

## TERMS & CONDITIONS OF TRADE (2/2004)

*To the fullest extent legally possible, all dealings between Brown Brothers Engineers Australia Pty Ltd ABN 79 064 496 813 ("Brown Bros") and any Customer are subject to these Terms & Conditions of Trade ("these Terms") unless otherwise agreed in writing.*

**1. Payment & Interest:** Payment is due within 30 days from the end of month each invoice issues without deduction. Interest will apply on overdue accounts at the rate under the Penalty Interest Rates Act 1983 (Vic), plus 3% calculated monthly in advance.

**2. Property:** a) Property in products shall not pass until payment in full of all monies owed by the Customer to Brown Bros who reserves the right to take possession & dispose of products as it sees fit at any time until full payment b) The Customer grants permission to Brown Bros to enter any property where any product is in order to do so & with such force as is necessary c) Immediately upon delivery the Customer accepts liability for the safe custody of the products & agrees to indemnify Brown Bros for any losses relating thereto d) Upon sale or disposition of any products prior to full payment, the Customer agrees to deposit all proceeds in a separate bank account, agrees not to mix proceeds with any other monies & will forthwith account to Brown Bros therefore notwithstanding that Brown Bros may have granted any credit facility &/or time to pay e) Until payment in full the Customer agrees:- (i) to keep all products as fiduciary for Brown Bros & store them in a manner which shows Brown Bros as owner (ii) only to sell products in the usual course of its business on condition that the Customer holds all proceeds in trust for Brown Bros. (iii) sale on terms, at cost or for less than cost shall not be "in the usual course" f) This clause 3 is not intended to create a charge over any products & shall be read down to the extent necessary to avoid creating a charge g) The Customer agrees that a certificate purporting to be signed by an officer of Brown Bros identifying products shall be conclusive evidence of Brown Bros' title thereto h) If the Customer uses product in any manufacture, construction or process ("process") the Customer agrees to hold such part of proceeds of disposition which relates to the cost of products used in the process, upon trust for Brown Bros. until payment in full of all monies owed to Brown Bros.

**3. Limitation of Liability:** a) The Customer agrees to limit any claim it makes to the cost of supply of equivalent products or the supply of services again b) Brown Bros shall not be liable for any claim loss or expense arising which is made after 14 days from date of delivery of product or services (or at all once products have been unpacked, on-sold or otherwise used or applied) after which there shall be deemed to have been unqualified acceptance c) Brown Bros will not be liable for any contingent consequential direct indirect special or punitive damage arising whether due to Brown Bros' negligence or otherwise & the Customer acknowledges this express limit of liability & agrees to limit any claim accordingly d) No other term, condition, agreement, warranty, representation or understanding whatsoever whether express or implied in any way extending to, otherwise relating to or binding upon Brown Bros, other than these Terms, is made or given.

**4. Exclusions:** a) Sample: Nothing between Brown Bros & the Customer shall be or be deemed a sale by sample b) If Brown Bros publishes material, anything so published which is incompatible with these Terms is expressly excluded c) The Customer will rely on its own knowledge in selecting any product or services & any advice or assistance given for or on behalf of Brown Bros shall be accepted at the Customer's risk & shall not be or be deemed given as expert or adviser nor to have been relied upon by the Customer.

**5. Customer Material etc:** The Customer agrees that (a) it has sole responsibility to ensure that materials, designs, drawings, specifications, procedures etc which are provided by or on behalf of the Customer, to be used by Brown Bros in meeting any orders, are correct and appropriate in every particular (b) any of its materials or property used by Brown Bros in the production of any product or the provision of any services shall be at the Customer's risk in all things and be of merchantable quality and fit for the purpose

**6. Placement of Orders:** The Customer agrees a) if any dispute arising concerning any order (& including any question of identity or authority or any telephone, facsimile e-mail or computer generated order) that the internal records of Brown Bros will be conclusive evidence of what was ordered in all respects b) each order it places shall be & be deemed to be a representation by it, made at the time that it is solvent & able to pay all of its debts as & when they fall due c) failure to pay Brown Bros in accordance with these Terms shall be & be deemed to be conclusive evidence that the Customer had no reasonable grounds for making the representation referred to in 7.b) hereof & that the representations were unconscionable, misleading and deceptive d) when any order is placed, the Customer shall inform Brown Bros of any material facts which would or might reasonably affect the commercial decision by Brown Bros to accept the order &/or grant credit in relation thereto & any failure to do so by or on behalf of the Customer shall create & be deemed to create an inequality of bargaining position, shall constitute & be deemed to constitute the taking of an unfair advantage of Brown Bros & to be unconscionable, misleading and deceptive.

**7. Purchase Price:** All sales are made by Brown Bros at its ruling price at the time of delivery b) Any sales tax & government imposts (including any GST or equivalent) will be to the Customer's account. c) Brown Bros' price lists exclude any sales tax & government imposts (including any GST or equivalent) unless expressly noted thereon.

**8. Delivery:** The Customer acknowledges & agrees that a) Brown Bros accepts no responsibility or duty for delivery, but may elect to arrange delivery at its discretion & without any liability & at the Customer's costs & responsibility in all things b) Brown Bros reserves the right to charge for any delivery c) The Customer shall be deemed to have accepted delivery & liability for the products immediately Brown Bros notifies the Customer that any products are ready for collection or they are delivered to a carrier or to the Customer's business premises or site whether attended or not d) A certificate purporting to be signed by an officer of Brown Bros confirming delivery shall be conclusive evidence of delivery as shall any signed delivery docket e) Brown Bros will not be liable for delay, failure or inability to deliver any products or perform any services f) Once the Customer is notified products are ready for collection or delivery, the Customer agrees to pay all costs of Brown Bros in holdings those products for the Customer.

**9. Variation:** Variation or cancellation of these Terms or orders must be agreed in writing.

**10. Variations in Quantity:** The Customer agrees to accept a permissible variation of quantity provided the variation does not exceed + or - 10% of the quantity ordered.

**11. Returns:** If Brown Brothers elects to take back product it must be in saleable Condition, upon terms agreed & a re-stocking fee of not less than 20% will apply.

**12. Products and Services:** a) Brown Bros disclaims any responsibility or liability relating to any products or services which are i) made or performed to designs, drawings &/or specifications &/or procedures etc or with materials which are provided or approved (whether in part or fully) by or on behalf of the Customer ii) utilised, stored, handled or maintained incorrectly or inappropriately b) the Customer agrees to check all products and services for compliance with all applicable standards & regulatory bodies before use, on-sale or application & to use or apply same in accordance therewith and with all manufacturers and/or Brown Bros recommendations & directions as well as with good commercial practice.

**13. Other Terms & Conditions:** No terms & conditions sought to be imposed by the Customer upon Brown Bros shall apply.

**14. Attornment:** The Customer hereby irrevocably appoints any solicitor of Brown Bros as its attorney in all things relative to these Terms and the Customers obligations thereunder

**15. Defaults:** a) Upon any default or breach hereof by the Customer, Brown Bros may (inter alia) retain all monies paid &/or cease further deliveries & recover from the Customer all loss of profits arising &/or at its discretion take immediate possession of any product not paid for, without prejudice to any other of its rights & without being liable in any way to any party b) The customer agrees not to commence or continue or permit to be commenced or continued through it any suit or action against Brown Bros whilst the customer is in default under any part of these Terms or in any of its dealings with Brown Bros

**16. Severability:** Any part hereof being a whole or part of a clause, shall be capable of severance without effecting any other part of these Terms.

**17. Customer Restructure:** The Customer agrees to notify Brown Bros in writing within 7 days, of any a) change in its structure or management including any change in director, shareholder or management or change in partnership or trusteeship b) any sale of disposition of any part of its business or trading assets to any third party who intends to engage in trade or business employing any part of those assets.

**18. Jurisdiction:** The Customer agrees that all contracts made with Brown Bros shall be deemed to be made in the State nominated by Brown Bros & agrees to submit to the jurisdiction of the appropriate Courts nominated by Brown Bros.

**19. Credit Limit:** If Brown Bros grants any credit facility or nominates any credit limit, this is an indication only of its intention at the time. Brown Bros can vary or withdraw any credit facility at any time at its discretion & without any liability to the Customer or any other party.

**20. Waiver:** If Brown Bros elects not to exercise any rights arising as a result of any breach of these Terms it shall not be a waiver of any rights relating to any subsequent or other breach.

**21. Notice:** The Customer agrees that it will be deemed to have notice of any change to these Terms, immediately they are adopted by Brown Bros & whether or not the Customer has actual notice thereof. The Customer shall be bound by any terms & conditions of sale adopted by Brown Bros immediately they are so adopted & notwithstanding any other purported or pre-existing terms & conditions of Brown Bros.

**22. Indemnity:** The Customer indemnifies Brown Bros against any claim or loss arising from or related in any way to any a) contract or transaction between Brown Bros & the Customer or anything arising therefrom or b) breach of these Terms c) transaction between Brown Bros & any third party who is engaged in any dealings which are directly or indirectly beneficial to the Customer and including any franchisor, franchisee, licensor or licensee of the Customer and any undisclosed purchaser of any asset of the Customer who has dealings with Brown Bros.

**23. Security For Payment:** The Customer agrees on written request to charge in favour of Brown Bros (i) by way of a fixed charge all its books of account, financial records, goodwill, documents of title & current & later acquired real property & intellectual property; & (ii) by way of a floating charge, the whole of the Customers other undertaking, property & assets, with payment of all monies owed to Brown Bros

**24. Forward Orders:** If the Customer places a forward order, the Customer agrees a) to pay for so much of any order as is from time to time invoiced by Brown Bros b) no delay or failure to fulfil any part of any order shall entitle the Customer to cancel or vary any order or delay or reduce any payment; c) to pay any GST applicable to any part of any forward order

**25. Force Majeure:** Brown Bros will not be in default or in breach of any contract with the Customer for anything which arises as a result of Force Majeure. Force Majeure means beyond the reasonable control of Brown Bros and includes any strike or lock-out.

**26. Insolvency:** a) If the Customer commits or is involved in any act of insolvency, it agrees that this should be deemed a default under these terms b) An act of insolvency is deemed to include bankruptcy, liquidation, receivership, administration or the like.

**27. Packaging:** The Customer agrees that it is responsible for ensuring that all product used for packaging etc. complies fully with all relevant laws, regulations and standards etc.

**28. Tooling:** The Customer agrees that all tooling, material or intellectual property employed in the preparation for or production of any products or provision of any services will be and remain the property of Brown Bros notwithstanding any contribution by the Customer thereto.

**29. Industrial and Intellectual Property:** a) The Customer warrants and agrees that at all material times it will have all necessary industrial and intellectual property rights in any product or services it requests of Brown Bros. b) Brown Bros. will be and be deemed the owner of any intellectual property it creates or contributes to. Delivery thereof to the Customer or at the Customer's direction will only be and be deemed to be a licence to use any such intellectual property but only after all monies due to Brown Bros. from the Customer are paid in full.

**30. Pallets:** The Customer agrees to procure the return of all pallets provided by Brown Bros to the Customer or any third party at the request of the Customer and to forthwith indemnify Brown Bros for the replacement cost of any pallet not so returned within 30 days.

**31. Recovery Costs:** The Customer will pay to Brown Bros the costs & expenses incurred by it or its solicitors, legal advisers, mercantile agents & other parties acting on Brown Bros' behalf in respect of anything instituted or being considered against the Customer whether for debt, possession of any products or otherwise.