

# FENNER DUNLOP STANDARD CONDITIONS OF SALE

## 1. INTERPRETATION

These Conditions of Sale shall be subject to the provisions of the Australian Consumer Law and any statutory amendment or re-enactment thereof for the time being in force which the Company is not capable of excluding, restricting or modifying. Unless otherwise inconsistent with the context the word "Australian Consumer Law" shall mean the law set out in Schedule 2 of the Competition and Consumer Act 2010 and any corresponding state or territory legislation, "person" shall include corporation, "Company" shall mean Fenner Dunlop Australia Pty Ltd, Australian Conveyor Engineering Pty Ltd, and Fenner Dunlop Conveyor Services Pty Ltd and its agents, servants and employees, and any of its subsidiaries as defined in section 9 of the Corporations Act 2001 (if such subsidiary is named as the party making or accepting the order), "goods" means any goods agreed to be supplied to the Purchaser by the Company under these Conditions of Sale, "PPSA" means Personal Property Securities Act 2009 (Cth) (including any amendment or re-enactment thereof), "Purchaser" shall mean and include the person to whom any quotation is made and shall include any person offering to contract with the Company on these terms and conditions, and "services" means any services to be performed for the Purchaser by the Company under these Conditions of Sale.

## 2. GENERAL

The Company agrees to supply the goods and/or perform the services ordered by the Purchaser from time to time in accordance with these Conditions of Sale and these Conditions of Sale are intended to apply to all such orders as an overarching agreement. Any order placed by the Purchaser is deemed to be an order incorporating these Conditions of Sale notwithstanding any inconsistencies which may be introduced in the order itself or any other document of the Purchaser. Any terms and conditions contained in any order or other document of the Purchaser which are not embodied herein are expressly excluded and these Conditions of Sale take precedence.

## 3. ACCEPTANCE

Acceptance by the Purchaser of these Conditions of Sale (as amended by the Company from time to time) may be by any one of the following ways:

- (a) by signing where indicated below and returning a copy of these Conditions of Sale to the Company;
- (b) by performing an act that is done with the intention of accepting these Conditions of Sale (including but not limited to continuing to order the goods and/or services); or
- (c) by oral acceptance.

## 4. ORDERS

Any quotation made by the Company is not an offer to sell the goods or to provide the services and no order given in pursuance of a quotation shall bind the Company until accepted by it in writing or by the commencement of supply of the goods and/or performance of the services. The Company reserves the right at any time to reject or not process any order placed by the Purchaser.

## 5. DELIVERY AND PERFORMANCE

- (a) Any date quoted for delivery of the goods and/or performance of the services is an estimate only and the Company shall not be liable to the Purchaser for any loss or damage whatsoever arising from failure to deliver the goods and/or perform the services on or before the quoted date. The Purchaser shall accept and pay for goods and/or services when tendered notwithstanding any failure by the Company to deliver the goods or perform the services by the quoted date. Written advice to the Purchaser that goods are ready for delivery whether in whole or in part shall constitute the delivery of those goods to the Purchaser and the terms of payment shall apply.
- (b) Except where the Purchaser has rights or remedies under the Australian Consumer Law which cannot be excluded, the Company shall not be liable to the Purchaser or any other party for any direct or indirect or consequential injury loss or damage whatsoever by reason of any delay in delivery of the goods or performance of the services whether the same is due to the negligence of the Company or any other party, strike or any other industrial action be it of the Company or other party, or any other cause whatsoever.
- (c) The Company reserves the right to deliver the goods by instalments. If delivery is made by instalments, the Purchaser shall not be entitled:
  - (i) to terminate or cancel the order; or
  - (ii) to any loss or damage whatsoever arising from failure of the Company to deliver any instalments on or before the quoted date.
- (d) Any quotation containing a provision to supply goods "ex stock" is subject to fulfilment of prior orders at the date of receipt of the Purchaser's order.

## 6. CANCELLATION

Any order may only be cancelled, varied or suspended by the Purchaser with the prior written consent of the Company and in the event of such cancellation, variation or suspension, the Purchaser undertakes to reimburse and indemnify the Company for any reasonable costs, expenses or charges incurred by the Company in preparation for and in the execution of an order.

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## 7. QUANTITIES AND QUALITY

- (a) All goods are supplied subject to reasonable availability to the Company of suitable materials and components and the Company reserves the right to substitute suitable alternative materials and components where necessary.
- (b) Whilst every effort is made to ensure their accuracy, the description, illustrations and materials contained in any catalogue price list, brochures, leaflets or other descriptive matter provided by or on behalf of the Company represent the general nature only of the items described therein and save where the Company has accepted an order of goods and/or services specified as so described or illustrated, shall not form any part of an order or agreement or amount to any representation or warranty in respect of the goods and/or services.
- (c) The Purchaser warrants that any goods supplied or services performed by the Company which are based in whole or in part upon designs, drawings or specifications supplied to the Company by or on behalf of the Purchaser shall not infringe any intellectual property rights of third parties and that any such designs, drawings or specifications shall be complete in every respect to enable the Company to supply the goods and/or perform the services in compliance with all requirements of the Purchaser or of any applicable law. The Purchaser shall indemnify and hold harmless the Company against any action, loss, cost, claim or damage that may be brought against or suffered by the Company for any breach of this warranty by the Purchaser.
- (d) The Company does not warrant or guarantee and it shall not be a term of any agreement between the Company and the Purchaser that any goods supplied or services performed by the Company which are based upon any designs, drawings or specifications supplied to the Company by or on behalf of the Purchaser will achieve any standard of performance or capacity whatsoever and the Purchaser acknowledges that it does not rely on the skill and the judgment of the Company for the fitness of the goods or services for any purpose of the Purchaser.

## 8. ACCESS AND ASSISTANCE

- (a) In respect of any work done by the Company in relation to goods to be supplied to or services to be performed for the Purchaser at a location other than the Company's premises, it shall, subject to any written agreement to the contrary, be the duty of the Purchaser to ensure that the conditions under which the work has to be performed, the layout, means of access, accessibility of the different parts of the subject matter being worked upon or handled and other material circumstances shall be suitable for the Company, failing which the Company shall be entitled to charge a reasonable increase in the price of the goods or services having regard to the prevailing circumstances.
- (b) Where services are to be performed on the Purchaser's premises, the Purchaser agrees to provide the Company on a timely basis with such access, utilities and equipment as the Company may reasonably require in order to perform the services. If the Purchaser fails to provide such assistance, the Company will be entitled to delay performance of the Services until such time as the Purchaser has complied with this obligation and increase the price for the Services to reflect any increased costs to the Company.

## 9. WAIVER

Failure by the Company to insist upon strict performance of any term of these Conditions of Sale or to enforce its rights under these Conditions of Sale shall not be deemed a waiver thereof or of any rights which the Company may have and shall not, and nor shall any express waiver, be deemed to be a waiver of any subsequent breach of any term or condition.

## 10. GUARANTEE AND WARRANTY

- (a) Except when the Purchaser is a "consumer" for the purposes of the Australian Consumer Law and the conditions, warranties and rights implied by that law cannot be excluded, restricted or modified, all representations, promises, statements, warranties and conditions (whether statutory, express or implied) regarding any goods supplied or services performed by or on behalf of the Company are expressly excluded. No claim can be made by the Purchaser against the Company unless the Purchaser notifies the Company in writing of the facts or matters which form part of any such claim within 14 days of the Purchaser becoming aware of the same. The Company's liability for any and all loss or damage resulting from any cause whatsoever, including alleged negligence, will be limited (at the Company's discretion) to, in the case of goods supplied to the Purchaser, the replacement or repair of the goods or the cost of having the goods replaced or repaired or, in the case of services performed for the Purchaser, a refund of the price paid for the services.
- (b) Where the Purchaser is a "consumer" under the Australian Consumer Law and the goods or services are subject to guarantees under the Australian Consumer Law that cannot be excluded, restricted or modified the Purchaser may be entitled to a replacement or refund and for compensation for any other reasonably foreseeable loss or damage. The Purchaser may also be 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.

## 11. LIMITATION OF LIABILITY

- (a) To the fullest extent permitted by law, the Company will not be liable to the Purchaser in contract, tort, law or otherwise for i) any loss of profit, hire, business contracts, revenues or anticipated savings, financial or economic loss, loss of opportunity; ii) for damage to the Purchaser's reputation or goodwill; iii) any loss resulting from any claim made by any third party; or iv) any special, indirect or consequential loss or damage of any nature whatsoever, and none of these shall be included in any claim by the Purchaser.
- (b) The Company shall not be liable in any circumstances for:
  - (i) any defects or damage caused in whole or in part by misuse, abuse, neglect, electrical or other overload, non-suitable lubricant, improper installation repair or alteration (other than to the extent caused by the Company);
  - (ii) any transport, installation, removal, labour or other costs;
  - (iii) goods not manufactured or services not performed by it but the Company will endeavour to pass on to the Purchaser the benefit of any claim made by the Company and accepted by the manufacturer of such goods and/or services under a warranty given by the manufacturer provided that nothing contained in this sub-paragraph shall limit the rights of the Purchaser to proceed against the Company pursuant to the Australian Consumer Law; or
  - (iv) technical advice or assistance given or rendered by it to the Purchaser whether or not in connection with the supply of goods or performance of services for or to the Purchaser provided always that the Company has rendered such services with due care and skill and that any materials supplied in connection with those services are reasonably fit for the purpose for which they are supplied.

## 12. INSOLVENCY & DEFAULT

If:

- (a) the Purchaser defaults in any payment due hereunder;
- (b) a resolution is passed or proposed or a petition is presented or an application filed for the winding up of the Purchaser;
- (c) a liquidator, administrator, receiver, controller or receiver and manager is appointed over the property or any part of the property of the Purchaser;
- (d) the purchaser makes or proposes to make any arrangement with its creditors;
- (e) the Purchaser becomes insolvent, is wound up or enters into bankruptcy; or
- (f) execution is levied upon the assets of the Purchaser for an amount in excess of \$1,000.00 and is not satisfied within seven days,

then the Company may at its option withhold further deliveries of goods, cease performing services or cancel any orders without prejudice to its rights hereunder PROVIDED HOWEVER that the Company may at any time and from time to time upon such terms as it may determine waive any of its rights under this clause, but without prejudice to its rights thereafter to rely upon the happening thereafter of any of the events hereinbefore referred to or upon the continuation after any such waiver of any state of affairs the subject of such waiver.

## 13. TITLE LIEN

- (a) Title to the goods to be delivered will not pass to the Purchaser until payment in full for the goods and all other amounts owing by the Purchaser to the Company (whether under this or any other agreement) has been received by the Company.
- (b) Until the date of final payment of all amounts referred to in paragraph (a) above, the Purchaser:
  - (i) shall store the goods so that they are clearly identified as the property of the Company and will hold the goods as a fiduciary bailee of the Company;
  - (ii) shall not dispose of the goods except in the ordinary course of the Purchaser's business or move the goods from the Purchaser's premises without the Company's prior written consent;
  - (iii) acknowledges and warrants that the Company has a security interest for the purposes of the PPSA in the goods and that such security interest attaches to the goods when the Purchaser obtains possession of the goods;
  - (iv) must not allow any person other than the Company to have or acquire any security interest in the goods for the purposes of the PPSA;
  - (v) must insure the goods for their full insurable or replacement value (whichever is higher) with a reputable insurer; and

- (vi) must not remove, deface or obliterate any identifying mark or number on any of the goods.
- (c) In addition to any lien to which the Company may, by statute or otherwise, be entitled, the Company shall, in the event the Purchaser fails to pay for the goods in full as required under these Conditions of Sale or becomes insolvent, enters into bankruptcy or is wound up, be entitled to:
- (i) without notice and without liability to the Purchaser (or any person claiming through the Purchaser), enter any premises where it suspects the goods may be located in order to search for and remove the goods without committing a trespass (even though they may be attached or annexed to other goods or land not the property of the Purchaser) and for this purpose the Purchaser irrevocably licenses the Company to enter such premises and undertakes that it will procure any necessary authority to enter from any relevant person and also indemnifies the Company from and against all loss suffered or incurred by the Company as a result of exercising such rights; and
- (ii) a general lien on all property or goods belonging to the Purchaser in its possession (although such goods or some of them have been paid for) for the unpaid price of any other goods sold and delivered to the Purchaser by the Company under this or any other arrangement understanding or contract.
- 14. RISK**
- Unless otherwise agreed in writing all goods shall be at the Purchaser's risk upon delivery to the Purchaser's premises (or a third party site nominated by the Purchaser) or upon such goods being made available for collection or loading by the Purchaser or the Purchaser's carrier or agent.
- 15. PAYMENT**
- (a) Unless otherwise agreed in writing payment terms are net cash 30 days from the end of the month in which, in the case of goods, the goods are delivered to the Purchaser or the Purchaser's carrier or agent or, in the case of services, the services are completed by the Company.
- (b) If the Company does not receive forwarding instructions sufficient to enable it to despatch the goods within 14 days of notification that they are ready, the Purchaser shall be deemed to have taken delivery of the goods and the terms of payment shall apply from such date.
- (c) The Purchaser shall be liable for storage charges payable monthly on demand, storage being at the Purchaser's risk.
- (d) The Company may require the payment of a deposit which, in such circumstances, must be paid by the Purchaser upon submitting the relevant order to the Company unless otherwise agreed between the parties.
- (e) The Company may charge the Purchaser on any overdue amounts interest at a rate of 2% over the then current rate fixed by the Penalty Interest Rates Act 1983 (Vic).
- (f) If the Company must take steps or action to recover any amount due to it, the Purchaser will be responsible for all costs and disbursements incurred by the Company in recovering the monies due.
- (g) The timing of payment is of the essence in all cases.
- 16. PRICE**
- (a) Unless otherwise expressly agreed in writing, the price of the goods and/or services shall be that price charged by the Company at the date of delivery and/or performance plus the amount which the Company is required to pay on account of any excise, GST or any other taxes or charges which may be established or levied by any governmental authority (domestic or foreign) upon the goods or services.
- (b) Where a price has been quoted, the price of the goods and/or services shall be Company's quoted price. All prices quoted are valid for the period stated on the quotation or if no period is stated, 30 days or earlier acceptance by Purchaser after which time they may be altered by the Company without giving notice to Purchaser.
- (c) Unless otherwise specified, any prices quoted do not include transportation costs. Goods shall be supplied "ex works".
- (d) The prices quoted are based on present day cost of labour and material and will be subject to contract price adjustment at the option of the Company.
- 17. GST**
- If any supply made by the Company under or in connection with these Conditions of Sale is a taxable supply, the Purchaser must pay to the Company, in addition to any amount or consideration payable by the Purchaser in relation to that supply, the amount of any GST payable in respect of the taxable supply at the time the consideration for the supply is payable.
- 18. SAMPLES**
- All samples are sent and inspected solely to enable the Purchaser to judge the quality of the bulk and shall not render any sale a sale by sample. All samples are to remain the property of the Company and shall be returned to the Company on request.
- 19. TOOLING & DIES**
- All patterns, dies, moulds or other equipment used in the manufacture of the goods or the performance of the services shall remain the property of the Company unless otherwise expressly agreed in writing. The Purchaser shall not permit any third party to use such equipment nor disclose to any third party any technical, dimensional or design details or any other information in respect of such equipment at any time.
- 20. PPSA**
- (a) Unless a contrary intention appears, words or expressions used in this clause 20 that are defined in the PPSA have the same meaning given to them in the PPSA.
- (b) If the Company determines that these Conditions of Sale or the supply of the goods creates a security interest in its favour over any personal property, the Company may apply for any registration, or give any notification, in connection with that security interest and the Purchaser must promptly, upon the Company's request, do anything to:
- (i) provide more effective security over the relevant personal property;
- (ii) ensure that any such security interest in favour of the Company is at all time enforceable, perfected and otherwise effective and ranks as a first priority security interest;
- (iii) enable the Company to prepare and register a financing statement or a financing change statement or give any notification in connection with that security interest; and
- (iv) enable the Company to exercise any of its rights or perform any of its obligations in connection with any such security interest or under the PPSA.
- (c) Except if section 275(7) of the PPSA applies, each of the parties agree not to disclose any information of the kind referred to in section 275(1) of the PPSA that is not publicly available.
- (d) If Chapter 4 of the PPSA would otherwise apply to the enforcement of the security interest created under these Conditions of Sale or the supply of the goods, the Purchaser agrees that the following provisions of the PPSA will not apply:
- (i) section 96 (person with an interest in the whole may retain accession);
- (ii) section 117 (obligations in land secured by personal property and land);
- (iii) section 120 (enforcement of security interest in liquid assets);
- (iv) section 121(4) (enforcement of liquid assets – notice to grantor);
- (v) section 123 (secured party may seize collateral);
- (vi) section 125 (obligation to dispose of or retain collateral);
- (vii) section 126 (apparent possession of collateral);
- (viii) section 130 (notice of disposal), to the extent that it requires the Company to give notice to the Purchaser;
- (ix) section 132(3)(d) (contents of statement of account after disposal);
- (x) section 132(4) (statement of account if no disposal);
- (xi) section 142 (redemption of collateral); and
- (xii) section 143 (reinstatement of security agreement).
- (e) Without limiting clause 20(d) above, the Company does not need to give the Purchaser any notice required under the PPS Law unless the requirement for the notice cannot be excluded.
- 21. FORCE MAJEURE**
- Without prejudice to the generality of any previous exclusion or limitation of liability, the Company shall not be liable for any failure to fulfil any term of any transaction governed by the Conditions of Sale if fulfillment has been delayed, hindered or prevented by any circumstances whatsoever which are not within the Company's control and if the Company is able to fulfil some but not all of the demand for its goods and/or services the Company may allocate its available supplies and resources amongst its customers in such a manner as the Company in its absolute discretion considers to be fair.
- 22. ANTI-BRIBERY LAWS**
- The Purchaser shall:
- (a) comply with all laws relating to anti-bribery and anti-corruption and all policies of the Company relating thereto as notified to the Purchaser from time to time and not contravene any such law or policy;
- (b) promptly notify the Company if any request or demand for financial or other advantage of any kind is received by the Purchaser in connection with the provision of the Goods or the performance of the Services or if any foreign public official is appointed as an officer or employer of or acquires an interest in the Purchaser;
- (c) have and enforce as appropriate its own policies and procedures to ensure compliance with this clause 22; and
- (d) ensure that any person for whom the Goods or Services are to be provided complies with this clause 22.
- 23. MISCELLANEOUS**
- (a) The contract formed between the Company and the Purchaser in connection with these Conditions of Sale is personal to the Purchaser and must not be assigned to a third party without the prior written consent of the Company.
- (b) The Company may in its discretion and without notification to the Purchaser sub-contract the whole or any part of the production or delivery of the goods agreed to be sold to the Purchaser.
- (c) These Conditions of Sale shall be governed by the laws of the State of Victoria and the Purchaser submits to the non-exclusive jurisdiction of the courts of that state.
- (d) If a provision of these Conditions of Sale would, but for this clause, be unenforceable, that provision must be read down to the extent necessary to avoid that result and, if the provision cannot be read down, must be severed without altering the validity and enforceability of the remainder of these Conditions of Sale.
- (e) These Conditions of Sale constitute the entire agreement between the parties. Except as expressly stated in these Conditions of Sale, no conditions, understanding or agreement purporting to modify or vary the terms of these Conditions of Sale shall be binding on the Company unless otherwise agreed in writing and signed by the Company.
- (f) These Conditions of Sale supersede all previous terms and conditions imposed by the Company and may be altered by the Company on 30 days notice.

1. I/We the undersigned declare that the information provided by me/us in support of this application is true and correct in every particular.
2. I/We agree to be bound solely by your Conditions of Sale as detailed above and I/We further agree that any terms and conditions of purchase that maybe incorporated in any order, acceptance of quotation or any other document, delivered by me/us, shall unless those terms and conditions are agreed to in writing by your duly authorised representative, have no legal effect.
3. I/We agree that any legal costs incurred by you on a solicitor and own client basis in the recovery of any monies due by me/us shall be recoverable in full from me/us.
4. I hereby certify that I am authorised to sign this application on behalf of the applicant.
- Director: \_\_\_\_\_ Date: \_\_\_\_\_
- Sole Trader/Partner: \_\_\_\_\_ Date: \_\_\_\_\_
- Name (PLEASE PRINT): \_\_\_\_\_