

TERMS AND CONDITIONS OF TRADE

1. Definitions

In these Terms:

"**ACL**" means the Australian Consumer Law Schedule of the *Competition and Consumer Act 2010* (Cth) as amended;

"**Consumer**" is as defined in the ACL and in determining if the Buyer is a Consumer, the determination is made if Buyer is a consumer under the Contract;

"**Contract**" means any contract for the provision of goods or services by EEM to the Buyer;

"**Buyer**" means the person, jointly and severally if more than one, acquiring Goods or Services from EEM under the Terms of this Contract;

"**Goods**" means any Goods supplied by EEM to the Buyer;

"**GST**" means the Goods and Services tax as defined in *A New Tax System (Goods and Services Tax) Act 1999* (Cth) as amended;

"**PPSA**" means the *Personal Property Securities Act 2009* (Cth) as amended;

"**Services**" means any Services supplied by EEM to the Buyer;

"**Site**" means any site at which services are to be performed;

"**Specifications**" means all drawings, illustrations, descriptive matter and particulars contained in EEM's catalogues, price lists and marketing documents; and

"**Terms**" means these Terms and Conditions of Trade.

2. Basis of Contract

- 2.1 The Terms apply exclusively to every Contract and cannot be replaced by any other terms, including the Buyer's terms and conditions (if any).
- 2.2 A Contract is accepted by EEM when EEM accepts, in writing or electronic means, an offer from the Buyer or provides the Buyer with the Goods or Services, in part or in whole.
- 2.3 EEM has absolute discretion to refuse to accept any offer.
- 2.4 EEM 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.
- 2.5 The Buyer must provide EEM with its specific requirements, if any, in relation to the Goods or Services.

3. Pricing

- 3.1 Prices quoted for the supply of Goods and Services exclude GST and any other taxes or duties.
- 3.2 If the Buyer requests any variation to the Contract, EEM may increase the price to account for the variation.
- 3.3 Where there is any change in the costs incurred by EEM in relation to Goods or Services, EEM may vary their price to take account of any such change, by notifying the Buyer.

4. Payment

- 4.1 Unless otherwise agreed in writing:
 - (a) Subject to 4.1(b), full payment for the Goods or Services must be made within 30 days of the date of EEM's invoice.
 - (b) EEM reserves the right to require payment in full on delivery of the Goods or completion of the Services.
- 4.2 Payment by cheque is not deemed made until the proceeds of the cheque have cleared.
- 4.3 Payment terms may be revoked or amended at EEM's sole discretion immediately upon giving the Buyer written notice.
- 4.4 The time for payment is of the essence.
- 4.5 All forms of card payments will incur a card processing fee of 1.5%.

5. Payment Default

- 5.1 If the Buyer defaults in payment by the due date of any amount payable to EEM, then all money which would become payable by the Buyer to EEM at a later date on any account, becomes immediately due and payable without the requirement of any notice to the Buyer, and EEM may, without prejudice to any of its other accrued or contingent rights:
 - (a) charge the Buyer a service charge on any sum due at the rate of 1.8 per cent per calendar month for the period from the due date until the date payment is made in full;
 - (b) charge the Buyer for, and the Buyer must indemnify EEM 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 Contract 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.
- 5.2 Clauses 5.1(c) and (d) may also be relied upon, at EEM's option:
 - (a) Where the Buyer is a natural person and becomes bankrupt or enters into any scheme or 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 or 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.

6. Passing of Property

- 6.1 Until EEM 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 EEM by the Buyer:
 - (a) title and property in all Goods remain vested in EEM and does not pass to the Buyer;
 - (b) the Buyer must hold the Goods as fiduciary bailee and agent for EEM;
 - (c) the Buyer must keep the Goods separate from its own goods and maintain EEM's labelling and packaging;
 - (d) the Buyer must hold the proceeds of sale of the Goods on trust for EEM in a separate account with a bank to whom the Buyer has not given security however failure to do so will not affect the Buyer's obligation to deal with the proceeds as trustee;
 - (e) in addition to its rights under the PPSA, EEM 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 EEM, and for this purpose the Buyer irrevocably licences EEM to enter such premises and also indemnifies EEM from and against all costs, claims, demands or actions by any party arising from such action.

7. Personal Property Securities Act

- 7.1 The PPSA applies to these Terms. These Terms are a security agreement.
- 7.2 For the purposes of the PPSA:
- (a) terms used in clause 7 that are defined in the PPSA have the same meaning as in the PPSA;
 - (b) EEM has a Purchase Money Security Interest (PMSI) in all present and future Goods supplied by EEM to the Buyer and the proceeds of the Goods; and
 - (c) the security interest is a continuing interest irrespective of whether there are monies or obligations owing by the Buyer at any particular time; and
 - (d) EEM has, where applicable, an agricultural PMSI in relation to the Goods supplied by EEM to the Buyer.
- 7.3 The security interest arising under these Terms attaches to the Goods when the Goods are collected or dispatched from EEM's premises.
- 7.4 Where permitted by the PPSA, the Buyer waives any rights to receive the notifications, verifications, disclosures or other documentation specified under sections 95, 118, 121(4), 130, 132(3)(d), 132(4), 135 and 157 of the PPSA.
- 7.5 To the extent permitted by the PPSA, the Buyer agrees that:
- (a) the provisions of Chapter 4 of the PPSA which are for the benefit of the Buyer or which place obligations on EEM will apply only to the extent that they are mandatory or EEM agree to their application in writing; and
 - (b) where EEM has rights in addition to those in Chapter 4 of the PPSA, those rights will continue to apply.
- 7.6 The Buyer must immediately upon the request of EEM:
- (a) do all things and execute all documents necessary to give effect to the security interest created under this Contract.
 - (b) procure from any person considered by EEM to be relevant to its security position such agreements and waivers (including as equivalent to those above) as EEM may at any time require.
- 7.7 EEM may allocate amounts received from the Buyer in any manner EEM determine, including in any manner required to preserve any PMSI it has in goods supplied by EEM.

8. Risk and Insurance

- 8.1 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 or collected from EEM's premises.
- 8.2 The Goods are sold to the Buyer on the basis that the Buyer has obtained all necessary licences or permits under all relevant laws and regulations in relation to the Goods.
- 8.3 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, installation, storage or possession of any of the Goods sold by EEM, unless recoverable from EEM on the failure of any statutory guarantee under the ACL.

9. Performance of Contract

- 9.1 Any period or date for delivery of Goods or provision of Services stated by EEM is an estimate only and not a contractual commitment.
- 9.2 EEM 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.
- 9.3 If EEM cannot complete the Services by any estimated date, it will do so within a reasonable time.

10. Delivery

- 10.1 Subject to clause 10.5, EEM will arrange for the delivery of Goods to the Buyer.
- 10.2 Unless otherwise agreed, 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.
- 10.3 EEM may make part delivery of the Goods or Services and may invoice the Buyer for the Goods or Services so delivered or completed.
- 10.4 The Buyer indemnifies EEM against any loss or damage suffered by EEM, its sub-contractors or employees as a result of delivery, except where the Buyer is a Consumer and EEM has not used due care and skill.
- 10.5 If agreed, the Buyer will collect the Goods.

11. Site Requirements

- 11.1 The Buyer must provide suitable and practical means of access to the Site and ensure that the Site is suitably prepared for the provision of the Services.
- 11.2 The Buyer indemnifies EEM against any loss or damage suffered by EEM, its sub-contractors or employees as a result of providing the Services, except where the Buyer is a Consumer and EEM has not used due care and skill.
- 11.3 Where EEM provides the Services at the Site, the Buyer warrants that it is the owner of the Site or is authorised to request the Services to be conducted at the Site, and that it has all of the required permissions, permits, approvals and authorisations for this to occur.
- 11.4 At no time does EEM take or accept any ownership of or responsibility for the Site. All risk and liability in and relating to the Site remains with the Buyer at all times.

12. Liability

- 12.1 Except as the Terms specifically state, or as contained in any express warranty provided in relation to the Goods or Services, the Contract 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.
- 12.2 If the Buyer is a Consumer nothing in these Terms restricts, limits or modifies the Buyer's rights or remedies against EEM for failure of a statutory guarantee under the ACL.
- 12.3 If the Buyer on-supplies the Goods or Services to a Consumer:
- (a) if the Goods or Services are not of a kind ordinarily acquired for personal, domestic or household use or consumption, then the amount specified in section 276A(1) of the ACL is the absolute limit of EEM's liability to the Buyer;
 - (b) if the Goods or Services are of a kind ordinarily acquired for personal, domestic or household use or consumption, then payment of any amount required under section 274 of the ACL is the absolute limit of EEM's liability to the Buyer, howsoever arising under or in connection with the sale, installation, use of, possession of, storage of, or any other dealings with the Goods or Services by the Buyer or any third party.

- 12.4 If clause 12.2 or 12.3 do not apply, then other than as stated in the Terms or any written warranty statement, EEM is not liable to the Buyer in any way howsoever arising under or in connection with the sale, installation, use of, possession of, storage of or any other dealings with the Goods or Services by the Buyer or any third party.
- 12.5 EEM 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, except to the extent of any liability imposed by the ACL.
- 12.6 The Buyer acknowledges that:
- (a) it has not relied on any advice, recommendation, information or assistance provided by EEM in relation to any Goods or Services or their use in relation to any Goods or Services or their use or application;
 - (b) it has not made known, either expressly or by implication, to EEM any purpose for which it requires any Goods or Services and it has the sole responsibility of satisfying itself that the Goods or Services are suitable for its use.
- 12.7 EEM will not be liable for any loss, damage or injury, including without limitation, the cost of any tainted, damaged or defective Goods or Services, incurred by the Buyer or any third party as a result of the Buyer's use of the Goods or Services purchased from EEM unless recoverable from EEM on the failure of any statutory guarantee under the ACL.
- 12.8 Notwithstanding clauses 12.6 and 12.7 in the event that a claim is made against EEM in relation to any representation, warranty, promise or statement or the provision of a Service, the total amount that can be claimed by the Buyer in relation to the same is the sum of the fees payable under and in connection with the representation, warranty, promise or statement.
- 12.9 Nothing in the Terms is to be interpreted as 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 so excluded, restricted or modified.
- 13. Cancellation**
- 13.1 If EEM 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.
- 13.2 No purported cancellation or suspension of an order or any part of it by the Buyer is binding on EEM once the order has been accepted.
- 14. Shortages and Exchanges**
- 14.1 Subject to clause 14.2 and 14.4, EEM will not be liable for any shortages, damage or non-compliance with the Specifications in the Contract unless the Buyer notifies EEM with full details and description within 30 days of delivery. Otherwise, the Buyer is deemed to have accepted the goods.
- 14.2 When any shortages, claim for damaged Goods or non-compliance with the Contract Specifications is accepted by EEM, EEM may, at its option, repair the Goods, replace the Goods, or refund the price of the Goods.
- 14.3 Subject to clause 14.4, EEM will not under any circumstances accept Goods for return where:
- (a) the Goods have been specifically produced, imported or acquired to fulfil the contract; or
 - (b) the Goods are discontinued or no longer in stock by EEM; or
 - (c) the Goods have been altered in any way; or
 - (d) have been used; or
 - (e) the Goods are not in their original condition due to damage caused by improper use; or
 - (f) the Goods have an expiration date that has been, or is near to being, exceeded; or
- Where the Buyer is a Consumer:
- (g) the Buyer has discovered the Goods can be purchased at a cheaper price elsewhere, and is seeking to return the Goods on that basis; or
 - (h) the Buyer alleges the Goods are defective, where EEM has drawn the defect to the attention of the Buyer before purchase; or
 - (i) the Buyer examined the Goods before buying and ought to have seen the obvious defect; or
 - (j) the Buyer seeks to return the Goods on the basis that they do not like the Goods or have no use for them.
- 14.4 If the Buyer is a Consumer, nothing in this clause limits any remedy available for a failure of the statutory guarantees in sections 56 and 57 of the ACL.
- 15. Specifications**
- 15.1 All Specifications are indicative only and may not be current or accurate. The Buyer acknowledges that it has not relied on the Specifications in making its purchasing decision.
- 16. Force Majeure**
- 16.1 EEM is not liable in any way howsoever arising under the Contract to the extent that it is prevented from acting by events beyond its reasonable control, including, without limitation, industrial disputes, strikes, lockouts, accident, breakdown, import or export restrictions, acts of God, acts or threats of terrorism or war. If an event of force majeure occurs, EEM may suspend or terminate the Contract by written notice to the Buyer.
- 17. Entire Agreement**
- 17.1 This contract constitutes the entire agreement between the parties concerning its subject matter, and supersedes any previous understanding or agreement, express or implied. The Buyer confirms that it has not relied on any representation not recorded in this Contract inducing it to enter the Contract.
- 18. Account Information**
- 18.1 The Buyer is required to advise EEM of any changes to their account details within seven days of the change.
- 18.2 If the Buyer has elected to receive any documentation (statements, invoices/credits) via e-mail the Buyer agrees to notify EEM immediately of any e-mail address updates to ensure there is no delay on delivery of the documentation and subsequent payment.
- 19. Charge**
- 19.1 The Buyer hereby charges all its property whatsoever whether currently owned by the Buyer or acquired in the future with its indebtedness to EEM.
- 20. Credit Limit**
- 20.1 The Buyer acknowledges that the amount of credit requested in Part 6 is an indication only and that it will be liable to EEM for all monies owing to EEM for the supply of Goods or Services notwithstanding that the amount owing exceeds the Monthly Credit requested.
- 21. Miscellaneous**
- 21.1 The law of Victoria from time to time governs the Contract. The parties agree to submit to the non-exclusive jurisdiction of the courts of Victoria, the Federal Court of Australia, and of courts entitled to hear appeals from these courts.
- 21.2 EEM's failure to enforce any of these Terms shall not be construed as a waiver of any of EEM's rights.
- 21.3 If a clause is unenforceable it must be read down to be enforceable or, if it cannot be so read down, it must be severed from the Terms, without affecting the enforceability of the remaining Terms.

- 21.4 A notice must be in writing and handed personally or sent by facsimile, email or pre-paid post to the last known address of the addressee. Notices sent by facsimile or email are deemed to be received on confirmation of successful transmission. Notices sent by pre-paid post are deemed to be received upon posting.
- 22. Prepayment Reward**
- 22.1 By agreement with EEM, the Buyer may pre-pay amounts for Goods and Services (**Prepayment Amount**). If such an arrangement is approved by EEM, this clause 5 applies.
- 22.2 EEM will issue a tax invoice to the Buyer upon receipt of the Prepayment Amount.
- 22.3 The Prepayment Amount:
- (a) is not refundable to the Buyer in whole or in part; and
 - (b) may only be used for purchases of Goods and Services from EEM.
- 22.4 If, at the end of any calendar month, the Buyer's account is in credit (as determined by EEM), EEM will credit the Buyer's account with an amount calculated by reference to NAB's 12 month term deposit rate plus 1.2%, calculated monthly (**Prepayment Credit**). In calculating the Prepayment Credit, any unused or carried forward Prepayment Credits will be ignored.
- 22.5 The Prepayment Credit:
- (a) is not interest;
 - (b) cannot be withdrawn or paid out;
 - (c) may only be used for purchases of Goods and Services from EEM; and
 - (d) will cease if the prepayment is not used within 12 months of the date it was first credited to the Buyer's account.
- 22.6 The Buyer agrees that EEM may set off any amount owing to it by the Buyer against the Prepayment Amount if the Buyer:
- (a) is in default of the Credit Application, these Terms or any other agreement between EEM and the Buyer; or
 - (b) is insolvent as defined in section 95A the Corporations Act 2001(Cth).
- 22.7 EEM has not made any representation to the Buyer as to the suitability or appropriateness of prepayment arrangements contemplated by this clause.