

# Terms and Conditions of Trade

To the fullest extent legally possible, all contracts and dealings between Elsema Pty Ltd (ACN 001 562 563) (and each of its subsidiaries, affiliates, associated companies, related entities, successors and assigns) and any person (**Customer**) relating to any Goods or Services are subject to the terms and conditions of trade set out below unless otherwise expressly agreed in writing.

## Definitions

Under these terms and conditions:

**Australian Consumer Law** means Schedule 2 of the *Competition and Consumer Act 2010* (Cth).

**Customer** means the Customer (or any person acting on behalf of and with the authority of the Customer) as described on any quotation, work authorisation or other form as provided by Elsema to the Customer.

**Goods** means any goods supplied by Elsema to the Customer (and where the context so permits shall include any supply of Services as hereinafter defined).

**GST** has the meaning given to that term in the *A New Tax System (Goods and Services Tax) Act 1999* (Cth).

**Elsema** means Elsema Pty Ltd (ACN 001 562 563) and its officers, servants, agents, sub-contractors, affiliates, associated companies, related entities, successors and assigns.

**Monies Owed** means any amount due and payable by the Customer to Elsema for the supply by Elsema to the Customer of any Good/s or Services.

**PPSA** means the *Personal Property Securities Act 2009* (Cth)

**Services** means all services supplied by Elsema and includes any advice or recommendations.

**Price** means the price payable for the Goods as agreed between Elsema and the Customer in accordance with clause 2 of these terms and conditions.

## 1. Acceptance

1.1 Any instructions received by Elsema from the Customer for the supply of Goods and/or the Customer's acceptance of Goods supplied by Elsema shall constitute acceptance of the terms and conditions contained herein.

1.2 Upon acceptance of these terms and conditions by the Customer the terms and conditions are binding and can only be amended with the written consent of Elsema.

1.3 The Customer shall give Elsema not less than fourteen (14) days prior written notice of:

- (i) any proposed change of ownership, structure or management of the Customer (including any change in director, shareholder, or management of change in partnership or trusteeship); and/or
- (ii) any change in the Customer's name; and/or
- (iii) any other change in the Customer's details (including but not limited to, changes in the Customer's address, facsimile number, or business practice).

The Customer shall be liable for any loss incurred by Elsema as a result of the Customer's failure to comply with this clause.

## 2. Pricing

2.1 Elsema reserves the right to change the Price without notice.

2.2 Official quotations made by Elsema are valid for thirty (30) days from quotation date, after which they may be subject to change without notice.

2.3 At Elsema's sole discretion a deposit may be required by the Customer.

## 3. Payment Terms

3.1 All invoices issued to the Customer must be paid on the following payment terms:

- (i) unless approved in writing by Elsema, pre-paid payment before Goods are delivered; or
- (ii) if so approved in writing by Elsema, payment within seven (7) days of invoice being issued; or
- (iii) if so approved in writing by Elsema, payment within thirty (30) days of invoice being issued.

3.2 Elsema's approval of any credit payment terms for a Customer is conditional upon the Customer first completing Elsema's standard credit application and Elsema approving such credit application.

3.3 Any dispute regarding the invoice must be notified to Elsema within the payment term as agreed between Elsema and the Customer.

3.4 GST and other taxes and duties that may be applicable shall be added to the Price except when they are expressly included in the Price.

## 4. Orders

The Customer agrees that:

4.1 from the time of making an order, the Customer is obliged to accept and pay for the Goods in accordance with these terms and conditions and a cancellation of the order due to a change of mind on the part of the Customer as to the content of the order shall not discharge this obligation to accept the Goods and make payment;

4.2 Elsema shall use reasonable commercial endeavours to ensure that the Goods are available and that the Services are provided to the Customer within the time frame requested by the Customer, but shall not be liable for any loss or damage caused by any delay; and

4.3 except to the extent expressly agreed in writing, the Customer shall not be entitled to reject the Goods or Services due to any delay outlined above.

## 5. Delivery of Goods

5.1 The Customer agrees, in respect of any Goods, that:

- (i) Elsema accepts no responsibility or duty to deliver but may elect to arrange delivery at its discretion and without liability and at the Customer's cost and risk in all things;
- (ii) Elsema will not be liable for delay, failure or inability to deliver;
- (iii) Goods shall be deemed delivered as soon as they are ready for delivery; and
- (iv) a charge will be made for frustrated delivery to cover Elsema's costs or attempts at delivery.

## 6. Defaults

6.1 Upon any default or breach hereof by the Customer, Elsema may, among other things, retain all monies paid and/or cease further deliveries and/or at Elsema's discretion, take immediate possession of any Goods not paid for, without prejudice to any other of its rights and without being liable in any way to any party.

## 7. Recovery Costs

7.1 The Customer shall pay all costs and expenses incurred by Elsema, its legal advisers, mercantile agents and others in respect of anything instituted or being considered against the Customer (whether for debt, possession of any Goods or otherwise).

## 8. Cancellation

8.1 Elsema may cancel any contract to which these terms and conditions apply or cancel delivery of Goods at any time before the Goods are delivered by giving written notice to the Customer. On giving such notice Elsema shall repay to the Customer any sums paid in respect of the Price. Elsema shall not be liable for any loss or damage whatever arising from such cancellation.

8.2 In the event that the Customer cancels delivery of Goods, the Customer shall be liable for any loss incurred by Elsema (including, but not limited to, any loss of profits) up to the time of cancellation.

8.3 Goods made to special order or Customer specification are under no circumstances acceptable for cancellation once these orders are in production.

## 9. Title

9.1 Elsema and the Customer agree that ownership of the Goods shall not pass until:

- (i) the Customer has paid Elsema all Monies Owed; and
- (ii) the Customer has met all other obligations due by the Customer to Elsema in respect of all contracts between Elsema and the Customer.

9.2 Elsema reserves the right to take possession and dispose of Goods as it sees fit at any time until full payment, and to that end the Customer grants Elsema and its agents permission to enter any property where the Customer keeps the Goods.

## 10. Defect

10.1 The Customer shall inspect the Goods on delivery and within seven (7) days of delivery notify Elsema of any alleged defect, shortage in quantity, damage or failure to comply with the description or quote.

10.2 The Customer shall afford Elsema an opportunity to inspect the Goods within a reasonable time following delivery if the Customer believes the Goods are defective in any way.

10.3 If it is found that the Goods are defective Elsema will accept the return and either provide a refund or a replacement for the defective Goods.

10.4 If the Customer shall fail to comply with these provisions the Goods shall be presented to be free from any defects or damage.

## 11. Returns of Goods

11.1 Returns will only be accepted provided that:

- (i) the Customer has complied with the provisions of clause 9.1; and
- (ii) Elsema has agreed in writing to accept the return of the Goods; and
- (iii) the Goods are returned at the Customer's costs within fourteen (14) days of the delivery date; and
- (iv) the Goods are returned in the condition in which they were delivered and with all packaging material, brochures and instruction material in as new condition as is reasonably possible in the circumstances;

11.2 Further to clause 11.1(iii), returns will also be accepted after fourteen (14) days but before the expiry of sixty (60) days from the delivery date provided that the Customer pay a fee of 15% of the purchase Price of the returned Goods for re-stocking and testing. Clause 11.1(i), (ii) and (iv) must also be complied with.

11.3 Nothing in this clause 11 excludes any obligation or liability of Elsema imposed by law which cannot be lawfully excluded.

## 12. Limitation of Liability

The Customer agrees:

12.1 to limit to the maximum extent permitted by law any claim it makes to the cost of replacement of the subject Goods;

12.2 Elsema shall not be liable for any loss or expense arising after 7 days from delivery (or at all once Goods have been unpacked or otherwise used) after which there shall be deemed to be unqualified acceptance; and

12.3 damage for any breach by Elsema of any express or implied terms of contract with the Customer are to be reduced to the extent that the Customer contributed to the damage; and

12.4 to the extent permitted by law, no other term, condition, agreement, warranty, representation or understanding (whether express or implied) in any way binding upon Elsema, other than these terms and conditions, is made or given by or on behalf of Elsema.

## 13. Warranties

13.1 Elsema warrants all Goods against defects in materials and workmanship for a period of one (1) year from the date of delivery.

13.2 The Customer acknowledges that Elsema does not provide any express guarantees or warranties in respect of the Goods other than those set out in the Agreement expressly confirmed by Elsema in writing and, in particular, Elsema makes no warranties relating to the Customers use of the Goods and their appropriateness for such use.

13.3 The Customer shall afford Elsema an opportunity to inspect the Goods once the Customer has notified Elsema of the defect,

13.4 The warranty is subject to the provisions of clause 11 and shall not apply:

- (i) to damage arising from normal wear and tear;
- (ii) unless the Goods have become defective under normal use and service;
- (iii) if alterations or repairs have been made to the Goods other than by Elsema or its authorised representative;
- (iv) if storage, installation or usage of the Goods are not in accordance with the installation and operating instructions;
- (v) if the Goods have been opened, dismantled or otherwise subjected to abuse, misuse, accident or other damage (including, without limitation, by reason of flood, fire or other act of God);
- (vi) if specifications of the Goods have not been followed when selecting the Goods;
- (vii) if the Goods have been used to perform functions other than the functions expressly specified in the specification of the Good

(viii) if the Customer has affixed other items to the Goods which changes the normal operation and function of the Goods;

(ix) to damage by corrosion (either internal or external) or to painted or anodised surfaces.

13.5 Except to the extent provided in clause 13.1, the only conditions and warranties which are binding on Elsema in respect of supply of its Goods or Services supplied by it to the Customer are those imposed and required to be binding by law (including the Australian Consumer Law) and which cannot be lawfully excluded.

13.6 Our goods come with guarantees that cannot be excluded under the Australian Consumer Law. You are entitled to a replacement or refund for a major failure and compensation for any other reasonably foreseeable loss or damage. You are also entitled to have the goods repaired or replaced if the goods fail to be of acceptable quality and the failure does not amount to a major failure.

13.7 To the extent permitted by law, the liability, if any, of Elsema arising from the breach of the conditions or warranties referred to in clause 13.1 are, at Elsema's option, limited to and completely discharged by supplying the Goods or Services.

13.8 Except as provided in this clause 13 all conditions and warranties implied by law in respect of the state, quality, condition of the Goods or Services which may, apart from this clause, be binding on Elsema, are excluded.

13.9 Except to the extent provided in clause 13.1, Elsema has no liability (including liability in negligence) to any person for any loss or damage, consequential or otherwise, suffered or incurred by that person in relation to Goods or Services and any loss or damage, consequential or otherwise, suffered or incurred by that person caused by, or resulting directly or indirectly from, any failure, defect or deficiency of any kind of the Goods or Services.

#### 14. Other Terms and Conditions

14.1 No terms and conditions sought to be imposed by the Customer upon Elsema shall apply.

#### 15. Disputes

15.1 If the Customer decides to begin proceedings to dispute any amount that Elsema claims as Monies Owed, the Customer agrees to firstly deposit the disputed amount into a trust account that earns the market interest rate and is in the joint names of Elsema and the Customer.

15.2 Once the dispute is settled, the trust funds must be dispersed according to the terms of the settlement.

#### 16. Intellectual Property Rights

16.1 Where Elsema has created any design, drawing or documents for the Customer, then the copyright in those designs and drawings and documents shall remain vested in Elsema, and shall only be used by the Customer at Elsema's discretion.

16.2 The Customer's purchase of Goods does not confer on the Customer any licence or assignment of any copyright, patent, design, trade mark or any other intellectual property right that subsists in the Goods or Services.

16.3 The Customer agrees that they shall not in any way reproduce, modify, translate, transmit, distribute or use for commercial purposes any of those intellectual property rights subsisting in the Goods or Services (or any part thereof) owned by Elsema without Elsema's express written approval.

16.4 The Customer agrees that it will not assert any rights in, or challenge Elsema's title to, those intellectual property rights.

16.5 The Customer agrees to assist Elsema in any way as requested by Elsema in order to protect Elsema's intellectual property rights.

16.6 Elsema makes no representation or warranty to the Customer of any kind, express or implied, that the Goods and Services will not infringe any intellectual property rights of a third party.

#### 17. Privacy Act

17.1 The Customer agrees that Elsema may make any inquiries it deems necessary to investigate the Customer's creditworthiness including undertaking inquiries with financial institutions, credit reporting agencies, any personal credit and/or consumer credit information providers (**Sources**).

17.2 The Customer authorises the Sources to disclose any information concerning its creditworthiness in their possession to Elsema. The Customer agrees that Elsema may disclose any information in its possession concerning the Customer's creditworthiness to the Sources.

#### 18. Personal Property Securities Act

18.1 Acknowledgement of PPSA rights and obligations.

Elsema and the Customer acknowledge and agree that if:

- (i) Goods are supplied under this contract and the PPSA applies to that supply;
- (ii) the Customer grants to Elsema a Purchase Money Security Interest (**PMSI**) under the PPSA in respect of all Goods supplied to the Customer pursuant to this contract; and
- (iii) the Customer consents to Elsema registering its PMSI under the PPSA and will do all things reasonably necessary to assist Elsema to register its PMSI.

18.2 Definitions

- (i) A term used in this clause 17 that is defined in the PPSA has the meaning given to it in the PPSA.

18.3 Registration

- (i) Elsema may apply to the Registrar to register its PMSI in the Goods at any time prior to or after delivery of the Goods at its cost.
- (ii) The Customer irrevocably waives the right to receive from Elsema verification of the registration pursuant to section 157(3)(b) of the PPSA.

18.4 Seizure

- (i) If the Customer defaults on any sum due for payment under these terms and conditions, Elsema has the right to seize the Goods.

18.5 Disposal or Retention of Goods

- (i) If Elsema seizes Goods in accordance with clause 18.4 Elsema is entitled to:
  - (a) dispose of the Goods including: by private or public sale; by lease; and by licence; or
  - (b) retain the Goods; or
  - (c) deal with the Goods in any way it sees fit.
- (ii) Elsema is not required to give the Customer notice of its intention to dispose of or retain Goods.

- (iii) If Elsema elects to dispose the Goods:
  - (a) Elsema will exercise all reasonable care to obtain at least market value or obtain the best price that is reasonably obtainable at the time of disposal, having regard to the circumstances existing at that time; and
  - (b) Elsema will not be required to provide a statement of account for each period after seizing the Goods, until it is disposed of.

#### 18.6 Obligations on the Customer

- (i) The Customer has an obligation to give Elsema notice if another party with a Security Interest (as defined in section 12 of the PPSA) in the Goods seizes or otherwise deals with Elsema's PMSI in the Goods.
- (ii) If the Customer grants any Security Interest in the Goods to another party, that other party must acknowledge the priority of Elsema's PMSI.

#### 18.7 Contracting Out

- (i) The Customer and Elsema agree that the following provisions of the PPSA do not apply to this contract: section 94 (notice of removal of accession), to the extent that it requires the secured party to give a notice to the grantor; section 96 (when a grantor may retain an accession); section 123 (right to seize collateral); section 125 (obligation to dispose of or retain collateral); section 126 (apparent possession); section 128 (secured party may dispose collateral); section 129 (disposal by purchase); section 130 (notice of disposal), to the extent that it requires the secured party to give a notice to the grantor; section 132(3)(d) (contents of statement of account after disposal); section 132(4) (statement of account if no disposal); section 134(1) (retention of collateral); section 135 (notice of retention); and section 142 (redemption of collateral).

### 19. General

- 19.1 If any provision of this contract shall be invalid, void, illegal or unenforceable the validity, existence, legality and enforceability of the remaining provisions shall not be affected, prejudiced or impaired.
- 19.2 All contracts made with Elsema shall be deemed to be made in the State of New South Wales and will be governed by the laws of New South Wales. The parties to this contract shall submit to the courts of New South Wales to determine any dispute arising.
- 19.3 Any part hereof being a whole part of a clause shall be capable of severance without effecting any other part of these terms and conditions.
- 19.4 Neither party shall be liable for any default due to any act of God, war, terrorism, strike, lock-out, industrial action, fire, flood, drought, storm or other event beyond the reasonable control of either party.