



## TERMS AND CONDITIONS OF SALE AND CONSIGNMENT

Effective 1st July 2009

### 1. BUYERS STATUTORY RIGHTS

These conditions of sale shall not exclude, limit, restrict or modify the rights, entitlements and remedies conferred upon the Buyer or the liabilities imposed upon the Seller, by any condition or warranty implied by the Commonwealth, State or Territory Act, or Ordinance, rendering void or prohibiting such exclusion, limitation, restriction or modification. In so far as any such condition or warranty can be:-

- (a) Excluded it is hereby excluded; or
- (b) Limited restricted or modified it is hereby limited restricted or modified to the fullest extent permitted by law.

### 2. WARRANTIES

Subject to Condition 1 to the Seller warrants that the goods supplied shall be of merchantable quality. All goods are supplied subject to this warranty only and any liability arising out of or in respect of the supply, resupply, use or reuse whether singly or otherwise of these goods, howsoever arising and whether for consequential loss or otherwise, and including any liability the Seller may otherwise have had by virtue of any representation, warranty condition or term, whether express or implied by law is hereby excluded.

### 3. LIMITATIONS OF LIABILITIES

Any liability incurred by the Seller to the Buyer is limited to the lowest of the cost of:-

- (a) Replacement of goods;
- (b) Obtaining equivalent goods or of having the goods repaired (at the option of the Seller); or
- (c) Refund of the price paid by the Buyer.

and does not extend to the consequential loss and is conditional upon the Buyer within 30 days of delivery making a written claim to the Seller setting out the full particulars of such claim and where possible returning to it sufficient part of the goods to enable a proper examination.

### 4. ADVICES

Subject to Condition 1, any advice, recommendation, information, assistance or service provided by the Seller in relation to the goods sold or manufactured by it or their use or application is given in good faith and is believed by the Seller to be appropriate and reliable. However, any advice, recommendation, information, assistance or service provided by the Seller in relation to any goods supplied by the Seller is provided without liability or responsibility on the part of the Seller.

### 5. DELIVERY

The Seller will make all reasonable efforts to have the goods delivered to the Buyer on the date agreed between the parties as the Delivery Date, but the Seller shall be under no liability whatsoever should delivery not be made on this date.

### 6. RISK

- (a) Unless otherwise agreed in writing, the risk in the goods purchased or goods delivered on consignment shall pass to the Buyer upon delivery to the Buyer or his agent or to a carrier commissioned by the Buyer.
- (b) Without in any way limiting the operation of the foregoing, upon delivery of the goods to the Buyer or his agent or to a carrier commissioned by the Buyer, the Buyer hereby covenants and where appropriate warrants with the Seller that, in the storage and handling of the goods, the Buyer shall comply with all relevant environmental laws and regulations, and does or on the acquisition of the goods will possess and comply with all necessary and/or relevant permits and licences and the Buyer shall ensure that the Buyer is familiar with and adheres to all the necessary and appropriate precautions and safety measures relating to the storing and handling of the goods.

### 7. PROPERTY

- (a) Property in all goods sold or all goods delivered on consignment shall remain the Seller and the Seller reserves the right to acquire, dispose or otherwise deal with the goods until such time as full payment is made for all amounts, due by the Buyer to the Seller.
- (b) Until full payment is made of all amounts owing by the Buyer to the Seller and title in all goods supplied by the Seller to the Buyer passes to the Seller, the Buyer shall in respect of all such goods;
  - (i) Store the goods separately in a way that clearly manifests the Seller's title;
  - (ii) Ensure that the goods are marked appropriately as belonging to the Seller and relate such goods to the invoice or consignment note under which they were delivered.
  - (iii) Separately identify the goods and the Seller's title, in the Buyer's inventory and stock records.
  - (iv) Permit and authorise the Seller its servants or agents to enter upon any premises where the goods are stored for the purposes of inspection, identification and stocktake.
  - (v) Insure the goods for an amount not less than the amount due to the Seller and hold any proceeds of insurance as trustee for the Seller notwithstanding that the risk in such goods has passed to the Buyer upon delivery.
- (c) Until payment is made of all money due by the Buyer to the Seller and the Seller has carried out and complied with all the rights and obligations contained herein, the Seller may without notice and without prejudice to any of its other rights and remedies and without demand, recover and/or resell;

- (i) Goods for which payment is yet made.
  - (ii) Goods supplied by the Seller to the Buyer for which title has been retained by the Seller, in substitution for goods for which payment is yet to be made; or
  - (iii) Goods supplied by the Seller to the Buyer for which title has been retained by the Seller for an amount equivalent to the amount required to discharge any indebtedness due by the Buyer to the Seller.
- (d) Until payment is made of all money due by the Buyer to the Seller and property and all the Seller's goods supplied to the Buyer passes to the Buyer the following provisions shall apply;
- (i) Any sale of the goods is deemed to be made by the Buyer on behalf of the Seller as undisclosed principal.
  - (ii) The proceeds of sale of such goods shall be placed in a separate account so as to be identifiable and be held on account of the beneficial ownership of the Seller.
  - (iii) The Seller is entitled to take any action for recovery of payment in its own name or in the customer's name.
  - (iv) The Buyer has no right to deal with the debt payable by the Buyer's customer to the Buyer without prior written authority of the Seller.
  - (v) The Buyer indemnifies the Seller against any liability the Seller may incur as a result of any warranty of representation made by the Buyer in respect of the goods or against any tax charge or duty payable in respect of such goods.

## 8. PRICE

Unless otherwise agreed in writing the price charged shall be the price ruling at the date of delivery by the Seller to the Buyer or the date of sale by the Buyer of consignment stock held by the Buyer on behalf of the Seller. Any price indications or price lists are subject to alteration to the price ruling at the delivery date or the date of sale by the Buyer including the Seller's consignment stock.

## 9. FORCE MAJEURE

Deliveries may be totally or partially suspended by the Seller during any period in which the Seller may be prevented or hindered from delivering by the Seller's normal means of supply or delivery by normal route through any circumstances outside reasonable control including but not limited to strikes, lockouts, raw material shortages, accidents or breakdowns of plant or machinery. However, during the period of total or partial suspension of delivery the Buyer may purchase elsewhere, at its own cost and risk, such quantities of alternative goods as may be necessary to cover its requirements during such period in substitution for the goods not delivered by the Seller. Whether or not the Buyer makes these arrangements the Seller shall not be under any liability in respect of such suspension, and in particular the Seller shall be under no obligation to deliver at any future date any goods not delivered during the period of suspension.

## 10. PAYMENT DEFAULT AND LIMIT

- (a) Subject to clause 10(b) and unless otherwise agreed expressly in writing or as provided on the Seller's invoice, payment shall be monthly, on or before the due date as shown on the Statement of Account which is issued at the end of the month by the Seller, or otherwise as indicated provided that the Buyer shall be in default of these terms and conditions immediately upon the happening of any or more of the following events;
- (i) The Buyer makes default in any payment;
  - (ii) The Buyer commits any act of bankruptcy or being a company passes a resolution for its winding up;
  - (iii) If a company, any of the events referred to in Section 460 of the Corporation Law occur;
  - (iv) The Buyer breaches any terms covenant or condition in any other contract agreement or understanding between the Buyer and the Seller;
  - (v) If there is any contract agreement or understanding between the Seller and any related company (as that term is defined under the Corporations Law) or guarantor of the Buyer, and the related company or the guarantor of the Buyer breaches any terms covenant or condition of such contract agreements or understanding;
  - (vi) Where the related company or any guarantor of the Buyer does or commits any act matter or thing which if it, he or she were the Buyer would be a breach of these terms and conditions; or
  - (vii) A Receiver or a Receiver and Manager of the Buyer is appointed;

Then without demand all monies owing and outstanding to the Seller on any account whatsoever and irrespective of whether the due dates as per the Statement of Account have occurred shall become immediately due and payable. In addition the Seller may without prejudice to its other rights either suspend further deliveries, requires payment in advance for all such deliveries or terminate any contract or agreement made forthwith by written notice to the Buyer and exercise any of the rights prescribed in clause 7.

- (b) Notwithstanding clause 10(a) the Seller may at all times at its sole unfettered discretion and without being under any duty or obligation to assign reason therefore, review, alter or terminate the Buyer's credit limit or terms without notice, and the decision of the Seller shall be final and the Seller accepts no liability or responsibility for any loss, howsoever arising including consequential loss incurred by the Buyer due to the operation of the condition.
- (c) Any expense, cost or disbursements incurred by the Seller in recovering any outstanding monies including debt collection agency fees, commission and any fees, costs or disbursements paid to the Seller's solicitors (on an indemnity basis) or on any other basis whatsoever shall be paid by the Buyer on an indemnity basis.
- (d) The Buyer hereby charges and mortgages in favour of the Seller to secure the repayment of the debt and all monies

which may become owing by the Buyer to the Seller hereunder all the Buyer's estate and interest in all property both real and personal present and future.

- (e) In the case of a trustee company we acknowledge that the trustee shall be liable on the account and that in addition the assets of the trust shall be available to meet payment of the accounts.

### 11. OVERDUE AMOUNTS

Amounts outstanding beyond the time due for payment as agreed by the Seller will automatically be subject to a service charge of 1.25% for each month, or part thereof, that the outstanding amount remains unpaid. Prompt action will be taken to collect overdue amounts and all Legal cost incurred will be due by the Buyer.

### 12. FUTURE DEALING

Unless otherwise agreed to in writing by the Seller and in substitution for and notwithstanding, any terms appearing in documentation provided by or on behalf of the Buyer the terms appearing herein shall be incorporated by implication into all agreements by the Seller to supply the Buyer with goods.

### 13. CONTAINERS

- (a) Containers in which goods are delivered and for which deposit is made remain the property of the Seller and must not be used for any other commodity than that contained therein at the time of delivery. On their return in good order and condition by the Buyer and at the Buyers expense to the factory or store of the Seller from which the goods were delivered, the full amount of the deposit will be repaid to the Buyer. Containers will be deemed to be still in the Buyer's hand until received at such factory or store. The Buyer will pay rental charge as determined by the Seller from time to time on all containers, which are not received, into the Seller's factory or store within one month of date of despatch by the Seller.
- (b) Containers, in which goods are delivered and for which a separate price is shown on the face of the invoice are, unless otherwise specified thereon, sold with the goods and their price as shown on the invoice must be paid with the price of the goods. If they are returned in good order and condition by the Buyer at the Buyer's expense to the Seller's factory or store from the date of invoice, the Seller will purchase the said containers, from the Buyer for their full invoice price. The Seller may offer less than the full invoice price for containers repurchased after the expiration of three (3) months from the date of invoice.
- (c) In the case of container where are received at a factory or store of the Seller otherwise than in good order and condition, only such part of the deposit or of their invoice price as in the opinion of the Seller is reasonable, having regard to their actual condition, will be allowed to the Buyer.

### 14. PALLETS

At all times the Seller retains the right to possession of any pallets used for delivery of the goods and the Buyer agrees to indemnify the Seller in respect of any pallets not returned in good order and condition to the Seller within one (1) month of delivery.

### 15. WEIGHT

In the absence of a proven defect in the Seller's system of weighing, the weights of goods sold hereunder shall be the last weight determined by the Seller's system of weighing prior of delivery.

### 16. SET-OFF

The Seller at its sole and unfettered discretion may at any time and from time to time set-off;

- (a) Any amount owing by the Seller to the Buyer in respect of goods and/or services supplied by the Seller to the Buyer to the Seller whether or not that amount has become due and payable or whether actually or contingently due which amount is referred to in this clause as 'the amount owing by the Seller' against;
- (b) Any amount owing by the Buyer to the Seller in respect of goods and/or services supplies by the Seller to the Buyer whether or not that amount is due and payable or actually or contingently due which amount is referred to in this clause as 'the amount owing by the Buyer' with the effect that;
  - (i) If the amount owing by the Seller exceeds the amount owing by the Buyer then the Seller may set-off the amount owing by the Seller against the amount owing by the Buyer and pay to the Buyer an amount equal to the difference between those two amount in full and final satisfaction of the amount owing by the Seller;
  - (ii) If the amount owing by the Seller is less than the amount owing by the Buyer then the Seller may set-off the amount owing by the Seller against the amount owing by the Buyer and the amount owing by the Seller shall be deemed to have been satisfied in full without any payment from the Seller to the Buyer and the net amount owing by the Buyer to Seller shall forthwith become due and payable.

### 17. CONSIGNMENT

These terms and conditions apply to goods sold as well as goods provided on consignment, that is sale or return. Any reference to goods sold in these terms and conditions shall be synonymous with goods provided upon consignment.

If goods are consigned by the Seller to the Buyer these terms and conditions shall apply whether the goods are held at the Buyer's premises or at any other premises, whether in control of the Buyer or not.

The Buyer shall as and when required by the Seller carry out a regular stock-take of the goods consigned and provide such details as may be required be the Seller in respect of such goods and do all such other things as may be required be the Seller in relation to such goods.

### 18. HEALTH AND SAFETY

It is the Buyers responsibility to ensure that all appropriate health and safety regulations are observed and other appropriate steps taken in relation to storage, handling and the use of the goods and where information is supplied to the Buyer on potential hazards relating to the goods, to bring such information to the attention of its employees, agents, sub-

contractors, visitors and customers. Without prejudice to the foregoing, it is also the Buyer's responsibility to provide safe facilities for the reception of goods into storage.

#### **19. GOODS & SERVICES TAX (GST) AND DRUMMUSTER LEVY**

Goods and Services Tax (GST) will be charged on those products that attract GST at the applicable rate. The DrumMuster levy will be charged on those products that attract DrumMuster levy at the applicable rates.

#### **20. INTELLECTUAL PROPERTY RIGHTS**

The Buyer shall not alter, remove or in any way tamper with any of the labels, leaflets, trademarks or other marks or numbers of the company attached to or placed upon the goods.

#### **21. NOTICES**

Any notices to be given to the Buyer shall be deemed to be given upon its being posted or sent by telex, facsimile, cable or telegram to the address of the Buyer set out in the contract or the Buyer's registered office or to the Buyer's last known address.

#### **22. ASSIGNMENT**

The Buyer may not assign or transfer or purport to assign or transfer any of its rights or obligations under or in connection with the contract to any other person or corporation whatsoever.

#### **23. SUB-CONTRACT**

The Seller reserves the right to sub-contract the performance of any contract or part thereof to any other party or person or corporation it may determine.

#### **24. SEVERABILITY**

Each clause and sub-clause of these terms and conditions whether in whole or part shall be severable from each other clause and sub-clause. If for any reason any clause or sub-clause or part thereof is invalid or unenforceable, these terms and conditions will be read and construed as if that clause, sub-clause or part is severed from these terms and conditions and invalidity of such clause, sub-clause or part shall not prejudice or in any way affect the validity or enforceability of any of the remaining clauses.

#### **25. PROPER LAW AND JURISDICTION**

All the contracts made between the Seller and the Buyer shall be governed by and construed in the accordance of the laws of New South Wales, Australia. The Buyer agrees to submit to the non-exclusive Jurisdiction of the New South Wales Courts for all purposes of or in connection with such contracts.