

# Energy 360 Pty Ltd

## Commercial Terms & Conditions



### 1. GENERAL

- 1.1. These terms and conditions apply to the sale of goods by Energy 360 Pty Ltd (the **Company**) to the purchaser of such goods (the **Purchaser**) (**Terms and Conditions**).
- 1.2. These Terms and Conditions can not be varied by any other terms, including the Purchaser's terms and conditions of purchase (if any).

### 2. QUOTATIONS PROVIDED BY THE COMPANY

- 2.1. All quotations are provided by the Company on the condition that these Terms and Conditions are given to and accepted by the Purchaser.
- 2.2. All quotations provided by the Company will remain open for placement of an order by the Purchaser (**Purchase Order**) within thirty (30) days of the date of the quotation.
- 2.3. Any such Purchase Order is not legally binding on the Company unless and until accepted by the Company in writing.
- 2.4. When the Purchaser submits a Purchase Order to the Company, the Purchaser accepts these Terms and Conditions.

### 3. CANCELLATION OF PURCHASE ORDERS

- 3.1. Purchase Orders accepted by the Company may not be cancelled in whole or in part by the Purchaser without the Company's prior written consent.
- 3.2. The Company will charge the Purchaser a fee of twenty percent (20%) of the Purchase Order value in respect of cancelled Purchase Orders, and reserves the right to charge the Purchaser for the Company's work-in-progress and disbursements relating to the Purchase Order as a condition of acceptance of the cancellation.

### 4. QUOTATION AND PRICE VARIATION

All prices quoted (the **Quotation Price**) are based on the Company's estimated costs of production, manufacture or supply at the time of quotation and are exclusive of GST and any other taxes or duties imposed on or in relation to the goods. The Company reserves the right to submit a variation to the Quotation Price if there is any increase in the cost of production, manufacture or supply, or if the Purchaser alters the specifications of the goods between the date of the quotation and the date of delivery.

### 5. DELIVERY

- 5.1. The delivery time specified in the quotation will date from the acceptance by the Company of a Purchase Order.
- 5.2. The Company will not be liable for any loss or damage arising as a result of failure to deliver in the time specified if such failure arises from events beyond the Company's control or whilst the Purchaser is in breach of these Terms and Conditions.
- 5.3. If for any reason the Company is prevented from delivering the goods to the Purchaser's site, the Purchaser will be deemed to have taken delivery of the goods and either;
  - 5.3.1. the Purchaser will be responsible for arranging and paying for suitable protected storage of the goods; or
  - 5.3.2. the Company may arrange suitable protected storage of the goods at the Company's premises or elsewhere. The Purchaser must on demand pay to the Company all costs of and incidental

to such storage. Goods stored by the Company on behalf of the Purchaser are at the Purchaser's risk.

## **6. TERMS OF PAYMENT**

- 6.1. The Purchaser will pay the Company in Australian dollars within thirty (30) days of the date of an invoice issued to the Purchaser by the Company.
- 6.2. If any payment is not received by the Company within the payment period in clause 6.1, interest on claims for such payment will accrue from the day after the expiration of the payment period at the rate of two percent (2%) per annum (calculated weekly) in excess of the base lending rate charged by the Australia and New Zealand Banking Group as its reference rate in Australia until full payment is received by the Company.
- 6.3. For goods destined for export and/or Purchase Orders placed by a Purchaser resident outside Australia, payments are to be made to the Company by electronic funds transfer to the Company's nominated bank account prior to shipment and will not be deemed to have been made until the funds have cleared in such bank account.
- 6.4. The Company reserves the right to vary the terms of payment and to require payment in cash in full or the provision by the Purchaser of such security as the Company considers appropriate prior to delivery if at any time in the Company's opinion the credit standing of the Purchaser becomes unsatisfactory.

## **7. TITLE AND INSURANCE**

- 7.1. Property in and title to the goods supplied to the Purchaser will remain with the Company and will only pass to the Purchaser upon payment in full to the Company of all monies owing by the Purchaser under these Terms and Conditions on any account. Prior to such payment, the Purchaser will hold the goods as bailee for the Company and store the goods separately in such a way that the goods may be readily identified as being the property of the Company. In the event of the goods being sold or disposed of by the Purchaser prior to such payment in full, any payment received by the Purchaser will be set aside in a separate account and held in trust by the Purchaser for the Company pending payment in full by the Purchaser. The Purchaser will be under a fiduciary duty to immediately account to the Company upon the receipt of any payment received by the Purchaser for the goods. The Company's title under this clause will not be affected by the attachment of the goods to plant, equipment, vehicles, trailers or other property of the Purchaser.
- 7.2. If any payment owed by the Purchaser to the Company is overdue in whole or in part:
- 7.2.1. The Company may (without prejudice to any of its other rights) recover and resell the goods and the Company's employees or agents may enter the Purchaser's premises for that purpose, without liability for trespass, negligence, payment of any compensation to the Purchaser or other person or otherwise; and
- 7.2.2. the Purchaser grants full leave and an irrevocable licence to the Company and any person authorised by the Company to enter any premises where the goods may be stored, from time to time, for the purpose of taking repossession of the goods. The Purchaser agrees that:
- a. It will be liable for all costs, losses and damages incurred or suffered by the Company (including any consequential loss or damage) as a result of the Company retaking possession of the goods or otherwise exercising its rights under this clause 7; and
  - b. It will indemnify the Company, and keep the Company indemnified, for all fees (including full legal fees on a full indemnity basis), costs and expenses incurred or suffered as a result of any and all prosecutions, actions, demands, claims or proceedings brought by or against the Company in connection with retaking possession of the goods or the exercise by the Company of its rights under this clause 7.

## **8. RISK**

- 8.1. Risk of damage to, or loss of, and all insurance responsibility for theft, damage, or otherwise in relation to the goods passes to the Purchaser immediately upon the Purchaser taking, or being deemed to have taken, delivery of the goods. The Company is not liable to the Purchaser for loss of or damage or deterioration to the goods after they are delivered
- 8.2. The Purchaser assumes all risk and liability for loss, damage, or injury to persons or to property belonging to the Purchaser or third parties arising out of the use, installation, possession or resale of any of the goods sold by the Company unless recoverable from the Company on the failure of a non-excludable statutory or consumer guarantee.
- 8.3. The goods are sold to the Purchaser on the grounds that the Purchaser has obtained all the necessary licences or permits under all relevant laws and regulations in relation to the goods

## **9. INDEMNITY**

- 9.1. The Purchaser indemnifies and holds the Company harmless from and against all liabilities, losses, damage, costs and expenses suffered by the Company, and from and against all actions, proceedings, claims or demands made against the Company, arising:
  - 9.1.1. As a result of the Purchaser's failure to:
    - a. Ensure that any safety markings on the goods are adequately displayed; or
    - b. bring to the attention of users of the goods safety manuals and updates applicable to the goods; or
    - c. otherwise comply with any laws, rules, standards or regulations applicable in relation to the goods or the use of the goods; or
  - 9.1.2. as a result of any other negligence or other breach of duty by the Purchaser; or
  - 9.1.3. as a result of compliance or adherence by the Company with any instructions by the Purchaser in relation to the goods or services and from and against all actions, proceedings, claims or demands made against the Company as a result of such compliance or adherence.

## **10. DRAWINGS AND SPECIFICATIONS**

- 10.1. All specifications, illustrations, drawings and data accompanying a quotation or otherwise in the Purchaser's possession or custody before or after acceptance of a Purchase Order are approximate only and are intended to be by way of general description of the goods and may not be relied upon by the Purchaser unless otherwise specified by the Company in writing. The Company does not agree to comply with any specifications and drawings referred to in any Purchase Order or otherwise provided by the Purchaser unless such specifications and drawings have been produced to the Company prior to delivery of the goods and have been agreed to in writing and signed by a duly authorised representative of the Company.
- 10.2. Copies of drawings, plans, specifications and other written or printed matter submitted to the Purchaser will remain the property of the Company and the information contained therein will be treated as strictly confidential and will not be used to the advantage of the Purchaser or to the detriment of the Company, and must not be used or disclosed to third parties without the prior written consent of the Company.

## **11. PATENT RIGHTS**

The Purchaser warrants that any design, instruction, or equipment furnished to the Company by or on behalf of the Purchaser will not be such as will cause the Company to infringe any patent, registered design, trademark or copyright or involve the unauthorised disclosure of confidential information in the execution of the Purchaser's Purchase Order and the Purchaser agrees to indemnify the Company against any infringement or threatened infringement or allegation of unauthorised use of patents, trademarks, designs,

copyright or confidential information arising out of the manufacture or use of the goods and it is specifically agreed that the sale and purchase of the goods does not confer on the Purchaser any licence or rights under any patents, designs, trademarks, copyright or confidential information which is the property of the Company. The Company will be under no obligation to disclose the methods or techniques used in production.

## 12. WARRANTIES AND LIMITATION OF LIABILITY

- 12.1. It is acknowledged by the Company that, under applicable State, Territory and Commonwealth law, certain conditions and warranties may be implied in the agreement between the Company and the Purchaser and rights and remedies conferred upon the Purchaser as the consumer in relation to goods or services which cannot be excluded, restricted or modified by agreement (**Non-excludable Rights**). The rights conferred upon the Purchaser by this warranty are in addition to and do not detract from any Non-excludable Rights which the Purchaser may have. Subject to any Non-excludable Rights which the Purchaser may have the Company disclaims all conditions and warranties expressed or implied, and all rights and remedies conferred on the Purchaser, by statute, the common law, equity, trade, custom or usage or otherwise whosoever and all such conditions, warranties, rights and remedies are hereby expressly excluded. Where so permitted the liability of the Company for a breach of a Non-excludable Right is limited, at the Company's option, in the case of goods, to the replacement or repair of the goods or the supply of equivalent goods or the cost of replacing or repairing the goods or of acquiring equivalent services again or the payment of the cost of having the services supplied again.
- 12.2. The goods are warranted to be free of defects resulting from faulty materials and workmanship for a period of twelve (12) months from the time of the Purchaser taking, or being deemed to have taken, delivery from the Company.
- 12.3. In order to qualify for this warranty:
- 12.3.1. A claim must be made within the warranty period;
  - 12.3.2. The defective parts or equipment must be returned at the Purchaser's cost in a manner directed by the Company, or otherwise accessible to the Company, failing which this warranty will not apply and the Company will be discharged from all liability under this clause;
  - 12.3.3. the Purchaser will notify the Company in writing of any defect within one (1) week of the defect being known;
  - 12.3.4. the Purchaser must have fulfilled its financial obligations;
  - 12.3.5. the Purchaser has not attempted to repair, adjust, improve or otherwise interfere with the goods or their related operating procedures, and has not subjected the goods to unreasonable stress or treatment, neglect, or improper storage. Any such action will cause this warranty to become null and void;
  - 12.3.6. the Purchaser has at all times used the goods in accordance with any operations and maintenance manual supplied to the Purchaser by the Company; and
  - 12.3.7. without limiting the foregoing, the goods have at all times in the Company's opinion been properly used in accordance with the Company's instructions.
- 12.4. The cost of dismantling and reinstating the goods, and the transportation of defective and/or replacements parts to and from the Company's premises, are not the Company's liability unless specifically accepted in writing by the Company.
- 12.5. Except as expressly provided in clauses 12.1, 12.2, 12.3 and 12.4, neither the Company its employees nor its agents will be liable for special, incidental, indirect or consequential loss or damage suffered by the Purchaser or any third party however caused, including but not limited to economic loss, loss of profits or revenue or any liability to any other party.

### **13. DISPUTE RESOLUTION**

- 13.1. If a dispute arises from or in connection with these Terms and Conditions, the party claiming a dispute will provide written notice to the other of the matters in dispute (**Dispute Notice**) and the parties will meet to resolve the dispute within 10 days after the service of the Dispute Notice.
- 13.2. If the dispute is not resolved within 17 days of the service of the Dispute Notice, either party may request in writing, a meeting of a member of the senior management of each of the Company and the Purchaser (or their respective nominees) who must meet within 7 days after the service of any such request for a meeting to attempt to resolve the dispute in good faith.
- 13.3. If the dispute is not resolved within 10 days after the service of the notice in clause 13.2, the parties must submit the dispute to mediation administered by the Resolution Institute in Australia, such mediation to be conducted in accordance with, and subject to, the Resolution Institute Mediation Rules. The mediator will be an independent person agreed by the parties or, failing agreement, a mediator will be appointed by the Chair of the Resolution Institute.
- 13.4. Neither party may commence litigation, other than for urgent interlocutory relief, unless and until the procedures in clauses 13.1, 13.2 and 13.3 have been complied with.

### **14. INCONSISTENT CLAUSE**

These Terms and Conditions will prevail over any terms or conditions to the contrary contained in the Purchase Order. Any terms and conditions of the Purchase Order deviating from or inconsistent with these Terms and Conditions are expressly excluded and any statement that the Purchaser's terms and conditions will prevail is also excluded.

### **15. FORCE MAJEURE**

The Company will not be liable for failure or delay in performance caused wholly or partially by unavailability of freight or shipping space, failure of any kind by a third party manufacturer or supplier to supply the whole or part of any goods to the Company, prohibitions or restrictions under any law or by any government or authority or inability to obtain any necessary export licence or import licence, or any act of force majeure including, but without limitation, strikes, lockouts, shortage of labour, flood, fire, earthquakes, explosion, accident, breakdown of machinery, rioting, civil or industrial disturbances, acts of war (whether declared or not), acts of God or any other causes whether or not of a similar nature or beyond the Company's control. In the event of any such failure or delay, the Company may at its discretion and without liability, terminate the whole or any part of its performance under these Terms and Conditions, or postpone its performance. This clause 15 does not apply to any obligation of the Purchaser to pay money.

### **16. WAIVER**

Failure by the Company to insist upon the strict performance of any term, warranty or condition of these Terms and Conditions will not be deemed to be a waiver thereof or of any rights the Company may have and no expressed waiver will be deemed a waiver of any subsequent breach of any term, warranty or condition.

### **17. NOTICES**

Any notice required or authorised to be given or served upon a party pursuant to these Terms and Conditions will be in writing and will be delivered personally or sent by facsimile transmission, email, or post to the relevant party at its address as appearing in the Purchase Order.

### **18. SEVERANCE**

It is agreed by the Company and the Purchaser that if any provision of these Terms and Conditions is determined to be voidable by any party, unenforceable or illegal, it will be read down so as to be valid and enforceable or, if it cannot be so read down, the provision (or where possible, the offending words) will be severed from these Terms and Conditions without thereby affecting the validity, legality or enforceability of the remaining provisions (or parts of those provisions) of these Terms and Conditions which will continue in full force and effect.

## **19. GOVERNING LAW**

These Terms and Conditions will be governed by and construed in accordance with the laws of the State of Victoria and the parties submit to the non-exclusive jurisdiction of the Courts of that State.