

Mechanical Constructions Air Services Pty Ltd – Terms & Conditions of Trade

1. **Definitions**
 - 1.1 "Seller" shall mean Mechanical Constructions Air Services Pty Ltd and its successors and assigns.
 - 1.2 "Client" shall mean the Client or any person acting on behalf of and with the authority of the Client.
 - 1.3 "Guarantor" means that person (or persons), or entity who agrees herein to be liable for the debts of the Client on a principal debtor basis.
 - 1.4 "Goods" shall mean Goods supplied by the Seller to the Client (and where the context so permits shall include any supply of Services as hereinafter defined).
 - 1.5 "Services" shall mean all services supplied by the Seller to the Client and includes any advice or recommendations (and where the context so permits shall include any supply of Goods as defined supra).
 - 1.6 "Price" shall mean the cost of the Goods as agreed between the Seller and the Client subject to clause 4 of this contract.
2. **Acceptance**
 - 2.1 Any instructions received by the Seller from the Client for the supply of Goods and/or the Client's acceptance of Goods supplied by the Seller shall constitute acceptance of the terms and conditions contained herein.
 - 2.2 Where more than one Client has entered into this agreement, the Clients shall be jointly and severally liable for all payments of the Price.
 - 2.3 Upon acceptance of these terms and conditions by the Client the terms and conditions are irrevocable and can only be rescinded in accordance with these terms and conditions or with the written consent of the manager of the Seller.
 - 2.4 None of the Seller's agents or representatives are authorised to make any representations, statements, conditions or agreements not expressed by the manager of the Seller in writing nor is the Seller bound by any such unauthorised statements.
 - 2.5 The Client undertakes to give the Seller not less than fourteen (14) days prior written notice of any proposed change in the Client's name and/or any other change in the Client's details (including but not limited to, changes in the Client's address, facsimile number, or business practice).
3. **Goods**
 - 3.1 The Goods are as described on the invoices, quotation, work authorisation or any other work commencement forms as provided by the Seller to the Client.
4. **Price And Payment**
 - 4.1 At the Seller's sole discretion the Price shall be either;
 - (a) as indicated on invoices provided by the Seller to the Client in respect of Goods supplied; or
 - (b) as indicated on charges sheets provided by the Seller to the Client in respect of Goods supplied; or
 - (c) the Seller's current Price, at the date of delivery of the Goods, according to the Seller's current Price list; or
 - (d) the Seller's quoted Price which shall be binding upon the Seller provided that the Client shall accept in writing the Seller's quotation within thirty (30) days.
 - 4.2 At the Seller's sole discretion a deposit may be required. The deposit amount or percentage of the Price will be stipulated at the time of the order of the Goods and shall become immediately due and payable.
 - 4.3 Time for payment for the Goods shall be of the essence and will be stated on the invoice, quotation or any other order forms. If no time is stated then payment shall be due seven (7) days following the date of the invoice.
 - 4.4 The Seller may withhold delivery of the Goods until the Client has paid for them, in which event payment shall be made before the delivery date.
 - 4.5 At the Seller's sole discretion, payment for approved Clients shall be made by instalments in accordance with the Seller's delivery/payment schedule.
 - 4.6 At the Seller's sole discretion, payment for approved Client's shall be due on thirty (30) days following the end of the month in which an invoice is dated.
 - 4.7 Payment will be made by cheque, or by bank cheque, or by direct credit, or by any other method as agreed to between the Client and the Seller.
 - 4.8 The Price shall be increased by the amount of any GST and other taxes and duties which may be applicable, except to the extent that such taxes are expressly included in any quotation given by the Seller.
5. **Delivery Of Goods / Services**
 - 5.1 Delivery of the Goods shall be made to the Client's address. The Client shall make all arrangements necessary to take delivery of the Goods whenever they are tendered for delivery.
 - 5.2 Delivery of the Goods to a carrier, either named by the Client or failing such naming to a carrier at the discretion of the Seller for the purpose of transmission to the Client, is deemed to be a delivery of the Goods to the Client.
 - 5.3 The costs of carriage and any insurance which the Client reasonably directs the Seller to incur shall be reimbursed by the Client (without any set-off or other withholding whatsoever) and shall be due on the date for payment of the Price. The carrier shall be deemed to be the Client's agent.
 - 5.4 The Seller may deliver the Goods by separate instalments (in accordance with the agreed delivery schedule). Each separate instalment shall be invoiced and paid for in accordance with the provisions in this contract of sale.
 - 5.5 The failure of the Seller to deliver shall not entitle either party to treat this contract as repudiated.
 - 5.6 The Seller shall not be liable for any loss or damage whatsoever due to failure by the Seller to deliver the Goods (or any of them) promptly or at all.
6. **Risk**
 - 6.1 If the Seller retains property in the Goods nonetheless, all risk for the Goods passes to the Client on delivery.
- 6.2 If any of the Goods are damaged or destroyed prior to property in them passing to the Client, the Client shall immediately be liable for payment of the Price without delay.
- 6.3 Without prejudice to any of its other rights or remedies under these Terms and Conditions of Trade (including the right to receive payment of the balance of the Price for the Goods), if the Client has failed to pay the Price the Seller is entitled to receive all insurance proceeds payable for the Goods. This applies whether or not the Price has become payable under the Contract. The production of these terms and conditions by the Seller is sufficient evidence of the Seller's rights to receive the insurance proceeds without the need for any person dealing with the Seller to make further enquiries.
7. **Client's Disclaimer**
 - 7.1 The Client hereby disclaims any right to rescind, or cancel the contract or to sue for damages or to claim restitution arising out of any misrepresentation made to him by any servant or agent of the Seller and the Client acknowledges that he buys the Goods relying solely upon his own skill and judgement and that the Seller shall not be bound by nor responsible for any term, condition, representation or warranty other than the warranty given in Clause 9 which warranty shall be personal to the Client and shall not be transferable to any subsequent Client.
8. **Defect/Returns**
 - 8.1 The Client shall inspect the Goods on delivery and shall within thirty (30) days of delivery notify the Seller of any alleged defect, shortage in quantity, damage or failure to comply with the description or quote. The Client shall afford the Seller an opportunity to inspect the Goods within a reasonable time following delivery if the Client believes the Goods are defective in any way. If the Client shall fail to comply with these provisions, the Goods shall be conclusively presumed to be in accordance with the terms and conditions and free from any defect or damage.
 - 8.2 For defective Goods, which the Seller has agreed in writing that the Client is entitled to reject, the Seller's liability is limited to either (at the Seller's discretion) exchanging the Goods or repairing the Goods provided that the Client has complied with the provisions of clause 8.1
9. **Warranty**
 - 9.1 Subject to the conditions of warranty set out in Clause 9.2 the Seller warrants that if any defect in any workmanship of the Seller becomes apparent and is reported to the Seller within twelve (12) months of the date of delivery (time being of the essence) then the Seller will either (at the Seller's sole discretion) repair the defect or remedy the workmanship.
 - 9.2 The conditions applicable to the warranty given by Clause 9.1 are:
 - (a) The warranty shall not cover any defect or damage which may be caused or partly caused by or arise through:
 - i) Failure on the part of the Client to properly maintain any Goods; or
 - ii) Failure on the part of the Client to follow any instructions or guidelines provided by the Seller; or
 - iii) Any use of any Goods otherwise than for any application specified on a quote or order form; or
 - iv) The continued use of any Goods after any defect becomes apparent or would have become apparent to a reasonably prudent operator or user; or
 - v) Fair wear and tear, any accident or act of God.
 - (b) The warranty shall cease and the Seller shall thereafter in no circumstances be liable under the terms of the warranty if the workmanship is repaired, altered or overhauled without the Seller's consent.
 - (a) In respect of all claims the Seller shall not be liable to compensate the Client for any delay in either replacing or repairing the workmanship/Goods or in properly assessing the Client's claim.
 - 9.2 For Goods not manufactured by the Seller, the warranty shall be the current warranty provided by the manufacturer of the Goods. The Seller shall be under no liability whatsoever, except for the express conditions as detailed and stipulated in the manufacturer's warranty. For the avoidance of doubt the Client acknowledges that the manufacturer's warranty does not cover after-hours repair work. Accordingly the Client shall be liable for any after-hours work provided by the Seller to the Client in respect of Goods not manufactured by the Seller.
10. **The Commonwealth Trade Practices Act 1974 and Fair Trading Acts**
 - 10.1 Nothing in this agreement is intended to have the effect of contracting out of any applicable provisions of the Commonwealth Trade Practices Act 1974 or the Fair Trading Acts in each of the States and Territories of Australia, except to the extent permitted by those Acts where applicable.
11. **Intellectual Property**
 - 11.1 Where the Seller has designed or drawn Goods for the Client, then the copyright in those designs and drawings shall remain vested in the Seller, and shall only be used by the Client at the Seller's discretion.
 - 11.2 Where any designs or specifications have been supplied by the Client for manufacture, by or to the order of the Seller then the Client warrants that the use of those designs or specifications for the manufacture, processing, assembly or supply of the Goods shall not infringe the rights of any third party.
12. **Default & Consequences Of Default**
 - 12.1 Interest on overdue invoices shall accrue from the date when payment becomes due daily until the date of payment at a rate of 2.5% compounding per calendar month and shall accrue at such a rate after as well as before any judgement.
 - 12.2 If the Client defaults in payment of any invoice when due, the Client shall indemnify the Seller from and against all the Seller's costs and disbursements

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- including on a solicitor and own client basis and in addition all of the Seller's nominees costs of collection.
- 12.3 Without prejudice to any other remedies the Seller may have, if at any time the Client is in breach of any obligation (including those relating to payment), the Seller may suspend or terminate the supply of Goods to the Client and any of its other obligations under the terms and conditions. The Seller will not be liable to the Client for any loss or damage the Client suffers because the Seller exercised its rights under this clause.
- 12.4 If any account remains unpaid at the end of the second month after supply of the goods or services an immediate amount of the greater of \$20.00 or 10.00% of the amount overdue shall be levied for administration fees which sum shall become immediately due and payable in addition to the interest payable under clause 11.1 hereof.
- 12.5 In the event that:
- any money payable to the Seller becomes overdue, or in the Seller's opinion the Client will be unable to meet its payments as they fall due; or
 - the Client becomes insolvent, convenes a meeting with its creditors or proposes or enters into an arrangement with creditors, or makes an assignment for the benefit of its creditors; or
 - a receiver, manager, liquidator (provisional or otherwise) or similar person is appointed in respect of the Client or any asset of the Client;
- then without prejudice to the Seller's other remedies at law
- the Seller shall be entitled to cancel all or any part of any order of the Client which remains unperformed in addition to and without prejudice to any other remedies; and
 - all amounts owing to the Seller shall, whether or not due for payment, immediately become payable.
 - immediately become payable.
- 13. Title**
- 13.1 It is the intention of the seller and agreed by the Client that property in the Goods shall not pass until:
- The Client has paid all amounts owing for the particular Goods, and
 - The Client has met all other obligations due by the Client to the Seller in respect of all contracts between the Seller and the Client, and that where practicable the Goods shall be kept separate until the Seller shall have received payment and all other obligations of the Client are met.
- 13.2 Receipt by the Seller of any form of payment other than cash shall not be deemed to be payment until that form of payment has been honoured, cleared or recognised and until then the Seller's ownership of rights in respect of the Goods shall continue.
- 13.3 It is further agreed that:
- Until such time as ownership of the Goods shall pass from the Seller to the Client the Seller may give notice in writing to the Client to return the Goods or any of them to the Seller. Upon such notice the rights of the Client to obtain ownership or any other interest in the Goods shall cease.
 - The Seller shall have the right of stopping the Goods in transit whether or not delivery has been made; and
 - If the Client fails to return the Goods to the Seller then the Seller or the Seller's agent may enter upon and into land and premises owned, occupied or used by the Client, or any premises as the invitee of the Client, where the Goods are situated and take possession of the Goods.
 - The Client is only a bailee of the Goods and until such time as the Seller has received payment in full for the Goods then the Client shall hold any proceeds from the sale or disposal of the Goods on trust for the Seller.
 - The Client shall not deal with the money of the Seller in any way which may be adverse to the Seller.
 - The Client shall not charge the Goods in any way nor grant nor otherwise give any interest in the Goods while they remain the property of the Seller.
 - The Seller may require payment of the Price or the balance of the Price due together with any other amounts due from the Client to the Seller arising out of these terms and conditions, and the Seller may take any lawful steps to require payment of the amounts due and the Price.
 - The Seller can issue proceedings to recover the Price of the Goods sold notwithstanding that ownership of the Goods may not have passed to the Client.
 - Until such time that ownership in the Goods passes to the Client, if the Goods are so converted, the parties agree that the Seller will be the owner of the end products.
- 14. Security And Charge**
- 14.1 Despite anything to the contrary contained herein or any other rights which the Seller may have howsoever:
- Where the Client and/or the Guarantor (if any) is the owner of land, realty or any other asset capable of being charged, both the Client and/or the Guarantor agree to mortgage and/or charge all of their joint and/or several interest in the said land, realty or any other asset to the Seller or the Seller's nominee to secure all amounts and other monetary obligations payable under the terms and conditions. The Client and/or the Guarantor acknowledge and agree that the Seller (or the Seller's nominee) shall be entitled to lodge where appropriate a caveat, which caveat shall be released once all payments and other monetary obligations payable hereunder have been met.
 - Should the Seller elect to proceed in any manner in accordance with this clause and/or its sub-clauses, the Client and/or Guarantor shall indemnify the seller from and against all the Seller's costs and disbursements including legal costs on a solicitor and own client basis.
 - To give effect to the provisions of clause [14.1 (a) and (b)] inclusive hereof the Client and/or the Guarantor (if any) do hereby irrevocably nominate
- constitute and appoint the Seller or the Seller's nominee as the Client's and/or Guarantor's true and lawful attorney to execute mortgages and charges (whether registerable or not) including such other terms and conditions as the Seller and/or the Seller's nominee shall think fit in his/her/its/their absolute discretion against the joint and/or several interest of the Client and/or the Guarantor in any land, realty or asset in favour of the Seller and in the Client's and/or Guarantor's name as may be necessary to secure the said Client's and/or Guarantor's obligations and indebtedness to the Seller and further to do and perform all necessary and other acts including instituting any necessary legal proceedings, and further to execute all or any documents in the Seller's absolute discretion which may be necessary or advantageous to give effect to the provisions of this clause.
- 15. Cancellation**
- 15.1 The Seller may cancel these terms and conditions or cancel delivery of Goods at any time before the Goods are delivered by giving written notice. The Seller shall not be liable for any loss or damage whatsoever arising from such cancellation.
- 15.2 At the Seller's sole discretion the Client may cancel delivery of Goods. In the event that the Client cancels delivery of Goods the Client shall be liable for any costs incurred by the Seller up to the time of cancellation.
- 16. Privacy Act 1988**
- 16.1 The Client and/or the Guarantor/s agree for the Seller to obtain from a credit-reporting agency a credit report containing personal credit information about the Client and Guarantor/s in relation to credit provided by the Seller.
- 16.2 The Client and/or the Guarantor/s agree that the Seller may exchange information about Client and Guarantor/s with those credit providers named in the Application for Credit account or named in a consumer credit report issued by a reporting agency for the following purposes:
- To assess an application by Client;
 - To notify other credit providers of a default by the Client;
 - To exchange information with other credit providers as to the status of this credit account, where the Client is in default with other credit providers; and
 - To assess the credit worthiness of Client and/or Guarantor/s.
- 16.3 The Client consents to the Seller being given a consumer credit report to collect overdue payment on commercial credit (Section 18K(1)(h) Privacy Act 1988).
- 16.4 The Client agrees that Personal Data provided may be used and retained by the Seller for the following purposes and for other purposes as shall be agreed between the Client and Seller or required by law from time to time:
- provision of Services & Goods;
 - marketing of Services and or Goods by the Seller, its agents or distributors in relation to the Services and Goods;
 - analysing, verifying and/or checking the Client's credit, payment and/or status in relation to provision of Services/Goods;
 - processing of any payment instructions, direct debit facilities and/or credit facilities requested by Client; and
 - enabling the daily operation of Client's account and/or the collection of amounts outstanding in the Client's account in relation to the Services and Goods.
- 16.5 The Seller may give, information about the Client to a credit reporting agency for the following purposes:
- to obtain a consumer credit report about the Client; and/or
 - allow the credit reporting agency to create or maintain a credit information file containing information about the Client.
- 17. Unpaid Seller's Rights To Dispose Of Goods**
- 17.1 In the event that:
- the Seller retains or regains possession or control of the Goods; and
 - payment of the Price is due to the Seller; and
 - the Seller has made demand in writing of the Client for payment of the Price in terms of this contract; and
 - the Seller has not received the Price of the Goods, then, whether the property in the Goods has passed to the Client or has remained with the Seller, the Seller may dispose of the Goods and may claim from the Client the loss to the Seller on such disposal.
- 18. General**
- 18.1 If any provision of these terms and conditions shall be invalid, void, illegal or unenforceable the validity, existence, legality and enforceability of the remaining provisions shall not be affected, prejudiced or impaired.
- 18.2 All Goods supplied by the Seller are subject to the laws of Western Australia and the Seller takes no responsibility for changes in the law which affect the Goods supplied.
- 18.3 The Seller shall be under no liability whatsoever to the Client for any indirect loss and/or expense (including loss of profit) suffered by the Client arising out of a breach by the Seller of these terms and conditions.
- 18.4 In the event of any breach of this contract by the Seller the remedies of the Client shall be limited to damages. Under no circumstances shall the liability of the Seller exceed the Price of the Services.
- 18.5 The Client shall not set off against the Price amounts due from the Seller.
- 18.6 The Seller may license or sub-contract all or any part of its rights and obligations without the Client's consent.
- 18.7 The Seller reserves the right to review these terms and conditions at any time and from time to time. If, following any such review, there is to be any change in such terms and conditions, that change will take effect from the date on which the seller notifies the Client of such change.
- 18.8 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.