buyer's responsibility.
- 7.6. If the Buyer is a consumer, nothing in this clause 7 limits any remedy available for a failure of the guarantees in sections 56 and 57 of the ACL.

## 8. WARRANTY

- 8.1. The Goods come with guarantees that cannot be excluded under the ACL. The Buyer is entitled to a replacement or refund for a major failure and for compensation for any other reasonably foreseeable loss or damage. The Buyer is also entitled to have the Goods repaired or replaced if the Goods fail to be of acceptable quality and the failure does not amount to a major failure.
- 8.2. The benefits of this warranty are in addition to any rights and remedies imposed by Australian State and Federal legislation that cannot be excluded. Nothing in this warranty is to be interpreted as excluding, restricting or modifying any State or Federal legislation applicable to the supply of Goods and Services which cannot be excluded, restricted or modified.
- 8.3. Subject to clauses 8.5, 8.6 and 8.7, the Seller warrants that the Goods will be free from defects in materials and workmanship for a period of 2 years (or up to 40,000kms if applicable).
- 8.4. If a defect in the Goods appears before the end of the warranty period and the Seller finds the Goods to be defective in materials or workmanship, the Seller will (at the Seller's sole discretion) repair the Goods, replace the Goods or resupply the Services free of charge.
- 8.5. This warranty will not apply:
- (a) where there has been failure on the part of the

- (b) Buyer to properly maintain any Goods; or
- (b) where there has been failure on the part of the Buyer to follow any instructions or guidelines provided by the Seller; or
- (c) if any Goods have been used other than for any application specified on a quote or order form; or
- (d) if the Goods have continued to be used after any defect becomes apparent or would have become apparent to a reasonably prudent operator or user;
- (e) to fair wear and tear, any accident or act of God;
- (f) to goods not manufactured by the Seller as they will be separately warranted by their individual manufacturer's warranty; or
- (g) where the Goods have been repaired, altered or modified without the Seller's consent.

- 8.6. The Seller makes no express warranties or representations other than set out in this warranty.
- 8.7. The repair or replacement of the Goods or part of the Goods is the absolute limit of the Seller's liability under this warranty.
- 8.8. If a fault covered by warranty occurs, the Buyer must first contact the Seller at the contact address listed in clause 8.12.
- 8.9. A warranty claim must be accompanied by:
- (a) proof of purchase;
  - (b) full details of the alleged defect; and
  - (c) appropriate documentation.
- 8.10. The Buyer must make the Goods available to the Seller for inspection and testing. If such inspection and testing find no defect in the Goods, the Buyer must pay the Seller's usual costs of service work and testing.
- 8.11. The Buyer must bear the cost of transport of the Goods to and from the Seller to make the warranty claim, and all insurance of the Goods.
- 8.12. The Seller's contact details are:
- Head Office  
894 Taylors Road  
**Dandenong South**  
**Victoria 3175**  
**Australia**  
Local Freecall 1300 020 374  
International: +61 3 9555 6500

## 9. LIABILITY

- 9.1. Except as the Terms specifically state, or as contained in any express warranty provided in relation to the Goods or Services, the Agreement does not include by implication any other term, condition or warranty in respect of the quality, merchantability, acceptability, fitness for purpose, condition, description, assembly, manufacture, design or performance of the Goods or Services or any contractual remedy for their failure.
- 9.2. If the Buyer is a consumer nothing in these Terms restricts, limits or modifies the Buyer's rights or remedies against the Seller for failure of a statutory guarantee under the ACL.
- 9.3. If the Buyer on-supplies the Goods to a person who is a consumer and the Goods or Services are not of a kind ordinarily acquired for personal, domestic or household use or consumption, the amount specified in section 276A(1) of the ACL is the absolute limit of the Seller's liability to the Buyer howsoever arising under or in connection with the sale, installation, use of, storage or any other dealings with the Goods by the Buyer or any third party.
- 9.4. If the Buyer on-supplies the Goods to a person who is a consumer and clause 9.3 does not apply, payment of any amount required under section 274 of the ACL is the absolute limit of the Seller's liability to the Buyer. Howsoever arising under or in connection with the sale,

# MACKAY CONSOLIDATED INDUSTRIES PTY LTD - TERMS & CONDITIONS OF TRADE

installation, use of, storage or any other dealings with the Goods by the Buyer or any third party.

- 9.5. If clause 9.3 or 9.4 do not apply, then other than as stated in the Terms or any written warranty statement, the Seller is not liable to the Buyer in any way arising under or in connection with the sale, installation, use of, storage or any other dealings with the Goods by the Buyer or any third party.
- 9.6. The Seller is not liable for any indirect or consequential losses or expenses suffered by the Buyer or any third party, howsoever caused, including but not limited to loss of turnover, profits, business or goodwill or any liability to any other party, other than, if the Buyer is a consumer, then to the extent the loss was reasonably foreseeable.
- 9.7. Nothing in the Terms is to be interpreted as excluding, restricting or modifying or having the effect of excluding, restricting or modifying the application of any State or Federal legislation applicable to the sale of Goods or supply of Services which cannot be excluded, restricted or modified.

## 10. INTELLECTUAL PROPERTY

- 10.1. Where the Seller has designed or drawn Goods for the Buyer, then the copyright in those designs and drawings shall remain vested in the Seller and shall only be used by the Buyer at the Seller's discretion.
- 10.2. Where the Buyer has supplied drawings, designs or instructions to the Seller, the Buyer warrants that all drawings, designs or instructions supplied to the Seller will not cause the Seller to infringe any patent, registered design or trademark in the execution of the Buyer's order.
- 10.3. The Buyer licenses the Seller to use the drawings, designs and instructions supplied by it to the Seller for the sole purpose of undertaking and complying with its obligations under this Agreement.
- 10.4. The Buyer indemnifies and agrees to keep the Seller indemnified against all liability, losses or expenses incurred by the Seller in relation to, or in any way directly or indirectly connected with, any breach of any intellectual property rights in relation to the supplied drawings, designs and instructions described in clause 10.2, or any intellectual property provided by the Buyer to the Seller in regard to the supply of Goods or Services.

## 11. DEFAULT & CONSEQUENCES OF DEFAULT

- 11.1. If the Buyer defaults in payment by the due date of any amount payable to the Seller, then all money which would become payable by the Buyer to the Seller at a later date on any account, becomes immediately due and payable without the requirement of any notice to the Buyer, and the Seller may, without prejudice to any of its other accrued or contingent rights :
- (a) charge the Buyer interest on any sum due at the rate of 2.5% per calendar month for the period from the due date until the date of payment in full;
  - (b) charge the Buyer for, and the Buyer must indemnify the Seller from, all costs and expenses (including without limitation all legal costs and expenses) incurred by it resulting from the default or in taking action to enforce compliance with the Agreement or to recover any Goods;
  - (c) cease or suspend supply of any further Goods or Services to the Buyer;
  - (d) by written notice to the Buyer, terminate any uncompleted contract with the Buyer;
  - (e) if payment is not made two months after the due date, charge the Buyer an administration fee of the greater of \$20.00 or 10.00% of the overdue amount.
- 11.2. Clauses 11.1(c) and (d) may also be relied upon, at the

Seller's option:

- (a) where the Buyer is a natural person and becomes bankrupt or enters into any scheme of arrangement or any assignment or composition with or for the benefit of his or her creditors or any class of his or her creditors generally; or
- (b) where the Buyer is a corporation and, it enters into any scheme of arrangement or any assignment or composition with or for the benefit of its creditors or any class of its creditors generally, or has a liquidator, administrator, receiver, manager or similar functionary appointed in respect of its assets, or any action is taken for, or with the view to the liquidation (including provisional liquidation), winding up or dissolution without winding up of the Buyer.

## 12. TITLE

- 12.1. Until the Seller receives full payment in cleared funds for all Goods and Services supplied by it to the Buyer, as well as all other amounts owing to the Seller by the Buyer:
- (a) title and property in all Goods remain vested in the Seller and do not pass to the Buyer. The Seller has a security interest in the Goods which have not been fully paid for and may register such interest under PPSA. The Buyer waives its rights to receive any notice under PPSA (including a notice of verification statement) unless the notice is required by PPSA and that requirement cannot be excluded;
  - (b) the Buyer must hold the proceeds of the sale of the Goods in trust for the Seller in a separate account however failure to do so will not affect the Buyer's obligation to deal with the proceeds as trustee;
  - (c) the Buyer must hold the Goods as fiduciary bailee and agent for the Seller;
  - (d) the Buyer must keep the Goods separate from its goods and maintain the Seller's labelling and packaging;
  - (e) the Seller may without notice, enter any premises where it suspects the Goods are and remove them, notwithstanding that they may have been attached to other Goods not the property of the Seller, and for this purpose the Buyer irrevocably licences the Seller to enter such premises and also indemnifies the Seller from and against all costs, claims, demands or actions by any party arising from such action.

## 13. CANCELLATION

- 13.1. If the Seller is unable to deliver or provide the Goods or Services then it may cancel the Buyer's order (even if it has been accepted) by written notice to the Buyer. The Seller is not liable for any loss or damage whatever arising from such cancellation of the Agreement.
- 13.2. No purported cancellation or suspension of an order or any part of it by the Buyer is binding on the Seller once the order has been accepted.

## 14. LIEN & STOPPAGE IN TRANSIT

- 14.1. Where the Seller has not received or been tendered the whole of the Price, or the payment has been dishonoured, the Seller shall have:
- (a) a lien on the Goods;
  - (b) the right to retain them for the price while the Seller is in possession of them;
  - (c) a right of stopping the Goods in transit whether or not delivery has been made or ownership has passed; and
  - (d) a right of resale,
  - (e) the foregoing right of disposal,

# MACKAY CONSOLIDATED INDUSTRIES PTY LTD - TERMS & CONDITIONS OF TRADE

provided that the lien of the Seller shall continue despite the commencement of proceedings or judgement for the price having been obtained.

## 15. UNPAID SELLERS RIGHTS TO DISPOSE OF GOODS

15.1. In the event that:

- (a) the Seller retains possession or control of the Goods; and
- (b) payment of the Price is due to the Seller; and
- (c) the Seller has made demand in writing of the Buyer for payment of the Price in terms of this contract; and
- (d) (the Seller has not received the Price of the Goods,

then, whether the property in the Goods has passed to the Buyer or has remained with the Seller, the Seller may dispose of the Goods and may claim from the Buyer the loss to the Seller on such disposal.

## 16. FORCE MAJEURE

16.1. A party is not liable in any way howsoever arising under the Agreement to the extent that it is prevented from acting by events beyond its reasonable control including, without limitation, industrial disputes, strikes, lockouts, accident, breakdown, failure of supplier, pandemic or epidemic, import or export restrictions, acts of god, acts or threats of terrorism or war. If an event of force majeure prevents a party from performing the Agreement for a consecutive period of two months or more, either party may terminate the Agreement by written notice to the other party.

## 17. GENERAL

- 17.1. If any Term is unenforceable it shall be read down to be enforceable or, if it cannot be read down, the term shall be severed from the Terms without affecting the enforceability of the remaining terms.
- 17.2. The law of Victoria from time to time governs the Terms. The parties agree to the non-exclusive jurisdiction of the courts of Victoria, the Federal Court of Australia, and of courts entitled to hear appeals from those Courts.
- 17.3. The Seller's failure to enforce any of these Terms shall not be construed as a waiver of any of the Seller's rights.
- 17.4. The Buyer shall not set off against the Price amounts due from the Seller.
- 17.5. The Seller may license or sub-contract all or any part of its rights and obligations without the Buyer's consent.
- 17.6. The Seller may vary or amend these Terms by written notice to the Buyer at any time. Any variations or amendments will apply to orders placed after the notice date.
- 17.7. A notice must be in writing and handed personally or sent by email, facsimile or prepaid mail to the last known address of the addressee. Notices sent by prepaid post are deemed to be received upon posting. Notices sent by facsimile or email are deemed to be received upon confirmation of successful transmission.