



TERMS & CONDITIONS

DATED THE FIRST DAY OF FEBRUARY 2016

McBerner's Pty Ltd

ABN 56 060 984 107

McBerns Pty Ltd

ABN 56 060 984 107 (The Manufacturer/Seller)

STANDARD TERMS AND CONDITIONS OF CONTRACT

(MANUFACTURER TO CUSTOMER OR CONTRACTOR)

1. Preliminary

These are McBerns Pty Ltd (**the “Seller”**) Standard Terms and Conditions, which will apply to every contract whereby you as the Customer (**the “Customer”**) order and purchase the items of the Products (as set out in the Order) from the Seller.

2. The Contract

2.1. The Terms of the Contract between the Seller and the Customer for the sale and supply of items of the Products Ordered are contained collectively in all of the following:

- (a) the duly completed Order;
- (b) these Standard Terms and Conditions;
- (c) the Acceptance; and
- (d) the relevant parts of the Seller’s then Current Price List.

2.2. The Contract date is the date the Seller Communicates acceptance to the Customer. An Order once placed where Acceptance has been Communicated may only be cancelled by the Customer if the Seller agrees in writing to its cancellation. Cancellation may be conditional on the Customer paying the costs and expenses incurred by the Seller up to the date of cancellation. The Customer must provide its ABN number on the completed Order Form unless already provided.

2.3. Where the Products have to be made or adapted to the Customer’s particular specifications or requirements then the Customer must also pay for all work in progress up to the date of cancellation.

3. Defined Terms

In these Standard Terms and Conditions and any related documents, unless the context otherwise requires, the following words and phrases mean:

“**ABN**” means Australian Business Number.

“**Acceptance**” means the occurrence of any one of the following:

- (a) the signed Acceptance by the Seller of the Order; or
- (b) the Acceptance by the Seller of a deposit for the Products in which event the Acceptance will be deemed Communicated without any further steps being required; or
- (c) the Delivery of the Products in which event the Acceptance will be deemed Communicated without any further steps being required.

“Communicates” means all tenses of the verb and any act of communication and includes written communications, electronic communications and facsimile communications but does not include oral communications unless confirmed in writing electronically or by facsimile.

“Contract” means this contract for the sale and purchase of the Ordered Products.

“Current Price List” means the price list published by the Seller from time to time as the current prices of the Products to its Customers, exclusive of GST.

“Delivery” means delivery at 11 Tectonic Crescent Kunda Park, Qld, 4556 or such other place as the Seller and the Customer may in writing agree as the place of delivery for the Products Ordered.

“GST” means Goods and Services Tax.

“GST Act” means *A New Tax System (Goods & Services Tax) Act 1999 (Cth)*.

“Installation” means (where applicable) the installation of the Products at the site of installation as agreed in writing by the Seller and the Customer.

“Intellectual Property” means all copyright in all designs, plans and drawings of the Products, all Designs whether registered or unregistered, all trade marks and logos whether registered or unregistered, all patents granted and patents pending and all know-how and information pertaining to the manufacture of the Products.

“Order” means an Order placed by the Customer on an Order Form for the purchase of an item or items of the Products duly completed and signed by the Customer and Communicated to the Seller containing:

- (a) the Price of the items of Products Ordered;
- (b) the Customer’s full details; and
- (c) the full details of the Products Ordered.

“Order Form” means the Seller’s Order Form which may be amended from time to time.

“Parties” means the Seller and the Customer.

“Person” means any individual, company or entity not being a Party and not being an employee of a Party.

“Price” means the purchase price of the Products exclusive of GST determined by reference to the Seller’s Current Price List and as set out in the Order.

“Products Ordered” means the Products ordered by the Customer and identified on the Order as signed by the Customer.

“Specifications” means any Seller’s specifications applicable to an item of the Products and where applicable any specifications for Installation.

“Tax Invoice” means a tax invoice that complies with the GST Act.

4. Price

4.1. The Seller agrees to sell and the Customer agrees to buy the Products ordered by the Customer for the Price. The Price must be paid within 30 days of invoice sent or at such other time as the Seller and the Customer may in writing agree.

4.2. The Seller will render a Tax Invoice to the Customer on or prior to Delivery. This may be emailed or mailed to the Customer at the Customer’s place of business. The Customer must provide the Seller with its ABN number at the time the Customer places its Order on the Order Form.

5. Price and Partial Delivery

5.1. Where there is partial Delivery of the Products, then the Seller will be entitled to be paid by the Customer that proportion or percentage of the Price that relates to those Products delivered on that partial Delivery.

6. Warranties

6.1. The Seller warrants to the Customer that:

6.1.1. the Products will be manufactured by the Seller using good and suitable materials and components;

6.1.2. the Products Ordered as manufactured will be fit and merchantable having regard to the purposes (if any) Communicated by the Customer to the Seller at or simultaneously with the placement of the Order. If no purposes have been Communicated, the Products will be fit and merchantable for their general purposes having regard to the nature of the Products Ordered;

6.1.3. the Products Ordered will conform in all material respects with any Specifications;

6.1.4. the Seller will replace or remedy any faulty part or component of any item of the Products Ordered that the Customer Communicates to the Seller as faulty or requiring replacement within three (3) months of Delivery;

- 6.1.5. the Products Ordered will be manufactured so that they are safe if properly used for their intended purpose;
- 6.1.6. where the Products Ordered are to be Installed by the Customer, that those Products will be suitable and capable of being so installed in accordance with the Specifications.
- 6.2. The Seller will not be responsible for any damage to the Products which occurs at any time after Delivery unless the Customer can provide reasonable evidence that the damage was a direct result of any fault or defect:
 - 6.2.1. in the manufacture of the Products Ordered;
 - 6.2.2. in the materials or components used in the manufacture of the Products Ordered;
 - 6.2.3. in the packing of the Products Ordered;
 - 6.2.4. in the products ordered which the Customer can show was caused prior to Delivery.
- 6.3. The Seller will not be liable to the Customer for any damage or destruction of the Products caused by:
 - 6.3.1. any failure by the Customer to properly or safely store the Products;
 - 6.3.2. any failure by the Customer to properly move the Products after Delivery;
 - 6.3.3. any failure by the Customer to properly install the Products;
 - 6.3.4. any failure by the Customer to use the Products for their purpose;
 - 6.3.5. any use by the Customer or any other Person of the Products contrary to their specifications;
 - 6.3.6. any act or omission by the Customer or any Person after Delivery;
 - 6.3.7. any failure to properly repair or maintain the Products.
- 6.4. Subject to the express terms of this Contract and to any statute or regulations (State or Federal) which cannot be excluded contractually, the Parties expressly agree that:
 - 6.4.1. the Seller does not accept any liability whatsoever in respect of any loss or damage (including injury, death, loss of profits or repudiation, economic loss and consequential loss or other damage) however caused (including the Seller's negligence) which may be suffered or incurred or which may arise either directly or indirectly in respect of any use of the Products;
 - 6.4.2. all Warranties implied by any Statute that can be excluded are hereby expressly excluded.

6.5. Where any Person suffers loss, damage or injury (including personal injury) as a direct or indirect result of any failure referred to in Clause 6.3 above or as a direct or indirect result of any misuse of the Products then the Customer hereby indemnifies the Seller against any liability (including costs) of the Seller to that Person.

7. Delivery of the Products

7.1. The Seller will Deliver the Products safely and securely packed.

7.2. The Customer or the Customer's representative must be present on Delivery to inspect the Products Ordered and sign for acceptance of the Products on Delivery.

8. Payment

8.1. Unless otherwise agreed in writing, payment for the Products Ordered must be made within 30 days delivery of Goods.

8.2. Where payment is made with a credit card facility, the merchant fee will be decided at time of purchase.

8.3. The Seller always reserves the right at any time to require whole or partial payment of the Price by the Customer at any time before delivery.

8.4. Where the whole or partial payment of the Price is required by the Seller before Delivery, any failure by the Customer to make such payment when required by the Seller entitles the Seller to:

8.4.1. suspend manufacture of the Products Ordered; and/or

8.4.2. after seven (7) days' prior written notice to the Customer, terminate this Contract and claim any damages. Damages will include the actual cost of work in progress up to termination plus the Seller's loss of gross profit on the Products Ordered.

9. Variations

9.1. The Seller does not agree to any variations to this Contract. This Contract does not oblige the Seller to accept any variation in the Products to be supplied.

9.2. The Seller will however (without obligation) consider any variations sought by the Customer.

9.3. The terms of any variation will not be binding unless and until they are agreed in writing and signed by the Seller and the Customer. They will then and only then constitute a variation to this Contract.

- 9.4. If no agreement is reached as to a sought variation, then the Products will be made and supplied in accordance with the terms of the Contract and the Customer will accept the Products as so made and ordered.
- 9.5. Where the Customer has requested a variation to the Products and such variation delays Delivery, the Seller reserves the right to invoice the Customer and receive payment on the agreed date of Delivery.

10. Time of Delivery and Delay

- 10.1. The Seller will take all reasonable commercial endeavours to ensure that the Products Ordered are Delivered on the agreed date for Delivery set out in the Order.
- 10.2. Where there is a schedule of times for Delivery referred to in the Order then the Seller will take all reasonable commercial endeavours to ensure that the Products are Delivered on the agreed scheduled dates for Delivery.
- 10.3. If the Seller is unable to Deliver the Products to the Customer by the date or dates of Delivery set out in the Order, then the Seller must promptly notify the Customer in writing to that effect with estimates of the revised time for the Delivery of the Products Ordered.
- 10.4. Provided the Seller has used all reasonable commercial endeavours to Deliver the Products to the Customer in accordance with the date or dates for Delivery in the Order, the Seller will not be liable to the Customer for any delay in Delivery of the Products or any part thereof.
- 10.5. The Customer acknowledges that the Seller may be dependent upon various supplies of materials and components from third parties in order to be able to Deliver the Products to the Customer by the agreed date or dates for Delivery. Any delay in the manufacture of the Products Ordered caused by any shortage or unavailability of materials or components may give rise to a delay in Delivery and the Customer acknowledges and agrees that in such circumstances the Seller will not thereby be in breach of its Delivery obligations.
- 10.6. The Seller reserves the right to invoice the Customer and receive payment for the Products even though Delivery has not occurred through the Customer's failure to take Delivery of the Products Ordered.
- 10.7. If the Customer fails to pay for the Products Ordered then the Seller may sue the Customer for the Price as a debt immediately due and owing to the Seller by the

Customer, even though Delivery has been suspended because of the Customer's failure to pay the Price when due.

11. Title

- 11.1. Unless otherwise agreed in writing by the Seller and the Customer, title in the Products Ordered will not pass to the Customer until the Products are fully paid for by the Customer. Where the Products have been Delivered to the Customer prior to having been fully paid for, the Customer will hold the Products until full payment has been made as a bailee at will for the Seller.
- 11.2. Where the Products are to be Installed by the Customer, the Customer acknowledges and agrees that in the event that payment is not made in accordance with this Contract then no Installation will take place without the Seller's prior written consent until the Products have been fully paid for.
- 11.3. The Parties agree that the full risk of damage, loss or destruction to the Products will pass to the Customer on Delivery of the Products even if title has not passed to the Customer at the time of such damage, loss or destruction. In the event that the Products are damaged, lost or destroyed after Delivery but before title has passed, the Customer will continue to be liable to the Seller to pay any balance of the Price.

12. Suspension of Delivery

- 12.1. The Seller may suspend Delivery of the Products without being in breach of this Contract if:
 - 12.1.1. where the Customer must make a pre-payment or instalment and fails to pay any pre-payment or installment of the Price for Products Ordered until such payment is made;
 - 12.1.2. the Customer fails to inspect the Products Ordered promptly upon being required by the Seller to do so but only until such inspection occurs;
 - 12.1.3. whilst any dispute between The Customer and the Seller remains unresolved;
 - 12.1.4. the Customer owes any money to the Seller on any account whatsoever;
 - 12.1.5. in the reasonable opinion of the Seller, the Customer will be unable to pay the Price or balance of the Price to the Seller.
- 12.2. The Seller must give 7 days' prior written notice to the Customer of its intention to suspend Delivery and the reasons for such suspension.

13. Installation

- 13.1. Unless otherwise agreed in writing, Installation of the Products Ordered is not part of this Contract. Installation of the Products Ordered is the Customer's responsibility and the Seller will not be responsible for any damage done to the Products Ordered during, or as a consequence of, their Installation or during or as a consequence of the Customer taking Delivery of the Products Ordered at the site of Installation and attempting to Install them.
- 13.2. In the case of the product being installed by the Seller, the Buyer, prior to the agreed upon delivery of the product, shall be responsible for preparing the site for installation of the Product.
- 13.3. If the condition of the site has changed subsequent to the pre installation inspection and this change results in the site being unsuitable for the Product we may amend or cancel the order and charge a \$500 call out fee in respect of time lost.
- 13.4. We will not be liable for any loss or damage (including liability for death or injuries to persons and loss of or damage to property) caused either directly or indirectly by the conditions and physical characteristics of the site.
- 13.5. We will perform the Installation works in accordance with any applicable law or safety requirement.
- 13.6. We will in the course of carrying out the installation works: take reasonable measures necessary to protect people and property at the premises: avoid unnecessary interference with the passage of people and vehicles at the premises; and prevent nuisance and unreasonable noise and disturbance. If we damage property at the premises, we will promptly rectify the damage and pay any compensation the law requires.

14. Ownership of Intellectual Property

- 14.1. Nothing in the Contract between the Parties gives the Customer any interest or right to the Intellectual Property in the Products Ordered which Intellectual Property the Customer acknowledges is exclusively owned by the Seller.
- 14.2. All copyright in all manuals, diagrams, drawings, plans and specifications that are provided to the Customer with the Products Ordered remains the sole and exclusive property of the Seller and such items are not to be reproduced without prior written permission of the Seller.

15. Inspection of the Products

- 15.1. It is the Customer's obligation to inspect the Products Ordered at such reasonable dates, times and places as the Seller notifies in writing to the Customer.
- 15.2. If the Customer fails to inspect the Products Ordered within seven (7) days of written notification from the Seller that the Products Ordered are ready to be inspected, then the Customer will be deemed to have accepted the Products, waived all rights of inspection and consequent to inspection to have waived all rights in respect to all visible defects and to have those defects rectified.
- 15.3. If on inspection the Customer does not accept the Products Ordered as being in accordance with the Contract, then the Customer shall within two (2) days of such inspection, send to the Seller by facsimile, email or letter full details of all rectifications the Customer requires in respect to those defects. If the Customer fails to do this within the said two (2) days of inspection, then notwithstanding that the Customer has orally or informally failed to notify the Seller of the defects, the Customer will be deemed to have accepted the Products pursuant to the inspection and to have waived the Customer's rights to have such defects rectified.
- 15.4. Where the Customer provides to the Seller the full details of rectification work consequent upon inspection within the time provided, the Seller will, if it accepts that such defects exist and require rectification, promptly at its own cost carry out all those requirements so as to cure the defects in the Products Ordered. Where the Products Ordered do not, because of such defects, comply with any Specifications, the Seller must rectify the Products Ordered so that they comply with the terms of the Specifications.
- 15.5. If in the reasonable opinion of the Seller the details of rectification sought by the Customer are outside the Specifications, the Seller shall within two working days of receiving full details of rectification inform the Customer in writing or by facsimile or email of those parts of the details of rectification which the Seller says are not required in order for the Products Ordered to comply with the Specifications.
- 15.6. If The Customer and the Seller cannot agree on the details of rectification then either Party may require the Products to be returned to the Seller and the cost of such return and the risk involved will be borne by the Customer.

16. Waiver

- 16.1. The failure by either the Customer or the Seller to exercise or enforce any rights conferred hereunder shall not, except where there is an express term to the contrary, be construed or deemed to be a waiver of any such right nor operate so as to bar the exercise or enforcement thereof at any time or other times thereafter.
- 16.2. A waiver of any right must be in writing signed by the Party waiving that right.

17. Termination

- 17.1. If the Customer:
- 17.1.1. enters into a deed of arrangement or commits an act of bankruptcy or compounds with its creditors or becomes insolvent, or has a trustee appointed to any of its assets or has a summons for its winding up filed, goes into liquidation or has a receiver appointed to the whole or any part of its assets or if an Administrator is appointed under Section 436A of the *Corporations Act 2001*; or
- 17.1.2. is in breach of any of the terms and/or conditions of this Contract then,

18. the Seller may immediately stop manufacture of any of the Products, stop any of the Products in transit, suspend Delivery and any further performance of this Contract and/or any other agreement with the Customer without prejudice to any of the Seller's other rights and remedies and without being in breach of any of the Seller's obligations under this Contract.

- 18.1. The Seller may also upon the happening of any event or circumstance in Clause 17.1 by notice in writing to the Customer terminate this contract. Such termination will be in addition to and will not affect or modify in any way the Seller's legal rights to seek damages or other relief.

19. Notice

- 19.1. Any notice required to be served must be in writing and may be served personally by facsimile or by email addressed to the recipient. A notice served by pre-paid post shall be deemed served two days after posting (whether received or not) to the recipient's registered office or place of business.
- 19.2. A notice served by email or by facsimile must be addressed to the Party concerned at its facsimile or email address and shall be deemed received the day after sending. An email or facsimile report shall be conclusive evidence of it having been sent and served.

20. Governing Law

- 20.1. This Contract shall be governed by and construed and interpreted in accordance with the laws of the State or Territory of Australia in which the Seller has its principal place of business.
- 20.2. Any dispute will be subject to the exclusive jurisdiction of the Courts of that State or Territory.

21. Interpretation

- 21.1. Where words importing the singular number or the plural number are used they include the plural number and singular number respectively and where words are used importing the neuter, female or masculine gender they include if applicable the masculine, feminine or neuter gender respectively.
- 21.2. Any reference to the Seller or the Customer includes their respective lawful successors and assigns.
- 21.3. The reference to any statute, by-law, code of conduct or standard is a reference to any and all applicable amendments, variations or replacements thereof.

22. Disputes

- 22.1. In the event of any dispute arising between the Seller and the Customer as to any Party's rights or obligations under the Contract or as to whether either Party has breached or failed to meet its obligations then both Parties agree to meet together and in good faith seek to resolve the dispute.
- 22.2. If notwithstanding this clause the dispute remains unresolved either Party may take such actions as it thinks fit to enforce its rights against the other.

23. Tendering

- a) The Tenderer has no right or entitlement for time or financial compensation whatsoever (including, without limitation, to a claim for economic loss or loss of opportunity) arising from or with respect to or by reason of any error, omission, or misrepresentation (express or inferred) in the Quotation Documentation.

24. Whole Agreement

- 24.1. The content of the documents in Clause 2 constitute the whole of the terms of this Contract. Except to the extent the law provides as mandatory requirement a term to be implied, no term is to be implied into this Contract.

24.2. All prior representations, undertakings and statements made by either Party to the other and not expressly included in this Contract are hereby expressly excluded from this Contract and each Party expressly hereby states that it has not relied in any way on such prior representations, undertakings or statements in deciding to enter into this Contract.