

# TERMS AND CONDITIONS OF SALE

To the fullest extent legally permissible, all dealings with Myenergi APAC Pty Ltd ABN 69 650 114 159 (& all subsidiaries, divisions, affiliates, related & associated companies, trusts & other entities and/or any successors and/or assigns) ("**Supplier**") relating to any goods and/or any services (the **goods** and/or the **services**) are subject to the following terms & conditions ("**Terms**") unless otherwise expressly agreed in writing:

## 1. STATUTORY PROVISIONS

These terms and conditions:

- (a) Are to be read subject to the provisions of the *Competition and Consumer Act 2010 (Act)* (as amended from time to time) and any terms, conditions, guarantees and warranties which the Act and any other law expressly provides may not in respect of the Terms be excluded, restricted or modified, or may be excluded, restricted or modified only to a limited extent (**Statutory Provisions**);
- (b) Are, unless the Supplier agrees in writing otherwise, the only terms and conditions of sale to which the Supplier will be bound, and the Customer agrees that these Terms will in all circumstances prevail over the Customer's terms and conditions of purchase (if any); and
- (c) Supersede and exclude all prior and other discussions, representations (contractual and otherwise) and arrangements in relation to the supply of goods and/or services including, but not limited to, those in relation to the performance of the goods or the results that ought to be expected from using the goods.

## 2. PAYMENT OF ORDERS/ACCOUNTS

- a) No order will be binding on the Supplier until accepted by the Supplier. All credit orders are accepted by the Supplier subject to satisfactory credit approval of the Customer and credit approval, if granted, may be withdrawn at any time. Where credit has not been granted, or is withdrawn, payment for all goods is required on delivery or at such other time specified by the Supplier in writing.
- b) In the absence of proper acceptance of a quote, all sales are made by the Supplier at its ruling price at the time of delivery. Government imposts (including GST) will be to the Customer's account. The Supplier's price lists exclude GST and any other government imposts unless otherwise indicated.
- c) Pro forma orders are firm, irrevocable and non-cancellable by the Customer and must be paid for in full within 7 days from date of Invoice. Time for payment is of the essence. Where payment is not received within 14 days of the date of invoice the order may be cancelled by and at the discretion of the Supplier and in such event the Customer will be liable from the date of notice of cancellation to a cancellation fee equivalent to 20% of the invoiced cost or \$50.00 whichever is the greater.
- d) All other orders must be paid for within 14 days of the date of invoice (**Payment Period**) and where payment in full is not received by the Supplier prior to the expiry of the Payment Period then the Customer shall be liable to pay Interest on the amount outstanding as at the expiry of the Payment Period at the rate of 12% per annum until payment in full is received by the Supplier.
- e) The Supplier is hereby irrevocably authorised to allocate the payment of any monies received from time to time from the Customer towards any outstanding amounts owed by the Customer (including interest, part payment of an invoice, administration, collection & other costs) in any order.
- f) The Supplier is entitled to set-off or deduct any amount payable by the Supplier to the Customer.

## 3. PROPERTY AND RISK IN AND DELIVERY OF GOODS.

- (a) The Customer agrees that:
  - (i) the Supplier accepts no responsibility or duty for delivery but may elect to arrange delivery at its discretion & without any liability & at the Customer's cost & responsibility in all things.
  - (ii) the Supplier reserves the right to charge for any delivery.
  - (iii) the Customer will be deemed to have accepted delivery & risk in and liability for goods immediately the Supplier notifies the Customer that any goods are ready for collection or upon the Supplier delivering any goods to a carrier or to the Customer's business premises or site whether attended or not and a certificate purporting to be signed by an officer of the Supplier confirming delivery shall be conclusive evidence of delivery as shall any signed delivery docket.
  - (iv) Any timeframes quoted by the Supplier for delivery of the goods are estimates only. The Supplier will use its reasonable endeavours to supply the goods in the quantities specified in the relevant order but will not be liable for delay, failure or inability to deliver any goods.
- (b) Even if the Supplier grants any credit facility and/or time to pay:
  - (i) property in goods shall not pass to the Customer until payment in full and of all monies owed to Supplier on any basis and on any account whatsoever ("**Full Payment**") and Supplier reserves the right to take possession and dispose of goods as it sees fit at any time until Full Payment;
  - (ii) the Customer grants permission to Supplier to enter any property to inspect, search for or recover the goods and with such force as is necessary;
  - (iii) the Customer agrees that a certificate purporting to be signed by an officer of Supplier identifying goods as unpaid for shall be conclusive evidence that the goods have not been paid for and of Supplier's title to those goods;
  - (iv) upon sale or disposition of any goods prior to Full Payment the Customer agrees to hold all proceeds as trustee and account to Supplier for the same as fiduciary and bailee;
  - (v) until Full Payment the Customer agrees to keep all goods as fiduciary for the Supplier & store them in a manner which shows the Supplier as owner and, subject to the Personal Property Securities Act (**PPSA**), only to sell goods in the usual course of business. Sale on terms at cost or less than cost will not be "in the usual course" unless otherwise agreed in writing with the Supplier;
  - (vi) without derogating from Supplier's rights as a creditor of the Customer or arising under these Terms if Products are used in any production and/or manufacturing process (**Process**) which results in an entitlement of the Customer to receive money from any other person the Customer agrees to hold such part of any monies received by the Customer (or the corresponding book debt owed to the Customer in respect of those monies) as is equivalent to the value of any goods used in the Process as invoiced to the Customer by Supplier UPON TRUST for Supplier until payment in full for those goods and all monies owed to Supplier on any account;
  - (vii) goods shall be deemed to be dealt with by the Customer on a "first in first out" basis at all times; and
  - (viii) nothing in this clause is intended to create a charge over any goods and this clause shall be read down to the extent necessary to avoid creating any charge.
- (c) The terms "**Collateral**", "**Debtor**", "**Financing Change Statement**", "**Financing Statement**", "**Grantor**", "**Proceeds**", "**Secured Party**", "**Security Agreement**" and "**Security Interest**" have the meanings given in the PPSA.
- (d) The Customer acknowledges and agrees that by accepting these terms and conditions which form part of the Terms and constitute a Security Agreement that covers the Collateral for the purposes of the PPSA:
  - (i) Supplier holds (as Secured Party) a Security Interest over all of the present and after acquired goods supplied by Supplier to the Customer and any Proceeds of the sale of those goods ("**Collateral**");
  - (ii) that any purchase by the Customer on credit terms from Supplier or retention of title supply pursuant to clause 3 hereof will constitute a purchase money security interest as defined under section 14 of the PPSA ("**PMSI**");
  - (iii) the PMSI granted herein will continue to apply to any goods coming into existence or proceeds of sale of goods coming into existence;
  - (iv) Supplier will continue to hold a Security Interest in the goods in accordance with and subject to the PPSA, notwithstanding that the goods may be processed, commingled or become an accession with other goods.
  - (v) any Supplier Security Interest will be a continuing and subsisting interest in the Collateral with priority to the fullest extent permitted by law over all over registered or unregistered Security Interest;
  - (vi) until title in the goods pass to the Customer, it will keep all goods supplied by Supplier free and ensure all such goods are kept free of any charge, lien or Security Interest and not otherwise deal with the goods in a way that will or may prejudice any rights of Supplier under these Terms or the PPSA; and
  - (vii) in addition to any other rights under these terms and conditions or otherwise arising, Supplier may exercise any and all remedies afforded to it as a Secured Party under Chapter 4 of the PPSA including, without limitation, entry into any building or premises owned, occupied or used by the Buyer, to search for and seize, dispose of or retain those goods in respect to which the Customer has granted a Security Interest to Supplier.
- (e) The Customer undertakes to:
  - (i) sign any further documents and provide such information which Supplier may reasonably require to register, amend or update a Financing Statement or Financing Change Statement in relation to a Security Interest on the PPS Register;

- (ii) indemnify and upon demand reimburse Supplier for all expenses incurred in registering a Financing Statement or Financing Change Statement on the PPS Register or releasing any Security Interests;
- (iii) not register or permit to be registered a Financing Change Statement in the Collateral without the prior written consent of Supplier; and
- (iv) provide Supplier not less than 7 days prior written notice of any proposed change in the Customer's name, address, contact numbers, business practice or such other change in the Customer's details registered on the PPS Register to enable Supplier to register a Financing Change Statement if required.
- (f) The Supplier and the Customer agree that sections 96, 125 and 132(3)(d) and 132(4) of the PPSA do not apply to the Security Agreement created under these Terms.
- (g) The Customer hereby waives its rights to receive notices under sections 95, 118, 121(4), 130, 132(3)(d) and 132(4) of the PPSA.
- (h) The Customer waives its rights as a Grantor and/or a Debtor under sections 142 and 143 of the PPSA.
- (i) Unless otherwise agreed in writing by Supplier, the Customer waives its right to receive a verification statement in accordance with section 157 of the PPSA.
- (j) The Customer shall unconditionally ratify any actions taken by Supplier under this clause 3.
- (k) This clause will survive the termination of these Terms to the extent permitted by law.

#### 4. DEFAULT

- (a) An act of default under these Terms shall be deemed to occur in the event of any of the following:-
  - (i) The Customer failing to make payment in full for any goods by the due date for payment;
  - (ii) Any distress or execution being levied upon the Customer's goods or property,
  - (iii) The Customer, being a company, becoming unable to pay its debts as they fall due, offering to enter into any scheme of arrangement with its creditors, the passing by the Board of Directors of the Customer of any resolution to wind up the Customer, the filing of any petition to wind up the Customer or the appointment of an administrator or receiver/ manager in respect of the Customer's affairs; or
  - (iv) The Customer, in the case of a natural person, being declared bankrupt, (Any such acts collectively hereinafter referred to as an **(Act of Default)**).
- (b) Immediately upon the Customer committing any Act of Default or breach of these Terms:
  - (i) The Supplier may (inter alia) call-up all monies, retain all monies paid and/or cease further deliveries of goods and/or provision of services & recover from the Customer all lost profits and/or at its discretion take immediate possession of any goods without prejudice to any other rights & without being liable in any way to any party;
  - (ii) The Customer agrees not to commence or continue or permit to be commenced or continued through it any suit or action against the Supplier while the Customer is in such breach or default;
  - (iii) The Customer agrees to indemnify the Supplier for all costs & expenses incurred by the Supplier & its solicitors, mercantile agents & other parties acting on the Supplier behalf in respect of anything instituted or being considered against the Customer whether for debt, possession of any goods or otherwise;
  - (iv) The Supplier may apply any payment in reduction of recovery costs and/or expenses, interest and/or part or all of any principal debt in such order of priority as the Supplier in its absolute & unfettered discretion elects; and
  - (v) The Customer irrevocably authorises the payment directly to the Supplier of any debt due to the Customer by any debtor of the Customer in reduction of any amount due to the Customer to the Supplier under these Terms or otherwise;

#### 5. WARRANTIES

Subject to the Statutory Provisions, to the fullest extent permitted by law:

- (a) The Supplier warrants that the goods comply with any supplied specifications for the goods (or if no such specifications exist, will be free of defects in materials and manufacture) but otherwise excludes, to the maximum extent permissible by law, all other conditions and warranties in relation to the goods;
- (b) No dealing with the Customer will be or be deemed to be a sale by sample;
- (c) if any guarantee under the Act is applicable to any good or service supplied by Supplier and Supplier's liability is due to a failure to comply with the guarantee and such failure cannot be remedied or is a major failure as defined in the Act (each such failure hereafter referred to as a **"Relevant Failure"**), Supplier's liability is as stated in the Act in respect of that Relevant Failure;
- (d) if the liability is due to a failure to comply with any condition, warranty or guarantee in respect of any good or service supplied by Supplier under these Terms and such failure is not a Relevant Failure, Supplier's liability is limited as follows in respect of such failure:
  - (i) if the failure is in respect of goods, Supplier's liability is limited to replacement of the goods or the supply of equivalent goods, the repair of the goods, payment of the cost of replacing the goods or of acquiring equivalent goods, or payment of the cost of having the goods repaired, as determined by Supplier in its sole discretion; and;
  - (ii) if the failure is in respect of services, Supplier's liability is limited to the supply of the services again or payment of the cost of having the services supplied again, as determined by Supplier's in its sole discretion; and
  - (iii) in respect of all other liability (if any), Supplier's liability is limited in the aggregate to the amount of \$10,000.
- (e) The Customer must examine the goods for damage or defects and must notify the Supplier of any defects in writing within 7 days of delivery. If the Customer does not notify the Supplier within 7 days of delivery the Customer will be taken to have accepted the goods.
- (f) To the extent the law permits and notwithstanding any other clause of these Terms or otherwise, the Supplier excludes all liability whatsoever for any consequential or indirect losses of any kind howsoever arising and whether caused by breach of statute, breach of contract, negligence or any other tort. Consequential or indirect losses will be taken to include any loss of income, profit or business, in the nature of overhead costs and of goodwill or reputation.
- (g) Whilst every effort is made to ensure accuracy, the descriptions, illustrations and material contained in any catalogue, price list, brochure or similar material provided by the Supplier represents the general nature only of the items described therein and the use of such description will not constitute a contract of sale by description. The Company reserves the right to modify the design of goods without notice.

#### 6. RETURNS AND CREDIT

- (a) The Customer agrees not to cancel the whole or any part of an order placed with the Supplier.
- (b) Any goods purchased by the Customer from the Supplier may only be returned to the Supplier where notification of the proposed return of the goods is received within seven (7) days of the date of delivery and the Supplier has agreed in writing to accept the return of the goods and the goods are returned in good condition at the expense of the Customer.

#### 7. INTELLECTUAL PROPERTY

- (a) The Customer agrees that all tooling, material, industrial and/or intellectual property employed in the preparation for sale or production of any goods and/or services shall be & remain the property of the Supplier notwithstanding any contribution by the Customer relating thereto.
- (b) The Customer must not advertise, use or represent any intellectual property of the Supplier or of any goods themselves in any way without the prior written consent of the Supplier and indemnifies the Supplier against any loss, cost or expense in connection with any breach of this clause.

#### 8. MISCELLANEOUS PROVISIONS.

- (a) It is expressly agreed that any dispute arising from or in connection with this agreement shall be subject to the jurisdiction of the Courts and Laws of the state of Victoria.
- (b) The Customer hereby irrevocably authorises the Supplier from time to time, in order to assess any application for credit, (a) to obtain information about the Customer from any credit provider named in this application, (b) to obtain a credit report in respect of the Customer from any credit agency and (c) to provide any information contained on this credit application form and also details of the performance of the Customer in compliance with the trading terms and conditions herein to other credit providers, credit agencies. The Customer further authorises the latter company to make such information available to other credit providers.
- (c) Freight costs and in-transit insurance are the responsibility of the Customer and are not included in the invoiced price of the Goods.
- (d) The Customer warrants that the goods for which the credit is hereby applied are acquired solely for commercial sale and are not acquired by the Customer for his her or its personal or private domestic use.
- (e) Nominating or allowing any credit limit is an indication of the Customer's intention at the time. the Customer may vary or withdraw any credit facility at any time at its discretion without any liability to the Customer or any other party.
- (f) the Customer has a continuing discretion to allocate available stock & gives no warranty as to certainty of supply unless expressly agreed in writing in advance.
- (g) To give effect to the Customer's obligations under these Terms the Customer irrevocably appoints any solicitor for the Supplier as the Customer's attorney.