

# EagleBurgmann Australasia Pty Ltd – Terms & Conditions of Trade

## 1. Definitions

- 1.1 "Seller" means EagleBurgmann Australasia Pty Ltd (ABN 56 002 454 284) and its successors and assigns.
- 1.2 "Customer" means the Customer or any person acting on behalf of and with the authority of the Customer.
- 1.3 "Guarantor" means that person (or persons), or entity that agrees herein to be liable for the debts of the Customer if a Limited Liability Customer on a principal debtor basis.
- 1.4 "Goods" means all goods supplied by the Seller to the Customer (and where the context so permits shall include any supply of Services as hereinafter defined).
- 1.5 "GST" means any taxation on the supply of goods and services to the Customer as may be imposed (whether on the Seller or any other supplier) for the supply of the Goods and/or Services to the Customer.
- 1.6 "Services" means all services supplied by the Seller to the Customer and includes any advice or recommendations (and where the context so permits shall include any supply of Goods as defined supra).
- 1.7 "Price" means the cost of the goods as agreed between the Seller and the Customer subject to clause 4 of this contract.
- 1.8 "PPSA" means legislation providing for the registration of security interests in property including, in respect of customers in Australia, the *Personal Property Securities Act 2009* (Cth), and in respect of customers in New Zealand, the *Personal Property Securities Act 1999* (New Zealand) (each as amended from time to time).
- 1.9 "Privacy Legislation" means legislation which concerns the holding of personal information by the Seller, including the *Privacy Act 1988* (Cth) and the *Privacy Act 1993* (New Zealand) (each as amended from time to time).

## 2. Acceptance

- 2.1 Any instructions received by the Seller from the Customer for the supply of Goods shall constitute acceptance of the terms and conditions contained herein.
- 2.2 Where more than one Customer has entered into this agreement, the Customers shall be jointly and severally liable for all payments of the Price.
- 2.3 Upon acceptance of these terms and conditions by the Customer the terms and conditions are irrevocable and can only be rescinded in accordance with these terms and conditions or with the written consent of the manager of the Seller.
- 2.4 The Customer warrants that under no circumstances will the Goods provided by the Seller be used as a component of or installed in "weapons of mass destruction".

## 3. Goods / Services

- 3.1 The Goods and/or Services are as described on the invoices, quotation, work authorisation or any other work commencement forms as provided by the Seller to the Customer.
- 3.2 The Seller makes no further representations or warranties as to the Goods other than as set out any invoices, quotation, work authorisation or any other work commencement forms as provided by the Seller to the Customer (except as provided for in clause 8 herein).

## 4. Price And Payment

- 4.1 At the Seller's sole discretion;
- (a) The Price shall be as indicated on invoices provided by the Seller to the Customer in respect of Goods supplied; or
- (b) The Price shall be the Seller's current price at the date of delivery of the Goods according to the Seller's current Price list; or
- (c) The Price of the Goods, subject to clause 4.2, shall be the Seller's quoted Price which shall be binding upon the Seller provided that the Customer shall accept in writing the Seller's quotation within thirty (30) days.
- 4.2 Any variation from the plan of scheduled works or specifications will be charged for on the basis of the Seller's quotation and will be shown as extras on the invoice. Payment for all extras must be made in full at their time of completion.
- 4.3 The Seller may withhold delivery of the Goods until the Customer has paid for them, in which event payment shall be made before the delivery date.
- 4.4 At the Seller's sole discretion, for certain approved Customers payment will be due thirty (30) days following the date of the invoice.
- 4.5 At the Seller's sole discretion, payment for approved Customers shall be due on 20<sup>th</sup> day of the month following the posting of a statement to the Customer's address or address for notices.
- 4.6 The Price shall be increased by the amount of any GST and other taxes and duties which may be applicable, except to the extent that such taxes are expressly included in any quotation given by the Seller.

## 5. Delivery Of Goods

- 5.1 Delivery of the Goods shall be made to the Customer's address. The Customer shall make all arrangements necessary to take delivery of the Goods whenever they are tendered for delivery, or delivery of the Goods shall be made to the Customer at the Seller's address.
- 5.2 Delivery shall be deemed to have been made by the Seller to the Customer when the Goods are dispatched from the Seller's premise or when the Seller gives written notice that the Goods are available for delivery, whichever should occur first.
- 5.3 The costs of carriage and any insurance which the Customer reasonably directs the Seller to incur shall be reimbursed by the Customer (without any set-off or other withholding whatever) and shall be due on the date for payment of the Price. The carrier shall be deemed to be the Customer's agent.
- 5.4 The Seller may deliver the Goods by separate instalments (in accordance with the agreed delivery schedule). Each separate instalment shall be invoiced and paid for in accordance with the provisions in this contract of sale.
- 5.5 Where there is no agreement that the Seller shall send the Goods to the Customer, delivery to a carrier at limited carrier's risk at the expense of the Seller is deemed to be delivery to the Customer.
- 5.6 Delivery of the Goods to a third party nominated by the Customer is deemed to be delivery to the Customer.
- 5.7 The Customer shall take delivery of the Goods tendered notwithstanding that the quantity so delivered shall be either greater or less than the quantity purchased provided that;
- (a) such discrepancy in quantity shall not exceed 5%, and
- (b) the Price shall be adjusted pro rata to the discrepancy.

- 5.8 The failure of the Seller to deliver shall not entitle either party to treat this contract as repudiated.

- 5.9 The Seller shall not be liable for any loss or damage whatsoever due to failure by the Seller to deliver the Goods (or any of them) promptly or at all.

## 6. Risk

- 6.1 All risk for the Goods passes to the Customer on delivery regardless of whether the Seller retains property in the Goods.
- 6.2 If any of the Goods are damaged or destroyed prior to property in them passing to the Customer, the Seller is entitled, without prejudice to any of its other rights or remedies under these terms and conditions (including the right to receive payment of the balance of the Price for the Goods), to receive all insurance proceeds payable in respect of the Goods. This applies whether or not the Price has become payable under these terms and conditions. The production of these terms and conditions by the Seller is sufficient evidence of the Seller's rights to receive the insurance proceeds without the need for any person dealing with the Seller to make further enquiries.

## 7. Defects/Returns

- 7.1 The Customer shall inspect the Goods on delivery and shall within thirty (30) days of delivery notify the Seller in writing of any alleged defect, shortage in quantity, damage or failure to comply with the description or quote. The Customer shall afford the Seller an opportunity to inspect the Goods within a reasonable time following delivery if the Customer believes the Goods are defective in any way. If the Customer shall fail to comply with these provisions the Goods shall be conclusively presumed to be in accordance with the terms and conditions and free from any defect or damage.
- 7.2 For defective Goods which the Seller has agreed in writing that the Customer is entitled to reject, the Seller's liability is limited to either (at the Seller's discretion) replacing the Goods or repairing the Goods provided that:
- (a) the Customer has complied with the provisions of clause 7.1;
- (b) the Goods are returned at the Customer's cost within fourteen (14) days of the delivery date along with a copy of the original invoice;
- (c) the Seller will not be liable for Goods which have not been stored or used in a proper manner;
- (d) the Goods are returned in the condition in which they were delivered and with all packaging material, brochures and instruction material in as new condition as is reasonable possible in the circumstances.
- 7.3 The Seller may (in its discretion) accept the Goods for credit (except for Goods made to special order, Customer specification or non-catalogue items which are under no circumstances acceptable for credit or return) but this may incur a handling fee of 15% of the value of the returned Goods plus any freight.

## 8. Warranty

- 8.1 For Goods manufactured by the Seller, the Seller warrants that the Goods are free from defects in material, workmanship and design. However the Seller provides no warranty in respect of design if the Seller is not the designer or has provided goods to the designs or specifications of the Customer or its agents.
- 8.2 The Seller's warranty is limited and ceases to apply upon any of the Goods being installed or used in a way that is inconsistent with any specifications provided in respect of the Goods, including but not limited to being used inconsistently with service or pressure ranges for which the Goods were manufactured.
- 8.3 The Seller's warranty is limited to repairing or replacing, at the Seller's sole option, the defective Goods within a 6 month period from the date of delivery of the Goods. Any costs of transporting defective Goods and replacement Goods shall be borne by the Purchaser. This warranty shall not apply if the Customer:
- 8.3.1 Fails to immediately report such a defect upon the such manifesting itself or could have been detected by an inspection (as would reasonably be carried out);
- 8.3.2 Fails to provide the Seller adequate time and opportunity to carry out an inspection or maintenance, or repair works;
- 8.3.3 Failed to comply with any of its obligations under this agreement;
- or if the defect:
- 8.3.4 has arisen due to repairs or alterations or any interference with the particular Goods;
- 8.3.5 has arisen or is caused by deterioration by corrosion including stress corrosion.
- 8.4 For Goods not manufactured by the Seller the warranty shall be the current warranty provided by the manufacturer of the Goods. The Seller shall be under no liability whatsoever except for the express conditions as detailed and stipulated in the manufacturer's warranty. The Seller is exclusively entitled to the benefits and guarantees given by the Seller's subcontractors and suppliers.
- 8.5 The Seller does not undertake that repair facilities and parts will be available for the Goods, and will not be liable to repair any defective Goods, and at the Seller's discretion may:
- (a) notify the manufacturers of the Goods of any defect notified by the Customer; and
- (b) request the manufacturers to repair or replace any defective Goods.
- 8.6 In the case of second hand Goods the Customer acknowledges that he has had full opportunity to inspect the same and that he accepts the same with all faults. No warranty is given by the Seller as to the quality or suitability for any purpose and any implied warranty, statutory or otherwise, is expressly excluded. The Seller shall not be responsible for any loss or damage to the Goods, or caused by the Goods, or any part thereof however arising.

## 9. Default & Consequences Of Default

- 9.1 Interest on overdue invoices shall accrue from the date when payment becomes due daily until the date of payment at a rate of 4.5% per calendar month and shall accrue compounding at such a rate after as well as before any judgment.
- 9.2 If the Customer fails to pay any invoice when due for payment, the Customer shall indemnify the Seller from and against all of the Seller's costs and disbursements, including on a solicitor and own client basis, and in addition all of the Seller's costs of collection.
- 9.3 Without prejudice to any other remedies the Seller may have, if at any time the Customer is in breach of any obligation (including those relating to payment), the Seller may suspend or terminate the supply of Goods to the Customer and any of its other obligations under the terms and conditions. The Seller will not be

- liable to the Customer for any loss or damage the Customer suffers because the Seller exercised its rights under this clause.
- 9.4 If any account remains unpaid at the end of the second month after supply of the goods or services the following shall apply: An immediate amount of the greater of \$20.00 or 10.00% of the amount overdue shall be levied for administration fees which sum shall become immediately due and payable.
- 9.5 In the event that:
- any money payable to the Seller becomes overdue, or in the Seller's opinion the Customer will be unable to meet its payments as they fall due, or;
  - the Customer becomes insolvent, convenes a meeting with its creditors or proposes or enters into an arrangement with creditors, or makes an assignment for the benefit of its creditors, or;
  - a receiver, manager, liquidator (provisional or otherwise) or similar person is appointed in respect of the Customer or any asset of the Customer,
- then without prejudice to the Seller's other remedies at law:
- the Seller shall be entitled to cancel all or any part of any order of the Customer which remains unperformed in addition to and without prejudice to any other remedies; and
  - all amounts owing to the Seller shall, whether or not due for payment, immediately become due and payable.
- 10. Title**
- 10.1 The property in the goods shall not pass until:
- The Customer has paid all amounts owing for the particular Goods, and
  - The Customer has met all other obligations due by the Customer to the Seller in respect of all contracts between the Seller and the Customer, and that the Goods, or proceeds of the sale of the Goods, shall be kept separate until the Seller has received payment of the Price and all other obligations of the Customer are met.
- 10.2 It is further agreed that
- Until such time as ownership of the Goods shall pass from the Seller to the Customer the Seller may give notice in writing to the Customer to return the Goods or any of them to the Seller. Upon such notice the rights of the Customer to obtain ownership or any other interest in the Goods shall cease.
  - If the Customer fails to return the Goods to the Seller then the Seller or the Seller's agent may enter upon and into land and premises owned, occupied or used by the Customer, or any premises as the invitee of the Customer, where the Goods are situated and take possession of the Goods, without being responsible for any damage thereby caused.
- 11. PPSA**
- 11.1 The Customer acknowledges and agrees that:
- These terms and conditions constitute a security agreement for the purposes of the PPSA; and
  - A security interest is taken in all Goods previously supplied by the Seller to the Customer (if any) and all Goods that will be supplied in the future by the Seller to the Customer during the continuance of the parties relationship;
- 11.2 The Customer undertakes to:
- sign any further documents and/or provide any further information, such information to be complete, accurate and up-to-date in all respects, which the Seller may reasonably require to register a financing statement or financing change statement on the Personal Property Securities Register;
  - indemnify, and upon demand reimburse, the Seller for all expenses incurred in registering a financing statement or financing change statement on the Personal Property Securities Register or releasing any Goods charged thereby;
  - not register a financing change statement or a change demand without the prior written consent of the Seller;
  - give the Seller not less than fourteen (14) days prior written notice of any proposed change in the Customer's name and/or any other change in the Customer's details (including but not limited to, changes in the Customer's address, facsimile number, or business practice); and
  - immediately advise the Seller of any material change in its business practices of selling the Goods which would result in a change in the nature of proceeds derived from such sales.
- 11.3 Unless otherwise agreed to in writing by the Seller, the Customer waives its right to receive a verification statement.
- 11.4 The Customer grants to the Seller a power of attorney to undertake on the Customer's behalf any of things set out in the clauses 11.1 and 11.2 above and unconditionally ratifies any actions taken by the Seller.
- 12. Security & Charge**
- 12.1 Notwithstanding anything to the contrary contained herein or any other rights which the Seller may have howsoever:
- Where the Customer and/or the Guarantor (if any) is the owner of land, realty or any other asset capable of being charged, both the Customer and/or the Guarantor agree to mortgage and/or charge all of their joint and/or several interest in the said land, realty or any other asset to the Seller or the Seller's nominee to secure all amounts and other monetary obligations payable under the terms and conditions. The Customer and/or the Guarantor acknowledge and agree that the Seller (or the Seller's nominee) shall be entitled to lodge where appropriate a caveat, which caveat shall be released once all payments and other monetary obligations payable hereunder have been met.
  - Should the Seller elect to proceed in any manner in accordance with this clause and/or its sub-clauses, the Customer and/or Guarantor shall indemnify the Seller from and against all the Seller's costs and disbursements including legal costs on a solicitor and own client basis.
  - To give effect to the provisions of clause [11, 12.1(a) to (b)] inclusive hereof the Customer and/or the Guarantor (if any) do hereby irrevocably nominate constitute and appoint the Seller or the Seller's nominee as the Customer's and/or Guarantor's true and lawful attorney to execute mortgages and charges (whether registrable or not) including such other terms and conditions as the Seller and/or its nominee shall think fit in their absolute discretion against the joint and/or several interest of the Customer and/or the Guarantor in any land, realty or asset in favour of the Seller and in the Customer's and/or Guarantor's name as may be necessary to secure the
- said Customer's and/or Guarantor's obligations and indebtedness to the Seller and further to do and perform all necessary and other acts including instituting any necessary legal proceedings, and further to execute all or any documents in the Seller's absolute discretion which may be necessary or advantageous to give effect to the provisions of this clause.
- 13. Intellectual Property**
- 13.1 Where the Seller has designed or drawn Goods for the Customer, any intellectual property rights in such shall remain vested in the Seller, and shall only be used by the Customer with the written permission of the Seller.
- 13.2 Where the Customer has supplied drawings, designs or specifications, and where it is necessary for the Seller to use the intellectual property rights contained in such for the purpose of this agreement, the Customer grants to the Seller a perpetual, royalty free, irrevocable licence to use those intellectual property rights for the purpose of this agreement.
- 13.3 Where any designs or specifications have been supplied by the Customer for manufacture by or to the order of the Seller, the Customer warrants that the use of those designs or specifications for the manufacture, processing, assembly or supply of the Goods shall not infringe the rights of any third party.
- 13.4 The Customer agrees to indemnify the Seller for all of the Seller's loss, costs and damages for any breach of clause 13.3.
- 14. Cancellation**
- 14.1 The Seller may cancel these terms and conditions or cancel delivery of Goods and Services at any time before the Goods are delivered by giving written notice. On giving such notice the Seller shall promptly repay to the Customer any sums paid in respect of the Price for those Goods. The Seller shall not be liable for any loss or damage whatever arising from such cancellation.
- 15. Privacy Legislation**
- 15.1 The Customer and the Guarantor/s (if separate to the Customer) authorises the Seller to:
- collect, retain and use any information about the Customer, for the purpose of assessing the Customer's creditworthiness or marketing products and services to the Customer; and
  - to disclose information about the Customer, whether collected by the Seller from the Customer directly or obtained by the Seller from any other source, to any other credit provider or any credit reporting agency for the purposes of providing or obtaining a credit reference, debt collection or notifying a default by the Customer.
- 15.2 Where the Customer is an individual the authorities under (clause 15.1) are authorities or consents for the purposes of the Privacy Legislation.
- 16. Customers Disclaimer**
- 16.1 The Customer hereby disclaims any right to rescind, or cancel the contract or to sue for damages or to claim restitution arising out of any misrepresentation made to him by any servant or agent of the Seller and the Customer acknowledges that he buys the Goods relying solely upon his own skill and judgement and that the Seller shall not be bound by nor responsible for any term, condition, representation or warranty other than the warranty given by the Manufacturer which warranty shall be personal to the Customer and shall not be transferable to any subsequent Customer.
- 17. Unpaid Sellers Rights To Dispose Of Goods**
- 17.1 In the event that:
- the Seller retains possession or control of the Goods; and
  - payment of the Price is due to the Seller; and
  - the Seller has made demand in writing of the Customer for payment of the Price in terms of this contract; and
  - the Seller has not received the Price of the Goods,
- then, whether the property in the Goods has passed to the Customer or has remained with the Seller, the Seller may dispose of the Goods and may claim from the Customer the loss to the Seller on such disposal.
- 18. Lien & Stoppage in Transit**
- 18.1 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 lien on the goods;
  - the right to retain them for the price while the Seller is in possession of them;
  - a right of stopping the goods in transit whether or not delivery has been made or ownership has passed; and
  - a right of resale,
  - the foregoing right of disposal,
- provided that the lien of the Seller shall continue despite the commencement of proceedings or judgement for the price having been obtained.
- 19. Dispute Resolution**
- 19.1 All disputes and differences between the Customer and the Seller touching and concerning this agreement shall firstly be resolved through mediation and the parties will submit to mediation before having recourse to any other dispute resolution process. Written notice of the dispute will be given by the party raising the dispute to the other party for it to be submitted to mediation before a mediator chosen by the parties or, where the parties cannot agree, by the Australian Commercial Disputes Centre (ACDC), or should the supply of Goods under this agreement have been made to the Customer in New Zealand the Chair of LEADR New Zealand. The parties will use their best endeavours to settle the dispute promptly. The mediation will be conducted according to the ACDC Commercial Mediation Guidelines to the extent that they do not conflict with the provisions of this clause. If the dispute is not resolved within 30 days after notice of the dispute is given pursuant to this clause, the mediation will terminate.
- 20. General**
- 20.1 If any provision of these terms and conditions shall be invalid, void or illegal or unenforceable the validity existence, legality and enforceability of the remaining provisions shall not be affected, prejudiced or impaired.
- 20.2 If this agreement is for the supply of Goods to the Customer in New Zealand, this agreement shall be governed and construed according to the laws from time to

- time in force in New Zealand and the parties submit to the non-exclusive jurisdiction of the Court of New Zealand, but otherwise clause 20.3 shall apply.
- 20.3 This agreement shall be governed and construed according to the laws from time to time in force in the State of New South Wales and the parties submit to the non-exclusive jurisdiction of the Court of New South Wales.
- 20.4 The Seller shall be under no liability whatever to the Customer for any indirect loss and/or expense (including loss of profit) suffered by the Customer arising out of a breach by the Seller of these terms and conditions.
- 20.5 In the event of any breach of this contract by the Seller the remedies of the Customer shall be limited to damages. Under no circumstances shall the liability of the Seller exceed the Price of the Goods.
- 20.6 Neither party shall be liable for any default due to any act of God, terrorism, war, strike, lock out, industrial action, flood, storm or other event beyond the reasonable control of either party.
- 20.7 The Customer shall not set off against the Price amounts due from the Seller.
- 20.8 The Seller may license or sub-contract all or any part of its rights and obligations without the Customer's consent.
- 20.9 The Seller reserves the right to review these terms and conditions at any time and from time to time. If, following any such review, there is to be any change in such terms and conditions, that change will take effect from the date on which the Seller notifies the Customer of such change.