

Mackay Consolidated Industries Pty Ltd
Conditions of Purchase
February 2011

1. DEFINITIONS:

"ACL" means the Australian Consumer Law Schedule of the Competition and Consumer Act;

"Buyer" means Mackay Consolidated Industries Pty Ltd (ABN 72 006 962 401), and its successors and assigns;

"Contract" means any contract for the purchase of Goods by the Buyer from the Seller;

"Delivery Date" means the date by which the Buyer requires the Seller to deliver the Goods, whether it is a single date or a delivery schedule as provided or amended by the Buyer;

"Goods" means any Goods ordered by the Buyer from the Seller;

"Intellectual Property" means all copyright, patents, designs, engineering plans, drawings, diagrams and schematics (whether based in software, electronics or hardcopy), trade marks, names, formulae, specifications and confidential information, and all modifications, improvements and enhancements;

"Order" means an official written order for Goods sent by the Buyer to the Seller, either by post, fax, email or other electronic means;

"Seller" means the Seller of the Goods or any person acting on behalf of or with the Seller's authority;

"Terms" mean these terms and conditions of purchase.

2. OFFER:

Any Order is an offer by the Buyer to purchase the Goods ordered upon these Terms and no inconsistent provisions, terms or conditions shall be enforceable against the Buyer.

3. PRICES:

(a) Prices quoted for the supply of Goods are firm. No price increases will apply to the Goods hereby ordered unless the Buyer accepts such price increases in writing.

(b) Quotations provided by the Seller to the Buyer are valid from the date of the Offer until such time as the Buyer may place an Order, unless the Seller provides written notice of withdrawal.

(c) Unless otherwise agreed in writing by the Buyer prices quoted include the cost of freight and insurance of the Goods to the destination specified by the Buyer.

(d) Prices quoted are exclusive of G.S.T.

4. PAYMENT

(a) The Buyer will make payment for the Goods within 30 days from the end of the month during which the Seller's tax invoice is received, subject to Order compliance and the Goods being delivered or completed on the Delivery Date.

(b) The Seller is not entitled to interest on unpaid monies, or for any other costs associated with recovery from the Buyer for unpaid monies.

(c) The Buyer may offset any sums due to it by the Seller.

(d) The Buyer accepts no responsibility for payment of Goods other than against its Order and in accordance with these Terms.

5. PACKAGING:

- (a) All Goods ordered shall be suitably packed and otherwise prepared for delivery without charge to the Buyer.
- (b) Where the Buyer has agreed in writing to pay the cost of freight and insurance the Goods shall be so packed and prepared for delivery in accordance with the carrier's requirements so as to secure the lowest transport and insurance rates.
- (c) Copies of carrier's invoices and insurance details must be supplied with the Goods.

6. ACCEPTANCE:

- (a) The Seller must deliver Goods that are of the quantity, quality and description detailed in an Order or advised to the Seller at the time of Order, and which comply with all applicable laws and regulations.
- (b) The Buyer shall be entitled to inspect all Goods upon their delivery to the destination specified and the Buyer may within twenty-one (21) days of the arrival of the Goods at the destination reject any defective Goods and retain the balance of the Goods and the Buyer shall not be deemed to have accepted the Goods until they have been so inspected.
- (c) The Buyer shall promptly notify the Seller of any defect found in the Goods delivered or any shortage in the quantity of the Goods supplied.
- (d) The Buyer shall not be required to hold any Goods rejected beyond a period of sixty (60) days from the date of such notification and all Goods so held shall be at the seller's risk.
- (e) If the quantity of the Goods delivered exceed or fall short of the amount specified in the Order, the Buyer may, in its absolute discretion:
 - (i) return excess quantities to the Seller at the Seller's risk and expense;
 - (ii) require the Seller to hold excess quantities until directed otherwise by the Buyer;
 - (iii) offset the value of the shortfall in accordance with clause 3(c);
 - (iv) obtain a refund from the Seller to the value of the short fall;
 - (v) require the Seller to deliver the shortfall amount at the same cost as the Goods delivered;
 - (vi) cancel the Order; and/or
 - (vii) obtain damages from the Seller in accordance with clauses 16 and 17.
- (f) Goods will not conform with an Order unless they:
 - (i) are fit for the purposes for which Goods of the same description would ordinarily be used;
 - (ii) are fit for a particular purpose expressly or impliedly made known to the Seller at the time of the Order;
 - (iii) possess the qualities of Goods which the Seller has held out to the Buyer by way of a sample or model;
 - (iv) supplied in accordance with and comply with the relevant specifications; and
 - (v) are supplied to the quality and quantity specified in an Order or otherwise agreed in writing.

- (g) All Goods provided by the Seller must comply with the provisions of all:
 - (i) mandatory and voluntary safety standards, information standards or regulations which apply to the Goods ("Standards");
 - (ii) safety or other requirements specified in an Order; and
 - (iii) any other applicable laws or regulations that may apply to the Goods.
- (h) The Buyer will return rejected non-conforming Goods to the Seller at the Seller's risk and cost.
- (i) On return or rejection of any non-conforming Goods, the Seller must, at the Buyer's option, either:
 - (i) allow the Buyer to offset payment in accordance with clause 3(c);
 - (ii) refund the price paid for the Goods; or
 - (iii) re-provide complying Goods.

7. PROPERTY AND RISK:

- (a) The property in and ownership of the Goods shall pass to the Buyer upon their delivery to the specified destination, subject to divestment.
- (b) The risk in the Goods and all insurance responsibility for theft, damage or otherwise remains with the Seller until the Goods are accepted by the Buyer.

8. DELIVERY:

Goods must be delivered by the Seller:

- (a) to the Buyer's specified delivery point; and
- (b) on the stated Delivery Date. Time is of the essence.

9. PART DELIVERY:

Delivery of incomplete orders shall be permitted only with the prior written consent of the Buyer and in giving consent the Buyer may call for such alternative arrangements as to payment or part payment as it considers reasonable in the circumstances.

10. FREIGHT:

The Seller must advise the Buyer in writing of any premium or excessive freight costs (whether charged or not) incurred in the fulfilment of this order.

11. CONTRACTORS:

All contractors performing work on the site, must have completed an induction and all the relevant paperwork according to Mackay Safety Procedures prior to commencement of any work.

12. TITLE:

- (a) The Seller warrants that:
 - (i) it owns or is licensed to supply any Goods that are the subject of any patent, trade mark, design, copyright or any other form of intellectual property; and
 - (ii) the supply of the Goods does not and will not infringe the Buyer's Intellectual Property or the intellectual property rights of any third party.

- (b) It is understood by the Seller that the Goods purchased are for the use of the Buyer or its affiliate companies and may be resold by it or them and/or may be incorporated in other products or subject to further processes of manufacture. In no event shall any claim for royalty or other additional compensation be made by the Seller by reason of such use or manufacture.
- (c) By accepting this order, the Seller agrees to indemnify and keep indemnified the Buyer, its transferees, successors, assigns, customers and the users of its product from and against all claims, demands, damages, losses, costs and expenses arising from any actual or legal proceedings by a third party alleging infringement of any intellectual property or any other property right in respect of the Goods purchased including any loss or damage suffered by compliance by any such party with any Injunction Order by court of competent jurisdiction.

13. BLUEPRINTS, TOOLS ETC.:

- (a) Where the Seller supplies Goods on the basis of the Buyer's Intellectual Property, the Seller acknowledges and agrees that the Buyer will own all tooling, moulds, machines and presses used or created by the Buyer in the process of manufacturing such Goods. The Seller must promptly deliver up all such tooling to the Buyer and immediately cease use of it, if requested by the Buyer.
- (b) The Seller acknowledges and agrees that the ownership of the Intellectual Property in all materials provided by the Buyer to the Seller including, but not limited to drawings, diagrams and schematics (whether based on software, electronics or hardcopy), specifications, designs, manuals, tenders, trade marks, patents and copyright, moulds and presses remains with the Buyer, and the Seller must promptly return all such material to the Buyer and immediately cease use of it, if requested by the Buyer.

14. PUBLICATIONS:

The Seller shall not at any time divulge any information received from the Buyer in relation to this agreement which is of a confidential nature nor shall the Seller without the prior written consent of the Buyer in any manner advertise or publish the fact that the Buyer has contracted with the Seller for the supply of the Goods ordered.

15. ORDER NOT TRANSFERABLE:

The Seller shall not without the Buyer's prior written consent assign transfer or change this agreement or any of the Seller's rights hereunder or sub-let or sub-contract the manufacture of the Goods ordered or any of them.

16. SPECIFICATIONS:

- (a) Where the Goods ordered are to be manufactured by the Seller to the design specification or special requirements of the Buyer such Goods shall be manufactured of new materials according to the specifications drawings samples or other description furnished by the Buyer or accepted by the Buyer in placing this order within the tolerances specified and using only materials of the kind quality or grade specified.
- (b) Where no tolerance or materials are specified by the Buyer's drawings specifications or instructions the Seller must manufacture the Goods to the highest quality using only first grade materials and workmanship and in accordance with best industry practice within Australia.

17. WARRANTIES:

- (a) The Seller warrants:
- (i) that it has the necessary skills, ability and capacity to supply the Goods;
 - (ii) that the Buyer will have and enjoy quiet possession of the Goods;
 - (iii) that it can supply the Goods free from any encumbrance in favour of any third party;
 - (iv) the quality and acceptability of materials and workmanship of the Goods and that the Goods are free from defects;
 - (v) that the Goods are supported by repair facilities and spare parts;
 - (vi) the Goods comply with all Standards and safety regulations;
 - (vii) the conformity of the Goods to any Order; and
 - (viii) that the Buyer will be assigned and have the full benefit of any manufacturer's warranties.
- (b) The Seller warrants that it will account for and reimburse the Buyer for any damages or costs associated with the failure and re-supply of any of the Goods to the Buyer.
- (c) The Seller will indemnify the Buyer, along with its servants, agents, invitees or licensees, and keep them indemnified, against all loss, liability, damage, costs, actions, demands and suits of whatsoever kind arising out of:
- (i) any claim for injury or death of any person, loss or damage caused in whole or in part by any act or omission by the Seller, its servants and agents whilst executing an Order or making a delivery, and the Goods the Seller supplies;
 - (ii) any claim with respect to the Goods arising out of any latent or inherent defect in any of the Goods;
 - (iii) any claim in respect to the Seller's failure to comply with Standards or any safety specifications in an Order; and
 - (iv) any liability or damage suffered by the Buyer as a result of a claim for failure of a statutory guarantee under the ACL that was caused or contributed to by the Supplier.

18. LIABILITY

- (a) The Seller is liable for any direct, indirect or consequential losses or expenses suffered by the Buyer or any third party arising out of the Contract or the use of the Goods howsoever caused, including, but not limited to loss of turnover, profits, business or goodwill or any liability to any other party.
- (b) The Seller is liable for any loss or damage suffered by the Buyer or any third party where the Seller has failed to meet any Delivery Date, or cancels or suspends the supply of Goods. This includes, but is not limited to:
- (i) the costs of freighting the Goods by air to avoid a breach by the Buyer of its obligations under a contract with its customer;
 - (ii) liquidated damages claims;
 - (iii) loss of turnover, profits, business or goodwill; and
 - (iv) any liability to any other party.
- (c) Nothing in the Terms is 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.

19. MISCELLANEOUS:

- (a) The laws of Victoria from time to time govern these 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.
- (b) If any provision of these Terms is unenforceable, it shall be read down to be enforceable, or if it cannot be read down, the Term or part will be severed from the Contract without affecting the enforceability of the remaining Terms.
- (c) The Buyer's failure to enforce any of these Terms will not be construed as a waiver of any of the Buyer's rights.
- (d) 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 pre-paid post are deemed to be received upon posting. Notices sent by facsimile and email are deemed received upon the sender's telecommunications machine confirming transmission.
- (e) The Seller must comply with the National Privacy Principles in connection with any personal information supplied to it in connection with this Contract.