

# TUCKWELL MACHINERY PTY LIMITED

A.B.N 57 129 000 157

## TERMS & CONDITIONS OF TRADE

### 1. INTERPRETATION

In these terms:

- a. **Acceptance of Order** means the Company's written acknowledgment that the Buyer has ordered the Goods & that the purchase is subject to the Contract.
- b. **Buyer** means the person or entity with whom the Company has contracted under the Contract and his, her or its successors and assigns.
- c. **Company** means Tuckwell Machinery Pty Ltd. ABN 57 129 000 157.
- d. **Confidential Information** means all the Company's trade secrets, confidential business & technical information, know-how, buyer & supplier lists, not generally known to the public but for a breach of these Terms.
- e. **Consequential Loss or Damage** means loss of profits, revenue, use or opportunity, re-installation costs, removal costs & any remote or indirect form of loss or damage.
- f. **Contract** means the agreement between the Company & Buyer constituted by these Terms, and if issued will also comprise and include the Acceptance of Order, the Sales Proposal and the Terms and the Order and if there is any inconsistency between them then the Acceptance of Order will prevail over the Sales Proposal, the Terms & the Order.
- g. **GST** means the Goods & Services Tax imposed by *A New Tax System (Goods & Services Tax) Act 1999*.
- h. **Goods** means all products and equipment supplied by the Company from time to time including software programmes, spare parts & consumables.
- i. **Order** means the Buyer's written response to the Sales Proposal
- j. **PPSA** means the *Personal Property Securities Act 2009*
- k. **PPSR** means the personal property security register created under PPSA
- l. **Sales Proposal** means the Company's written offer to supply the goods to the buyer and includes any written amendments issued by the Company prior to simultaneous with issue of the Order
- m. **Services** means all installation, commissioning, maintenance, repairs, and on-site and off-site technical support services and software development and installation services provided by the Company from time to time.
- n. **Terms** means these Terms & conditions of trade, as amended from time to time.

### 2. APPLICATION

- a. These terms apply to all Goods sold or supplied and Services provided by the Company.
- b. All provisions of the Contract are set out in these Terms, and Sales Proposal, the Order & Acceptance of Order.
- c. No amendment, alteration, waiver or cancellation of any of these Terms is binding on the Company unless confirmed by the Company in writing.
- d. The Buyer acknowledges that no employee or agent of the Company has any right to make any representation, warranty or promise in relation of the Goods or the sale of the Goods other than as contained in these Terms.

### 3. PRICES

- a. Prices are determined by the Company's price list current at the time of order and are subject to change without notice.
- b. Prices do not include GST, the cost of packaging, delivery, freight & insurance to the Buyer's nominated point of collection or delivery, unless specifically stated otherwise in writing.

### 4. TERMS OF PAYMENT

- a. Payments are to be made direct to the Company, strictly net, without any deduction or discount other than as stated in these Terms or in the relevant invoice or statement.
- b. On Acceptance of Order, the Buyer must pay to the Company the deposit, if any, stipulated in the Contract, by cheque unless otherwise agreed.
- c. If the Buyer defaults on any of its obligations under the Contract, the deposit paid under Clause 4b will be forfeited to the Company.

- d. Subject to 4b, payments are to be made within thirty (30) days of the date of the relevant invoice or statement even if delivery of the Goods is delayed.
- e. In the absence of any specific written direction to the contrary, payments will be credited against the oldest outstanding account of the Buyer with the Company to the most recent.
- f. The absence of minor parts that does not seriously affect the use of the Goods does not entitle the Buyer to a reduction or a delay of payment.
- g. Interest is payable on all overdue accounts calculated on a daily basis at the rate of two percent (2%) per month as from the due date for payment until payment is received by the Company.
- h. Without limiting any other right available to the Company at law or in equity, the Buyer must indemnify the Company from and against all costs & expenses incurred in enforcing any obligation under the Contract, including but not limited to legal costs on an indemnity basis.

**5. PROPERTY IN GOODS**

- a. Neither legal nor beneficial ownership of Goods supplied by the Company will pass to the Buyer until such time as the Goods so supplied by the Company to the Buyer from time to time, have been paid in full in cash or cleared funds.
- b. Until the amount payable to the Company in respect of the Goods has been paid in full in cash or cleared funds.
  - i. The Buyer will hold the Goods only as bailee for the Company
  - ii. The Goods must be stored in such a manner that they are readily distinguishable from other products owned by the Buyer or other persons and so as to clearly show that they are the property of the Company; and
  - iii. The Buyer must indemnify the Company from and against any claim, action, proceeding, damage, loss, cost, expense or liability incurred or suffered by the Company arising out of the possession, use or disposal of the Goods by the Buyer or repossession or attempted repossession of them by the Company.

**6. RISK & INSURANCE**

- a. The Goods are entirely at the risk of the Buyer from the moment the Goods arrive on truck at the Buyers premises even though property in and title to the Goods may not have passed to the Buyer at that time.
- b. The Buyer must, at its own expense, maintain the Goods and insure them for the benefit of the Company for their full replacement value against theft, destruction, fire, water & other risks, as from the moment the Goods arrive on truck at the Buyers premises and until property of and title to the Goods have passed to the Buyer. The Buyer must further take all reasonable measures to ensure that the Company's title to the Goods is in no way prejudiced. If the Goods are lost, destroyed or damaged, any insurance proceeds relating to the Goods in respect of such event that are received by the Buyer, must be paid to the Company immediately on receipt.

**7. DELIVERY**

- a. Availability dates are estimates only, but the Company will use its best endeavours to maintain the respective estimate date of delivery.
- b. The estimated date for delivery may be extended by a suitable length as determined by the Company in its discretion.
  - i. If the Buyer fails to supply information in good time required by the Company to execute the order, or if the Buyer changes specifications;
  - ii. In the case of events which are beyond the Company's control, no matter where they arise. Such events include but are not limited to epidemics, mobilisation, war, rebellions, major disruptions of productions, accidents, labour disputes, government actions, natural disasters or
  - iii. If the Buyer is in arrears with its work in connection with the delivery, or if it has not fulfilled its contractual obligations, especially those relating to payment.
- c. The Company may at any time extend the time for delivery of the Goods provided that the extension does not exceed the reasonable amount of time allowable for such a delivery.
- d. The Buyer acknowledges and agrees that time is not of the essence in relation to delivery of the Goods by the Company to the Buyer.

## **8. DELIVERY BY INSTALMENTS**

- a. The Company reserves the right to deliver the Goods in whole or by instalments, as well as to deliver prior to the date for delivery, and in such an event, the Buyer must not refuse to take delivery of the Goods.
- b. Where the Goods are delivered by instalments, each instalment is regarded as a separate contract.
- c. Any failure on the part of the Company to deliver any instalment within any specified time does not entitle the Buyer to repudiate the Contract in respect of the balance of the Goods that have not been delivered.

## **9. INSTALLATION AND COMMISSIONING**

- a. Unless expressly stated otherwise in the Contract the price does not include installation or commissioning of the Goods.
- b. Where the Company installs and commissions the Goods, the Company will provide the Services of sufficiently technically qualified personnel to supervise the installation and to instruct the Buyers staff in the operation of the Goods for such period as determined by the Company. The Company makes no recommendation as to the location of the Goods within the Buyers premises and will install or supervise the installation at the location requested by the Buyer.
- c. The Buyer is responsible for allowing the prompt installation and providing proper maintenance of the Good which includes providing an adequate foundation and employment of sufficient technically qualified personnel. The Buyer will obtain and provide all necessary permits, equipment, material services, facilities and utilities in compliance with local safety, health, soundproofing and other requirements and taking into account the particular characteristics of the site and the Goods. The Buyer hereby warrants that the premises are suitable for the installation and commissioning of the Goods.
- d. If any payment is in arrears for any Goods or Services, the Company may, in its absolute discretion and without giving notice to the Buyer, suspend installation and commissioning until payment is made and if any such payment remains unpaid for seven (7) days after written demand sent to the Buyer, the Company may cancel the Contract and any other such agreement without prejudice to its right to recover any money then due and owing to the Company by the Buyer or any loss suffered by it as a result of cancellation of the Contract.
- e. The Goods will be deemed to be installed and commissioned when the Company has certified that the Goods is erected and working to specifications whereupon the commissioning certificate will be signed by the Company's representative and the warranty period (if any) will start

## **10. INSPECTION**

Unless the Buyer has inspected the Goods and has given written notice to the Company within seven (7) days after collection or delivery that the Goods do not comply with the relevant specifications or descriptions, the Goods are deemed to have been accepted in good order & condition.

## **11. CANCELLATION OF ORDER & RETURN OF GOODS**

- a. No order may be cancelled, modified or deferred without the prior written consent of the Company and if such consent is given, it is at the Company's sole discretion, subject to the Company being reimbursed all losses, including loss of profits, and payment of a cancellation and restocking fee (being not less than 15% of the invoice value of the Goods).
- b. The Company will not accept the return of any Goods to it by the Buyer unless;
  - i. The Company has previously agreed to the return of the Goods in writing
  - ii. The Goods have been returned to the Company's premises within 30 days from the date of delivery to the Buyer
- c. If the Company agrees to the return of Goods,
  - i. The Goods must be unsoiled, undamaged and in a resalable condition (if otherwise, the Buyer must pay for all costs of replacement or repair)
  - ii. The Buyer must pay for the delivery, freight, customs, duties, levies and/or insurance in respect of the return of the Goods to the Company; and
  - iii. The Buyer must bear the risk of loss or damage of the Product in transit until arrival of the Goods at the address of the Company as advised by the Company from time to time.
- d. The Company may allow the Buyer credit for returned Goods at the Company's sole discretion, if;
  - i. The original invoice number and date have been quoted by the Buyer

- ii. The Goods have been returned to the Company's premises within 30 days from the date of delivery to the Buyer
- iii. Where Goods were supplied by the Company in special manufacturers cartons, the Goods have been returned in those cartons in their original and unmarked condition, complete with all instructions and other documents originally supplied with the Goods, and
- iv. All charges for outward and inward freight, packing and delivery have been paid by the Buyer
- e. The Company will not allow a credit or return of the Goods if the Goods are;
  - i. Imported especially for the Buyer or non-standard equipment made to special order; or
  - ii. Marked on the Company's invoices as "NOT REFUNDABLE"

**12. RE-SALE OF GOODS**

- a. Should the Buyer be a re-seller of the Goods then, subject to clause 12b the Buyer has the right to sell the Goods in its own name at full market value and in the ordinary course of business.
- b. Until the amount payable to the Company in respect of the Goods, and in respect of all other Goods previously supplied by the Company to the Buyer, have been paid in full in cash or cleared funds, any sale of the Goods under Clause 12a will only be effected by the Buyer as trustee for the Company and the proceeds of such sale and the rights of the Company's Buyer against its own Buyer arising from such sale will be held in trust for the Company. The said proceeds must be held in a separate account or otherwise clearly identified in the books and records of the Buyer.
- c. If the Buyer resells any Goods then, unless the Goods are clearly identifiable by serial numbers or other distinguishing marks, the Buyer is deemed to have disposed of the Goods in the chronological order of supply by the Company to the Buyer (oldest to most recent).

**13. INCORPORATION OF GOODS**

- a. If the Buyer uses the Goods in some manufacturing or construction process of its own or on behalf of some third party and receives monies from time to time in respect of such use, then the Buyer must hold such monies received in trust for the Company.
- b. The part referred to in Clause 13a will be deemed to equal in dollar terms to the amount owing by the Buyer to the Company at the time of the receipt of such monies by the Buyer.
- c. Money received by the Buyer excludes any debts due to other parties by the Buyer but not yet paid by the Buyer.
- d. In the circumstances outlined in Clause 13a, the Buyer must not assign or deal with its debts in any way prior to payment of the moneys receivable by the Buyer in respect of the Goods prior to their payment to the Company.

**14. DEFAULT**

- a. If the Goods are not paid for in accordance with these Terms or other written agreement between the Company and the Buyer or
- b. The Company receives notice of or reasonably believes that a third party may attempt to levy execution against or attach the Goods;
- c. The Company or one or more of its directors is or are convicted of a crime of dishonesty.
- d. A form of payment by the Buyer to the Company, such as a cheque, has been dishonoured for insufficient funds
- e. A writ for execution of judgement against the property of the Buyer in any court proceedings by any judgement creditor against the Buyer has been returned unsatisfied; or
- f. Any other event occurs which is likely to adversely affect the Buyer's ability to pay for the Goods
- g. Then the Company may at any time thereafter, without notice to the Buyer and without prejudice to any other rights which it may have against the Buyer, terminate any contract relating to the Goods

**15. RIGHT TO ENTER PREMISES**

- a. In any of the circumstances referred to in the preceding clause the Buyer
- b. Authorises the Company by itself, its agents, or representatives, at all reasonable times, without notice, to enter into (with force if reasonably necessary) and at all necessary times to remain in and on any premises where the Goods are located in order to collect the Goods, without being guilty of any manner of trespass and
- c. Assigns to the Company all the Buyer's rights to enter onto and remain in and on such premises until all the Goods have been collected.

**16. ADMINISTRATION, RECEIVERSHIP**

- a. In any of the circumstances referred to in Clause 14e;

- i. Neither the Buyer nor its insolvency representatives or any other person acting for the Buyer and/or its creditors is entitled to sell, charge, remove, dispose of, use or otherwise deal with the Goods in any way inconsistent with the Company's ownership of the Goods, without the Company's prior written approval.
- ii. The Buyer, its insolvency representative or any other person acting for or on behalf of the Buyer and/or its creditors is obliged to re-deliver the Goods to the Company immediately on the appointment of the insolvency representative at its or his expense
- iii. If the Goods are returned or collected by the Company, the Company will within 28 days, account to the Buyer or its legal representative for all monies received for those Goods from the Buyer, less the Company's reasonable administrative charges, expenses incurred and loss of profits involved and
- iv. The insolvency representative will become personally liable to the Company on a full indemnity basis in respect of any dealings with or use of the Goods by the Buyer or the insolvency representative occurring after the date of appointment of the insolvency representative and will account to the Company or reimburse the Company for all monies received as a result of such dealings or use of the Goods.

#### **17. BUYER AS TRUSTEE**

- a. If the Buyer carries on business as trustee of a trust then the Buyer warrants that;
  - i. The Buyer enters into this Contract as trustee of the trust
  - ii. The Buyer has all requisite powers to enter into this Contract
  - iii. The beneficiary of the trust approves the purchase of the Goods on these Terms and
  - iv. The assets of the trust are available to the Company in satisfaction of any debt incurred by the Buyer.

#### **18. COMPANY'S LIABILITY LIMITED**

- a. The Buyer acknowledges and agrees that
  - i. The Buyer has determined that the Goods are fit for the purpose for which the Buyer requires them
  - ii. The Buyer has not relied on the Company's skill and judgement in selecting the Goods
  - iii. The Company is not responsible if the Goods do not comply with any applicable safety standards or similar regulations and that the Company is not liable for any claim resulting from such non-compliance.
- b. The Company is not subject to, and the Buyer releases the Company from any liability (including but not limited to Consequential Loss & Damage) arising from any delay in delivery of or any defect or fault in the Goods to the full extent permitted law.
- c. If, despite Clause 18b, the statutory provision under the *Competition and Consumer Act 1923* or any other act or the general law impose on the Company a liability for a defect or fault in the Goods then, to the extent to which the Company is entitled to do so, the Company's liability is limited, at the Company's option to
  - i. Replacement or repair of the Goods
  - ii. Providing the Services again
  - iii. Supply of equivalent Goods or
  - iv. Payment of the cost of replacing or repairing the Goods or of acquiring equivalent products or having the Services provided by a third party.
  - v. And in any case, the Company will not be liable for any Consequential Loss or Damage or any other loss or damage and
  - vi. The Company's total liability to the Buyer is limited to the invoice value of the Goods or Services, as the case may be.

#### **19. WARRANTY**

- a. If the Goods are acquired by a consumer, subject to Clause 19c, the Company warrants that the Goods will be of acceptable quality as defined under the Competition & Consumer Act 2010.
- b. If the Goods are not acquired by a consumer, subject to Clause 19c, the Company warrants;
  - i. That the Goods will be supplied in an undamaged condition and
  - ii. Goods against defective materials and workmanship for 360 days (except spare parts which are warranted for 90 days only) from the date of delivery to the Buyer, or for a period which

is correspondingly shorter on a pro rate basis if the Goods are used or operated for more than one 8 hour shift per day.

- c. The Company cannot give any warranty in respect of any used or second hand Goods and, in particular, does not promise that such Goods are free of hidden defects, safe or durable or fit for any particular purpose. Where the Company agrees to commission second hand Goods, the Company nevertheless does not warrant the condition or performance of such used or second hand Goods and any costs the Company incurs in repairing, modifying or replacing parts of the Goods will be payable by the Buyer.
- d. These warranties extend only to the Buyer and to no other person.
- e. The provision of any act or law implying terms, conditions, guarantees and/or warranties which might otherwise apply to or arise out of the Contract are hereby expressly excluded to the full extent permitted by law.
- f. On discovery of any defect in the Goods, the Buyer must notify the Company in writing of such defect. All warranty claims must be received by the Company within seven (7) days of the day of discovery.
- g. The Buyer's failure to provide written notice to the Company of any alleged breach of the above warranty within the required time will release and discharge the Company from any obligation or liability for that breach of warranty.
- h. The Buyer must not carry out any remedial work to allegedly defective Goods without first obtaining the written consent of the Company to do so otherwise all of the Company's warranties will be voided to the full extent permitted by law.

#### **20. PERSONAL PROPERTY SECURITY**

The Buyer acknowledges that if the Company has a security interest in the Goods and/or their proceeds for the purposes of the PPSA then the Company may register its security interest in the Goods and their proceeds on the PPSR. The Buyer also undertakes, at its own expense, to promptly do anything (such as supplying information) which the Company requests and reasonably requires the Buyer to do for the purposes of ensuring that the security interest is enforceable, perfected, or otherwise effective.

#### **21. CUSTOMS, DUTIES, TARIFFS & LEVIES**

All applicable customs duties, tariffs and levies are payable by the Buyer unless the order, order confirmation, invoice or other writing indicates otherwise.

#### **22. CATALOGUES AND TECHNICAL DOCUMENTS**

- a. Particulars in leaflets, catalogues, drawings, brochures, and other printed material supplied by the Company in relation to Goods are for illustrative purposes only, and are not binding on the Company.
- b. All technical documents such as drawings, illustrations, descriptions, etc, are the exclusive property of the Company. They must not be made available to third parties, or copied, duplicated or used for reproducing any part of the Goods.

#### **23. SAMPLES**

- a. Any sample inspected by the Buyer is solely for the Buyer's convenience and does not constitute a sale by sample. All samples remain the property of the Company.

#### **24. SPECIFICATIONS**

- a. Subject to Clause 24b, unless otherwise agreed in writing the Goods are supplied subject to any specification as to weight, quantity, size, dimensions, finishes, chemical composition and physical properties as may be published generally by the Company or as may be set out in any specification issued by the Company in relation to the Goods.
- b. The Company may vary any specification as to weight, quantity, size, dimensions, finishes, chemical composition and physical properties as the Company considers is normally regarded as being commercially acceptable.
- c. Where any specifications for the Goods are to be supplied by the Buyer, they must be supplied in a reasonable time to enable the Company to complete delivery by the date for delivery.

#### **25. PRIVACY**

- a. The Buyer acknowledges and agrees that the Company may collect, store and use personal information in relation to the Buyer or, if the Buyer is a company, its directors and officers, for the purposes of considering any credit application from the Buyer or any other purpose related and incidental to the business relationship between the Buyer and the Company.

- b. The Company agrees that it will not disclose any personal information of the Buyer or its directors or officers to any third party except to obtain credit information concerning the Buyer, make an entry on the Buyer's credit report or to enforce these Terms.

**26. INTELLECTUAL PROPERTY**

- a. Where Goods supplied by the Company include software programmes and/or where services provided by the Company include software development unless expressly stated otherwise in writing;
- b. The Buyer acquires a non-exclusive, non-transferrable licence to use such software
- c. The Company retains all intellectual property rights & title in respect of such software

**27. GOVERNING LAW**

- a. The Contract for the supply of Goods under these Terms is deemed to have been made at the Company's place of business in Kingston, Queensland and any cause of action is deemed to have arisen there.
- b. The Buyer and the Company agree to submit to the non-exclusive jurisdiction of the courts of Queensland and courts that hear appeals from those courts.

**28. FORCE MAJEURE**

The Company will not be liable for any breach of contract due to any matter or thing beyond the Company's control (including but not limited to transport stoppages, transport breakdown, fire, flood, earthquake, acts of God, strikes, lock-outs, work stoppage, wars, riots or civil commotion, intervention of public authority, explosion or accident).

**29. WAIVER OF BREACH**

No failure by the Company to insist on strict performances of any of the terms in these Terms is a waiver of any right or remedy which the Company may have, and is not a waiver of any subsequent breach or default by the Buyer.

**30. NO ASSIGNMENT**

Neither this Contract nor any rights arising under this Contract may be assigned by the Buyer without the prior written consent of the Company which is at the Company's absolute discretion.

**31. SEVERABILITY**

If any provision contained in these Terms is held by a court to be unlawful, invalid or unenforceable, the validity and enforceability of the remaining provisions are not affected.

**THE BUYER ACKNOWLEDGES HAVING READ & AGREES TO BE BOUND BY THE ABOVE TERMS & CONDITIONS OF TRADE.**