

**AUS PITS TERMS AND CONDITIONS OF PURCHASE (page 1 of 7)**

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**1. Definitions**

**Aus Pits** means Holmes Nominees (Aust) Pty Ltd (ACN 101 759 826) trading as Aus Pits

**Contract** means a contract for the sale of Goods or Services to Aus Pits, which arises in accordance with clause 2 of these Terms

**Design Documents** means all correspondence, reports, plans, drawings (including sections and elevations), designs, samples, sketches, illustrations, computational models, specifications, calculations, information and other documents in any written or other format which are necessary to carry out and complete the Purchase Order

**Dispute** means any dispute in relation to this Contract

**Goods** means goods which Aus Pits has agreed to purchase from the Supplier, details of which are contained in a Purchase Order

**Intellectual Property** means all rights in any trademarks, designs, software, patents and patent applications, copyright, confidential information, processes, methods, inventions, product formulations, eligible layout rights, know-how and trade secrets, whether registered or unregistered

**Invoice** means a tax invoice describing the Goods or Services which the Supplier is selling to Aus Pits

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

**Price** means the price payable in respect of the Goods or Services, as specified in the Purchase Order

**Purchase Order** means an order for Goods or Services provided by Aus Pits to the Supplier

**Services** means services which Aus Pits has agreed to engage the Supplier to perform, details of which are contained in a Purchase Order

**Supplier** means the supplier whose details appear in the Purchase Order

**Terms** means these terms and conditions of trading

**Third Party Costs** means any costs, fees, charges, expenses, damages, penalties, claims, late delivery fees and non-delivery fees incurred by Aus Pits as a result of the late delivery or non-delivery of any Goods or Services by the Supplier

**Warranty** means any manufacturer's warranty provided to Aus Pits by the Supplier in relation to the Goods.

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**2. Contract**

2.1. Aus Pits may order Goods or Services from the Supplier from time to time by providing to the Supplier a Purchase Order specifying the price payable in respect of the Goods or Services.

2.2. Following receipt of a Purchase Order, the Supplier will acknowledge receipt of the Purchase Order. Upon receipt of the acknowledgement by Aus Pits, a Contract arises between Aus Pits the Supplier for the supply of the Goods or Services at the Price, and the Supplier is deemed to have adopted and accepted these Terms.

2.3. These Terms apply to all trade and all Contracts between Aus Pits and the Supplier.

2.4. Aus Pits will not accept goods or services from the Supplier on any terms or conditions other than these Terms.

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**3. Performance and Price**

3.1. The Supplier must supply the Goods or Services in the manner set out in the Purchase Order.

3.2. Aus Pits is not obliged to pay any amount to the Supplier until the Supplier gives Aus Pits a valid Invoice for the supply.

3.3. Aus Pits may set off any amount that the Supplier owes to it against any amount owed by Aus Pits to that Supplier.

3.4. Subject to clause 5 and resolution of any Dispute in relation to the Price, Aus Pits will pay any valid Invoice within 60 days after the end of the month in which the Invoice is dated unless a different timeframe for payment is specified in the Purchase Order.

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**4. Delivery and Force majeure**

- 4.1. Unless otherwise agreed in writing, the Supplier must deliver (or arrange for delivery of) the whole of the Goods or Services or both to the location and on or before the date specified in the Purchase Order together with:
  - 4.1.1. a delivery note stating the date of issue, the supplier's details, the Goods delivered and the Purchase Order details; and
  - 4.1.2. copies of all relevant engineering details, designs, evidence of compliance with applicable standards and any other documentation requested by Aus Pits.
- 4.2. Unless specified otherwise in the Purchase Order, insurance, delivery, freight charges and any other charge associated with the supply of the Goods or Services are included in the Price.
- 4.3. If Aus Pits agrees to partial delivery of Goods or Services, then the Supplier must ensure that the delivery note supplied in accordance with clause 4.1.1 and the Invoice reflect the actual supply.
- 4.4. If the Supplier supplies goods in excess of the quantity specified in a Purchase Order, then, Aus Pits may:
  - 4.4.1. purchase the additional goods at the same rate as the Goods ordered; or
  - 4.4.2. return the goods at the Supplier's expense.
- 4.5. The Supplier must package goods appropriately to reduce the risk or damage to Goods on delivery, and Aus Pits is in no event responsible for any loss or damage to any Goods during delivery.
- 4.6. The Supplier must comply with any direction given by Aus Pits regarding the packaging of Goods.
- 4.7. If Aus Pits determines that the Goods cannot be unloaded safely, it may refuse to accept delivery of Goods.
- 4.8. If Aus Pits returns Goods to the Supplier, then the Supplier must:
  - 4.8.1. accept the return of the Goods;
  - 4.8.2. re-supply the Goods;
  - 4.8.3. pay any additional delivery costs;
  - 4.8.4. pay any Third Party Costs; and
  - 4.8.5. not charge Aus Pits any additional fee for the re-supply of Goods, or Services that are associated with the Goods that Aus Pits refuses to accept.
- 4.9. If the Supplier fails to deliver the Goods or Services, or fails to deliver the Goods or Services on or before the date specified in the Purchase Order then, in addition to any other damages due to Aus Pits, the Supplier must pay damages (including any Third Party Costs) to Aus Pits for any loss suffered as a result of the non-delivery or delay.
- 4.10. The Supplier must not withhold supply of Goods or Services to Aus Pits.

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**5. Acceptance**

- 5.1. The Supplier agrees that acceptance of any Goods or Services by Aus Pits is subject to its inspection within a reasonable time after delivery. Aus Pits may notify the Supplier if any Goods delivered under a Contract are not accepted.
- 5.2. If the Supplier receives notice from Aus Pits in accordance with clause 5.1, the Supplier must, at Aus Pits' discretion:
  - 5.2.1. repair the Goods; or
  - 5.2.2. replace the Goods with non-defective Goods; or
  - 5.2.3. refund to Aus Pits such part of the Price paid by Aus Pits which is referable to the Goods that are not accepted; or
  - 5.2.4. perform the Services again.

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- 5.3. If Aus Pits does not accept Goods, it will hold those Goods at the Supplier's risk and cost for no more than 5 days after rejection pending the Supplier's disposition advice or collection of the Goods. If the Supplier fails to give such disposition advice or collect the Goods, then Aus Pits may return the Goods to the Supplier's address as noted on the Purchase Order, Invoice or delivery note specified in clause 4.1.1. The Supplier must accept the returned Goods and pay any costs of returning the Goods.
- 5.4. The Supplier must hold Aus Pits harmless against any loss suffered (including any Third Party Costs) as a result of the Goods or Services that are not accepted and must not charge Aus Pits any additional fee for Goods or Services supplied in accordance with clause 5.2.

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**6. Title and Risk**

- 6.1. The Supplier acknowledges and agrees that property in and title to any Goods passes to Aus Pits on its acceptance of the Goods and the Supplier may not charge the Goods in any way nor grant or otherwise give any interest in the Goods.
- 6.2. Risk in any Goods passes to Aus Pits on its acceptance of the Goods.

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**7. Warranty and Indemnity**

- 7.1. The Supplier warrants that:
- 7.1.1. the Goods are of merchantable quality and free from any defect of material or workmanship;
  - 7.1.2. the Goods comply with all specifications provided by Aus Pits;
  - 7.1.3. any Services are provided with due care and skill;
  - 7.1.4. the Goods or Services are fit for the purpose for which goods or services of a similar kind are commonly supplied and for any other purpose made known to the Supplier;
  - 7.1.5. where the Goods are sold by description or sample, the Goods correspond with that description or sample;
  - 7.1.6. the Goods are free from any lien, charge, or any other encumbrance or security interest;
  - 7.1.7. the Goods or Services do not infringe any patent, trade mark, trade name, copyright or other property right of a third party;
  - 7.1.8. it has obtained and will maintain all necessary licences, permits and consents that may be required in connection with the supply of the Goods or Services;
  - 7.1.9. where the Supplier is certified to AS/NZ ISO 9001 Quality Management Systems for Quality Assurance the supply of Goods or Services or both will be fulfilled in accordance with the terms of that certification; and
  - 7.1.10. it is knowledgeable about, and will comply with, all anti-corruption, anti-bribery, anti-trust and anti-money laundering laws and other criminal laws, rules and regulations which may be applicable to the performance of the Contract.
- 7.2. The warranties set out in clause 7.1 apply in addition to any warranties or guarantees implied by law, and are not a waiver of any such implied warranties.
- 7.3. If the Goods carry a Third Party manufacturer's warranty or guarantee, the Supplier assigns all rights under that warranty to Aus Pits.
- 7.4. The Supplier indemnifies and holds Aus Pits harmless in respect of all claims, losses and expenses in connection with the use of the Goods or Services by Aus Pits or any of its customers, and in respect of any other acts or omissions of the Supplier in connection with its obligations under the Contract. The Supplier's liability to indemnify Aus Pits under this clause 7.4 is reduced proportionally to the extent that Aus Pits has contributed to the claims, losses or expenses.

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**8. Cancellation**

Aus Pits may cancel any Contract or cancel delivery of Goods or part thereof at any time before the whole of the Goods are delivered or Services provided by giving written notice to the Supplier. Aus Pits is not liable for any loss or damage whatever arising from such cancellation. To the extent that any Goods must be returned to the Supplier, the Supplier must pay any costs of removal and return.

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**9. Insurance**

9.1. The Supplier must take out and maintain at its own expense:

9.1.1. workers' compensation insurance;

9.1.2. public liability insurance for not less than \$20,000,000.00 in aggregate;

9.1.3. product liability insurance for not less than \$10,000,000.00 in aggregate;

9.2. If the Supplier supplies Goods, then in addition to those insurances specified in clause 9.1, the Supplier must at its own expense, insure Goods against all loss or damage and take out and maintain product liability insurance for not less than \$10,000,000.00 in aggregate.

9.3. If the Supplier supplies Services, then in addition to those insurances specified in clause 9.1, the Supplier must take out and maintain professional indemnity insurance for not less than \$5,000,000.00 in aggregate.

9.4. All insurances must be current during the period in which Goods or Services are supplied. The Supplier must provide copies of the required current insurances to Aus Pits upon request.

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**10. Confidentiality**

10.1. The Supplier acknowledges that it may obtain knowledge of or access to Aus Pits' proprietary or confidential information or both including the Design Documents, and must:

10.1.1. mark the information as the property of Aus Pits;

10.1.2. keep the information strictly confidential; and

10.1.3. not use that information for any purpose other than fulfilling a Purchase Order.

10.2. All copies of any proprietary or confidential information including the Design Documents in the possession of the Supplier must be returned to Aus Pits on completion of the Purchase Order to which it relates or upon Aus Pits' request.

10.3. The Supplier must not, without the prior written consent of Aus Pits, disclose to any party the existence of this Contract or any contract or dealing between the Supplier and Aus Pits.

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**11. Intellectual Property**

11.1. Unless otherwise expressly stated in the Contract, the parties agree that the ownership of any Intellectual Property in any materials provided by one party to the other under this Contract will not be altered, transferred or assigned.

11.2. The Supplier acknowledges that all specifications, Design Documents and other Intellectual Property supplied by Aus Pits to the Supplier or developed by the Supplier for the purpose of providing goods or services to Aus Pits are the property of Aus Pits. The Supplier irrevocably assigns any such Intellectual Property rights to Aus Pits and must take all reasonable steps to ensure that its officers, employees, contractors and agents comply with this obligation.

11.3. The Supplier is solely responsible for any infringement of the Intellectual Property rights of any third party, and the Supplier indemnifies Aus Pits against any costs, expenses, damages or liability incurred by Aus Pits arising from any such infringement.

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**12. PPSA**

- 12.1. The Supplier acknowledges that this Contract:
- 12.1.1. Constitutes a security agreement for the purposes of the PPSA; and
  - 12.1.2. Creates a Security Interest in all Design Documents (by virtue of the acknowledgement of title in these Terms) and/or all current and after acquired accounts as original collateral of the Supplier.
- 12.2. The Supplier agrees that Aus Pits may register a Security Interest arising under any Contract on the Personal Property Securities Register (the PPSR).
- 12.3. The Supplier agrees that it must:
- 12.3.1. promptly sign any further documents and provide any further information which Aus Pits may reasonably require to:
    - 12.3.1.1. register a Financing Statement or Financing Change Statement in relation to a Security Interest on the PPSR;
    - 12.3.1.2. register any other document required to be registered by the PPSA; and
    - 12.3.1.3. correct a defect in a statement referred to in 12.3.1.1 or 12.3.1.2;
  - 12.3.2. indemnify, and upon demand reimburse, Aus Pits for all expenses incurred in registering a Financing Statement or Financing Change Statement in relation to the Design Documents or accounts in favour of a third party without Aus Pits' prior written consent;
  - 12.3.3. not register a Financing Change Statement in respect of any Security Interest without Aus Pits' prior written consent; and
  - 12.3.4. not register, or permit to be registered, a Financing Statement or a Financing Change Statement in relation to the Design Documents or its accounts in favour of a third party without Aus Pits' prior written consent.
- 12.4. For the avoidance of doubt, the Security Interest extends to the Supplier's present and after acquired accounts as original collateral. Section 55(4) of the PPSA applies in the event that any subsequent interest is registered in by any third party in respect of the Design Documents, or the Supplier's accounts.
- 12.5. The Supplier hereby waives its right to receive any notice under the PPSA (including notice of a verification statement) unless such notice is required by the PPSA and cannot be excluded.
- 12.6. All expressions used in these Terms and the PPSA have the same meanings as when used in the PPSA.
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**13. Dispute Resolution**

- 13.1. If a Dispute arises, either party may notify the other party of the nature and particulars of the Dispute, and the parties must, within 7 days of the delivery of such notice, commence discussions to attempt to resolve the Dispute in good faith, without the necessity of resorting to any formal proceedings.
- 13.2. If the Dispute is not resolved within the next 10 days, either party may refer the Dispute to mediation in accordance with, and subject to, the mediation rules of the Australian Commercial Disputes Centre (ACDC). The parties agree that they must bear the costs of mediation under this clause 13 equally.
- 13.3. If neither party refers the Dispute to mediation within 24 days of delivery of the initial notice of the Dispute, either party may commence court proceedings in respect of the Dispute.

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**14. Enforcement Expenses and Costs**

The Supplier agrees that it must pay to Aus Pits on demand any expenses, fees and disbursements incurred by Aus Pits in recovering any amount owing to it by the Supplier, including any reasonable debt collection agency fees and legal expenses.

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**15. Jurisdiction**

Any Contract between the Supplier and Aus Pits is governed by the laws of the state of Victoria. The parties submit to the non-exclusive jurisdiction of the courts of the State of Victoria and any courts which may hear appeals from those courts in respect of any proceedings in connection with any Contract.

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**16. Severability**

If any of these Terms is invalid or unenforceable in any jurisdiction, that Term must be read down for the purposes of that jurisdiction, if possible, so as to be valid and enforceable, and is otherwise capable of being severed to the extent of the invalidity or unenforceability, without affecting the remaining Terms or affecting the validity or enforceability of that Term in any other jurisdiction.

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**17. Notices**

17.1. A notice, consent, approval or other communication (each a notice) under this Contract must be signed by or on behalf of the party giving it, addressed to the party to whom it is to be given and:

- 17.1.1. delivered to that party's address;
- 17.1.2. sent by pre-paid mail to that party's address; or
- 17.1.3. transmitted by facsimile to that party's facsimile number.

17.2. A notice given to a party in accordance with this clause 17 is treated as having been given and received:

- 17.2.1. if delivered to a party's address, on the day of delivery if a business day, otherwise on the next business day;
  - 17.2.2. if sent by pre-paid mail, on the second business day after posting; or
  - 17.2.3. if transmitted by facsimile to a party's facsimile number and a correct and complete transmission report is received, on the day of transmission if a business day, otherwise on the next business day.
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**18. Amendment**

This Contract may only be amended or supplemented in writing, signed by the parties.

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**19. Waiver**

The non-exercise of or delay in exercising any power or right of a party does not operate as a waiver of that power or right, nor does any single exercise of a power or right preclude any other or further exercise of it or the exercise of any other power or right. A power or right may only be waived in writing, signed by the party to be bound by the waiver.

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**20. Entire Agreement**

This Contract is the entire agreement of the parties on the subject matter. The only enforceable obligations and liabilities of the parties in relation to the subject matter are those that arise out of the provisions contained in this Contract. All representations, communications and prior agreements in relation to the subject matter are merged in and superseded by this Contract.

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**21. Assignment**

The Supplier may not assign or transfer any of its rights or obligations under this Contract without the prior consent in writing of Aus Pits.

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**22. Non-Merger**

No provision of this Contract:

22.1.1. merges on or by virtue of completion of a Purchase Order or termination otherwise of a Contract; or

22.1.2. is in any way modified, discharged or prejudiced by reason of any investigations made or information acquired by or on behalf of Aus Pits.

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**23. Priority**

In the event of any inconsistency, the parties agree that the provisions of the Purchase Order take priority over the provisions of this Contract.

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**24. Amendments**

Aus Pit terms and conditions of purchase are subject to change. All amendments will be posted to Aus Pits' website at <http://www.auspits.com.au/> (the Website) without prior or separate notification. The Supplier agrees to be bound by any amendments to these terms and conditions from the date they are posted to the Website. Aus Pits recommends that the Supplier refers to the Website regularly to review the current terms and conditions of purchase.

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