

## 1. Definitions

In these terms and conditions unless the context requires otherwise:

**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 to the Customer, which arises in accordance with clause 2 of these Terms

**Customer** means the customer whose details appear in the Purchase Order and/or the Invoice

**Financing Statement** has the meaning given to it by the PPSA

**Financing Change Statement** has the meaning given to it by the PPSA

**Goods** means goods which the Customer has agreed to purchase from Aus Pits, details of which are contained in an Invoice

**Invoice** means a tax invoice describing the Goods which Aus Pits is selling to the Customer

**Price** means the price payable in respect of the Goods, as specified in the Invoice

**Purchase Acknowledgement** means a written communication from Aus Pits to the Customer which confirms that Aus Pits accepts the Customer's order

**Purchase Order** means an order for the Goods provided by the Customer to Aus Pits

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

**PPSR** means the Personal Properties Securities Register

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

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

**Website** means the Aus Pits website at <http://www.auspits.com.au/>.

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## 2. Contract

- 2.1. The Customer may order Goods from Aus Pits from time to time by providing a Purchase Order to Aus Pits.
  - 2.2. Following receipt of a Purchase Order Aus Pits will send a Purchase Acknowledgement to the Customer, and upon Aus Pits sending the Purchase Acknowledgement, or otherwise indicating to the Customer an acceptance of the Purchase Order a contract arises between Aus Pits and the Customer for the supply of the Goods at the Price, and otherwise on these Terms, and if applicable, the Terms and Conditions of Credit.
  - 2.3. These Terms apply to all trade and all Contracts between Aus Pits and the Customer.
  - 2.4. Aus Pits will not supply goods to the Customer on any terms or conditions other than these Terms.
  - 2.5. The Customer is deemed to have adopted and accepted these Terms upon taking delivery of any Goods from Aus Pits.
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## 3. Price

- 3.1. The Customer must pay the Price in the manner set out in the Invoice.
  - 3.2. If the Customer fails to make payment of any amount of the Price on the due date, the Customer must pay to Aus Pits interest on the full amount outstanding at the rate equal to 1.5% per month as at the date on which the relevant payment is due to be paid, calculated monthly for the period from the due date until payment is received.
  - 3.3. The Customer may not set off against the Price any amounts due from Aus Pits.
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## 4. Delivery and Force majeure

- 4.1. The Customer may arrange to take delivery of the Goods at its cost from Aus Pits' premises. Alternatively, Aus Pits will deliver (or arrange for delivery of) the Goods to the Customer's address as specified in the Purchase Order and/or the Invoice. The Customer must make all arrangements necessary to take delivery of the Goods whenever they are tendered for delivery. Aus Pits is not responsible for any loss or damage to the Goods during delivery.
- 4.2. Unless specified otherwise in the Invoice, delivery and freight charges are not included in the Price, and are payable by the Customer at the same time as the Price is due to be paid.

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- 4.3. Aus Pits may, in its absolute discretion, charge in addition to the Price any costs incurred as a result of:
- 4.3.1. additional site or travel costs;
  - 4.3.2. storage of Goods; and
  - 4.3.3. delays or downtime in excess of 1.5 hours caused by the Buyer, a third party or inclement weather at a rate of \$250.00 per hour plus GST.
- 4.4. Aus Pits will use all reasonable endeavours to comply with the Customer's particular delivery requirements. Where changes are made to the manufacturing processes or specifications of any Goods, however, the Customer may not cancel the whole or part of an order or claim compensation due to Aus Pits' failure to comply with its delivery requirements or minor variations to the Goods.
- 4.5. If the Customer does not accept delivery of the Goods within seven (7) days of Aus Pits' notification to the Customer that the Goods are ready for delivery, then the Customer acknowledges that Aus Pits will store the Goods (outside if necessary) and the Customer agrees to pay the Invoice for the Goods within the terms of that Invoice plus storage costs which are amended from time to time and set out on the Website.
- 4.6. If for any reason beyond the control of Aus Pits, including without limitation, strike, trade dispute, fire, flood, accident, tempest, death, war declared or undeclared, blockade, governmental or quasi-governmental restraint, unavailability of Goods, loss or destruction of the Goods, delays in transport or an act of God, an order cannot be filled at the time required by the Customer or at all, Aus Pits is not required to supply the Goods to the extent and for the period that it is so unable to supply the Goods, and Aus Pits is not liable to the Customer in respect of any inability on its part to perform its obligations.

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**5. Withholding Supply**

Aus Pits reserves the right to withhold supply of Goods to the Customer, and Aus Pits is not liable for loss or damage resulting directly or indirectly from such action where:

- 5.1. Aus Pits has insufficient goods to fill an order;
- 5.2. the goods specified in the Invoice have been discontinued; or
- 5.3. the Customer has unpaid invoices outstanding in excess of 30 days.

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**6. Exchange of Credit Information**

The Customer agrees that:

- 6.1. Aus Pits may obtain from a credit-reporting agency a credit report containing personal credit information about the Customer in relation to credit provided by Aus Pits;
- 6.2. Aus Pits may exchange information about the Customer with any credit providers named in the Customer's application for credit or in a consumer credit report issued by a reporting agency, for the following purposes:
  - 6.2.1. to assess an application by the Customer for credit;
  - 6.2.2. to notify other credit providers of a default by the Customer;
  - 6.2.3. to exchange information with other credit providers as to the status of the Customer's credit account, where the Customer is in default with other credit providers; and
  - 6.2.4. to assess the credit worthiness of the Customer; and
- 6.3. Aus Pits may give information about the Customer to a credit reporting agency for the following purposes:
  - 6.3.1. to obtain a consumer credit report about the Customer; and/or
  - 6.3.2. to allow the credit reporting agency to create or maintain a credit information file containing information about the Customer.

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**7. Return of Goods**

Subject to the terms of any Warranty and the Customer's rights (if any) under the Australian Consumer law:

- 7.1. the Customer must notify Aus Pits if any Goods delivered under a Contract are defective or are otherwise in breach of these Terms within three (3) days of delivery. If the Customer does not give the requisite notice to Aus Pits within this time frame, the Customer is deemed to have waived its rights in respect of such Goods; and
  - 7.2. if Aus Pits accepts a notice from the Customer in accordance with clause 7.1, Aus Pits' sole obligation is, at its option, either:
    - 7.2.1. to replace the Goods with non-defective Goods; or
    - 7.2.2. to refund to the Customer such part of the Price paid by the Customer which is referable to the defective Goods.
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**8. Retention of Title**

- 8.1. The Customer acknowledges and agrees that property in and title to any Goods remains with Aus Pits and do not pass to the Customer until Aus Pits receives payment in full of all money owing by the Customer to Aus Pits on any account.
- 8.2. Aus Pits and the Customer further agree that until property in and title to the Goods pass to the Customer:
  - 8.2.1. the Customer must hold the Goods as the bailee of Aus Pits;
  - 8.2.2. if required by Aus Pits, the Goods must be kept separate and identifiable;
  - 8.2.3. if the Customer fails to make any payment in accordance with the Contract, Aus Pits may give notice in writing to the Customer to return the Goods to Aus Pits and, if the Customer fails to return the Goods, Aus Pits is hereby authorised to enter the Customer's premises or the premises of any agent at which the relevant Goods are located, without liability for trespass or any resulting damage, and retake possession of the Goods, and either keep or resell the Goods;
  - 8.2.4. the Customer may sell the Goods to a third party in the ordinary course of the Customer's business, provided that:
    - 8.2.4.1. the Customer must hold all proceeds from the sale or disposal of the Goods on trust for Aus Pits in a separate account from the Customer's own money; and
    - 8.2.4.2. the Customer must account to Aus Pits for the proceeds of the sale or disposal of the Goods until the Customer's total indebtedness to Aus Pits is discharged;
  - 8.2.5. in the event that the Customer has sold the Goods to a third party and has defaulted in payment to Aus Pits for such Good, the Customer:
    - 8.2.5.1. agrees to provide full details of the third party to Aus Pits;
    - 8.2.5.2. consents to Aus Pits seeking payment directly from the third party, or Aus Pits entering into a separate contract with the third party for the sale of the Goods;
    - 8.2.5.3. forgoes any beneficial right to payment for the Goods from the third party, and will do all such things necessary to direct the third party to make payment for the Goods directly to Aus Pits; and
    - 8.2.5.4. will remain liable for the entire payment of the Goods until such time as the full debt is paid to Aus Pits, including being liable for any shortfall in payment by the third party.
  - 8.2.6. in the event that the Goods are converted into or intermingled with other products, property in and title to the end products vest in Aus Pits; and
  - 8.2.7. the Customer may not charge the Goods in any way nor grant or otherwise give any interest in the Goods.
- 8.3. If Aus Pits takes possession of any Goods in accordance with clause 8.2.3, the Customer remains liable to pay the Invoice.

9. **Personal Properties Securities Act 2009**

- 9.1. The Customer acknowledges that these Terms together with any Purchase Order and Invoice:
- 9.1.1. constitute a security agreement for the purposes of the PPSA; and
  - 9.1.2. create a Security Interest in all Goods described in the Purchase Order and/or the Invoice and/or all current and after acquired accounts as original collateral of the Customer.
- 9.2. The Customer acknowledges and agrees that Aus Pits may effect a registration on the PPSR in relation to any Security Interest arising under or in connection with any Contract, the Terms and Condition of Sale, or the Terms and conditions of Credit.
- 9.3. The Customer agrees that it must:
- 9.3.1. promptly sign any further documents and/or provide any further information which Aus Pits may reasonably require to:
    - 9.3.1.1. register a Financing Statement or Financing Change Statement in relation to a Security Interest on the PPSR;
    - 9.3.1.2. register any other document required to be registered by the PPSA; and
    - 9.3.1.3. correct a defect in a statement referred to in clause 9.3.1.1 or 9.3.1.2;
  - 9.3.2. indemnify, and upon demand reimburse, Aus Pits for all expenses incurred in registering a Financing Statement or Financing Change Statement on the PPSR or releasing any Goods or accounts charged thereby;
  - 9.3.3. not register a Financing Change Statement in respect of any Security Interest without Aus Pits' prior written consent; and
  - 9.3.4. not register, or permit to be registered, a Financing Statement or a Financing Change Statement in relation to the Goods or its accounts in favour of a third party without Aus Pits' prior written consent.
- 9.4. For the avoidance of doubt, the Security Interest extends to the Customer'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 Goods, or the Customer's accounts.
- 9.5. The Customer 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.
- 9.6. If chapter 4 of the PPSA applies to the enforcement of a Security Interest arising under or in connection with this Agreement, the Customer agrees that the following provisions of the PPSA will not apply to the enforcement of that Security Interest:
- 9.6.1. section 95 (notice of removal of accession), to the extent that it requires Aus Pits to give the Customer a notice;
  - 9.6.2. section 96 (when a person with an interest in the whole may retain an accession);
  - 9.6.3. section 121(4) (enforcement of liquid assets - notice to grantor);
  - 9.6.4. section 125 (obligation to dispose of or retain collateral);
  - 9.6.5. section 130 (notice of disposal), to the extent that it requires Aus Pits to give the Customer a notice;
  - 9.6.6. section 132(3)(d) (contents of statement of account after disposal);
  - 9.6.7. section 132(4) (statement of account if no disposal);
  - 9.6.8. section 142 (redemption of collateral);
  - 9.6.9. section 143 (reinstatement of security agreement).
- 9.7. Where a person is a controller in relation to the Goods, Part 4.3 of the PPSA does not apply to the enforcement of any Security Interest in the Goods by that controller.
- 9.8. Expressions used in these Terms and in the PPSA have the same meanings as when used in the PPSA.

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### 10. Risk

- 10.1. Risk in the Goods passes to the Customer upon the Goods being dispatched for delivery. The Customer accepts all risk involved in the use and/or possession of the Goods.
- 10.2. The Customer must insure Goods against all loss or damage, and Aus Pits' interest must be noted on such insurance policy.
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### 11. Cancellation

Aus Pits may cancel any Contract or cancel delivery of Goods at any time before the Goods are delivered by giving written notice to the Customer. Aus Pits is not liable for any loss or damage whatever arising from such cancellation.

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### 12. Exclusion of Warranties

- 12.1. This clause 12 only applies if the Australian Consumer Law does not apply to the Contract, for example if:
- 12.1.1. the Goods are purchased for the purpose of resupply or for the purpose of being used up or transformed in trade or commerce; or
  - 12.1.2. the Goods are not of a kind ordinarily acquired for personal, domestic or household use or consumption; or
  - 12.1.3. the Price is higher than \$40,000.00.
- Nothing in these Terms is intended to have the effect of excluding or limiting any consumer guarantees given by Aus Pits under the Australian Consumer Law.
- 12.2. Subject to clause 12.1, except as provided in these Terms and any Warranty and to the extent permitted by law, and except where conditions and warranties as to the supply of goods are implied by any statute or rule of law, all implied conditions, guarantees and warranties (including guarantees or warranties as to merchantability and fitness for purpose) are expressed excluded.
- 12.3. Subject to clause 12.1, Aus Pits makes no representation or warranty in relation to any Goods not manufactured by Aus Pits, all of which (to the extent permitted by law) are sold to the Customer "as is". The Customer agrees to look solely to the Warranty (if any).
- 12.4. Warranties in relation to Goods are void if the Goods are not handled in accordance with Aus Pits' recommended handling and installation guidelines which are available on the Website.
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### 13. Limitation of Liability

- 13.1. This clause 13 only applies if and to the extent that the Australian Consumer Law does not apply to the Contract. Clause 12.1 describes Contracts to which the Australian Consumer Law does not apply. Nothing in these Terms is intended to have the effect of limiting Aus Pits' liability under the Australian Consumer Law.
- 13.2. Subject to clause 13.1, Aus Pits accepts no responsibility and is not liable for any direct or indirect, special or consequential loss or damage or injury to any person, corporation or other entity in connection with a Contract or the Goods, howsoever caused.
- 13.3. Aus Pits accepts no responsibility and is not liable for any loss incurred in connection with the storage of any goods by Aus Pits.
- 13.4. To the fullest extent permissible by law and subject to clause 13.1 and the terms of any Warranty, Aus Pits' liability to the Customer is limited to the lesser amount of:
- 13.4.1. the cost of replacing the Goods; and
  - 13.4.2. the cost of repairing the Goods,
- provided always that Aus Pits' liability will not exceed the amount paid or payable by the Customer under the relevant Contract.
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- 13.5. The Customer agrees to handle the Goods only in accordance with Aus Pits' recommended handling and installation guidelines which are available on the Website. Aus Pits accepts no responsibility and is not liable for any damage caused to the Goods whether caused directly or indirectly as a result of the Customer, or its agents, employees or subcontractors failing to handle the Goods in accordance with the recommended handling and installation guidelines.
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**14. Dispute Resolution**

- 14.1. If a dispute arises out of or relating to a Contract (a Dispute), 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.
- 14.2. 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 14 equally.
- 14.3. 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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**15. Intellectual Property**

- 15.1. The Customer acknowledges that no rights to any intellectual property in the Goods (including, without limitation, patent, trademark, design, copyright or plant breeder's rights) are transferred to the Customer.
- 15.2. The Customer must notify Aus Pits immediately if the Customer's use of the Goods results in an actual or alleged infringement of a third party's intellectual property rights.
- 15.3. The Customer is solely responsible for any infringement of the intellectual property rights of any third party resulting from the Customer's use of the Goods, and the Customer must indemnify Aus Pits for any costs, expenses, damages or liability incurred by Aus Pits arising from any such infringement.
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**16. Enforcement Expenses and Costs**

The Customer 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 Customer, including any reasonable debt collection agency fees and legal expenses and any costs incurred by Aus Pits in respect of any order cancelled by the Customer.

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**17. Jurisdiction**

Any Contract between Aus Pits and the Customer 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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**18. 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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**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**

These Terms are to be read in conjunction with the Invoice, and Terms and Conditions of Credit or Commercial Credit Application and these documents constitute the entire agreement between the parties. In the event of a conflict between these Terms and the Invoice, these Terms will prevail.

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21. **Agreement Binding on Successors**

These Terms are binding on the Customer, its successors, and legal personal representative.

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22. **Amendments**

Aus Pit terms and conditions of sale are subject to change. All amendments will be posted to the Website without prior or separate notification. The Customer 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 Customer refers to the Website regularly to review the current terms and conditions of sale.