

## Burnback Welding Equip Services - Terms & Conditions of Trade

### 1. Definitions

- 1.1 **"Burnback"** means West Coast Trading Pty Ltd (ABN: 67 635 639 995) T/A Burnback Welding Equip Services, its successors and assigns or any person acting on behalf of and with the authority of West Coast Trading Pty Ltd (ABN: 67 635 639 995) T/A Burnback Welding Equip Services.
- 1.2 **"Confidential Information"** means information of a confidential nature whether oral, written or in electronic form including, but not limited to, this Contract, either party's intellectual property, operational information, know-how, trade secrets, financial and commercial affairs, Contracts, client information (including but not limited to, **"Personal Information"** such as: name, address, D.O.B, occupation, driver's license details, electronic contact (email, Facebook or Twitter details), medical insurance details or next of kin and other contact information (where applicable), previous credit applications, credit history) and pricing details.
- 1.3 **"Contract"** means the terms and conditions contained herein, together with any quotation, order, invoice or other document or amendments expressed to be supplemental to this Contract.
- 1.4 **"Cookies"** means small files which are stored on a user's computer. They are designed to hold a modest amount of data (including Personal Information) specific to a particular client and website and can be accessed either by the web server or the client's computer. **If the Customer does not wish to allow Cookies to operate in the background when using Burnback's website, then the Customer shall have the right to enable / disable the Cookies first by selecting the option to enable / disable provided on the website, prior to making enquiries via the website.**
- 1.5 **"Customer"** means the person/s, entities or any person acting on behalf of and with the authority of the Customer requesting Burnback to provide the Services as specified in any proposal, quotation, order, invoice, or other documentation, and:  
(a) if there is more than one Customer, is a reference to each Customer jointly and severally; and  
(b) if the Customer is a partnership, it shall bind each partner jointly and severally; and  
(c) if the Customer is on behalf of or part of, a Trust, shall be bound in its own capacity as a trustee; and  
(d) includes the Customer's executors, administrators, successors, and permitted assigns.
- 1.6 **"Goods"** means all Goods or Services supplied by Burnback to the Customer at the Customer's request from time to time (where the context so permits the terms 'Goods' or 'Services' shall be interchangeable for the other).
- 1.7 **"GST"** means Goods and Services Tax as defined within the "A New Tax System (Goods and Services Tax) Act 1999" (Cth).
- 1.8 **"Price"** means the Price payable (plus any GST where applicable) for the Goods as agreed between Burnback and the Customer in accordance with clause 6 below.

### 2. Acceptance

- 2.1 The parties acknowledge and agree that:  
(a) they have read and understood the terms and conditions contained in this Contract; and  
(b) the parties are taken to have exclusively accepted and are immediately bound, jointly and severally, by these terms and conditions if the Customer places an order for or accepts delivery of the Goods.
- 2.2 In the event of any inconsistency between the terms and conditions of this Contract and any other prior document or schedule that the parties have entered into, the terms of this Contract shall prevail.
- 2.3 Any amendment to the terms and conditions contained in this Contract may only be amended in writing by the consent of both parties.
- 2.4 The Customer acknowledges and accepts that the Supply of Goods:  
(a) on credit shall not take effect until the Customer has completed a credit application with Burnback and it has been approved with a credit limit established for the account. In the event that the supply of Goods requested exceeds the Customer's credit limit and/or the account exceeds the payment terms, Burnback reserves the right to refuse delivery; and  
(b) for accepted orders may be subject to availability and if, for any reason, Goods are not or cease to be available, Burnback reserves the right to vary the Price with alternative Goods as per clause 6.2 subject to prior confirmation and agreement of both parties. Burnback also reserves the right to halt all Services until such time as Burnback and the Customer agree to such changes. Burnback shall not be liable to the Customer for any loss or damage the Customer suffers due to Burnback exercising its rights under this clause.
- 2.5 Any advice, recommendation, information or assistance provided by Burnback in relation to Goods or Services supplied is given in good faith to the Customer, or the Customer's agent and is based on Burnback's own knowledge and experience and shall be accepted without liability on the part of Burnback. Where such advice or recommendations are not acted upon then Burnback shall require the Customer or their agent to authorise commencement of the Services in writing. Burnback shall not be liable in any way whatsoever for any damages or losses that occur after any subsequent commencement of the Services.
- 2.6 These terms and conditions may be meant to be read in conjunction with Burnback's Hire Form, and where the context so permits, the terms 'Goods' or 'Services' shall include any supply of Equipment, as defined therein.
- 2.7 Electronic signatures shall be deemed to be accepted by either party providing that the parties have complied with Section 10 of the Electronic Transactions Act 2011 or any other applicable provisions of that Act or any Regulations referred to in that Act.

### 3. Errors and Omissions

- 3.1 The Customer acknowledges and accepts that Burnback shall, without prejudice, accept no liability in respect of any alleged or actual error(s) and/or omission(s):  
(a) resulting from an inadvertent mistake made by Burnback in the formation and/or administration of this Contract; and/or  
(b) contained in/omitted from any literature (hard copy and/or electronic) supplied by Burnback in respect of the Services.
- 3.2 In circumstances where the Customer is required to place an order for Goods, in writing, or otherwise as permitted by these terms and conditions, the Customer is responsible for supplying correct order information such as, without limitation, measurements and quantity, when placing an order for Goods (whether they are made to order Goods or not) ("**Customer Error**"). The Customer must pay for all Goods it orders from Burnback notwithstanding that such Goods suffer from a Customer Error and notwithstanding that the Customer has not taken or refuses to take Delivery of such Goods. Burnback is entitled to, at its absolute discretion to waive its right under this sub-clause in relation to Customer Errors.

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### 4. Change in Control

- 4.1 The Customer shall give Burnback not less than fourteen (14) days prior written notice of any proposed change of ownership of the Customer and/or any other change in the Customer's details (including but not limited to, changes in the Customer's name, address, contact phone or fax number/s, change of trustees, or business practice). The Customer shall be liable for any loss incurred by Burnback as a result of the Customer's failure to comply with this clause.

### 5. On-line ordering

- 5.1 The Customer acknowledges and agrees that:
- (a) Burnback do not guarantee the website's performance; and
  - (b) display on the website does not guarantee the availability of any particular Goods; therefore, all orders placed through the website shall be subject to confirmation of acceptance by Burnback.

### 6. Price and Payment

- 6.1 At Burnback's sole discretion, the Price shall be either:
- (a) as indicated on any invoice provided by Burnback to the Customer upon placement of an order for Goods; or
  - (b) Burnback's quoted Price (subject to clause 6.2) which will be valid for the period stated in the quotation or otherwise for a period of seven (7) days.
- 6.2 Burnback reserves the right to change the Price if a variation to Burnback's quotation is requested. Any variation from the plan of scheduled Services or specifications of the Goods (including, but not limited to, any variation in details, sizes, quantities and delivery instructions provided by the Customer or as a result of increases to Burnback in the cost of taxes, levies, materials and labour which are out of Burnback's control etc) will be charged for on the basis of Burnback's quotation, and will be detailed in writing, and shown as variations on Burnback's invoice. The Customer shall be required to respond to any variation submitted by Burnback within ten (10) working days. Failure to do so will entitle Burnback to add the cost of the variation to the Price. Payment for all variations must be made in full at the time of their completion.
- 6.3 Time for payment for the Goods being of the essence, the Price will be payable by the Customer on the date/s determined by Burnback, which may be:
- (a) on delivery of the Goods; or
  - (b) by way of instalments/progress payments in accordance with the Burnback's payment schedule; or
  - (c) thirty (30) days following the end of the month in which a statement is posted to the Customer's address or address for notices; or
  - (d) the date specified on any invoice or other form as being the date for payment; or
  - (e) failing any notice to the contrary, the date which is seven (7) days following the date of any invoice given to the Customer by Burnback.
- 6.4 Payment may be made by cash, electronic/on-line banking, credit card (a surcharge may apply per transaction), or by any other method as agreed to between the Customer and Burnback.
- 6.5 Burnback may in its discretion allocate any payment received from the Customer towards any invoice that Burnback determines and may do so at the time of receipt or at any time afterwards. On any default by the Customer Burnback may re-allocate any payments previously received and allocated. In the absence of any payment allocation by Burnback, payment will be deemed to be allocated in such manner as preserves the maximum value of Burnback's Purchase Money Security Interest (as defined in the PPSA) in the Goods.
- 6.6 The Customer shall not be entitled to set off against, or deduct from the Price, any sums owed or claimed to be owed to the Customer by Burnback nor to withhold payment of any invoice because part of that invoice is in dispute. Once in receipt of an invoice for payment, if any part of the invoice is in dispute, then the Customer must notify Burnback in writing within three (3) business days, the invoice shall remain due and payable for the full amount, until such time as Burnback investigates the disputed claim, no credit shall be passed for refund until the review is completed. Failure to make payment may result in Burnback placing the Customer's account into default and subject to default interest in accordance with clause 17.1.
- 6.7 Unless otherwise stated the Price does not include GST. In addition to the Price, the Customer must pay to Burnback an amount equal to any GST Burnback must pay for any supply by Burnback under this or any other agreement for the sale of the Goods. The Customer must pay GST, without deduction or set off of any other amounts, at the same time and on the same basis as the Customer pays the Price. In addition, the Customer must pay any other taxes and duties that may be applicable in addition to the Price except where they are expressly included in the Price.

### 7. Delivery of Goods

- 7.1 Delivery ("Delivery") of the Goods is taken to occur at the time that:
- (a) the Customer or the Customer's nominated carrier takes possession of the Goods at Burnback's address; or
  - (b) Burnback (or Burnback's nominated carrier) delivers the Goods to the Customer's nominated address even if the Customer is not present at the address.
- 7.2 The cost of Delivery will be payable by the Customer in accordance with the quotation provided by Burnback to the Customer, or as otherwise notified to the Customer prior to the placement of an order for Goods.
- 7.3 Burnback may deliver the Goods in separate instalments. Each separate instalment shall be invoiced and paid in accordance with the provisions in these terms and conditions.
- 7.4 The Customer must take Delivery by receipt or collection of the Goods whenever they are tendered for Delivery.
- 7.5 Any time specified by Burnback for Delivery of the Goods is an estimate only and Burnback will not be liable for any loss or damage incurred by the Customer because of Delivery being late. However, both parties agree that they shall make every endeavour to enable the Goods to be delivered at the time and place as was arranged between both parties. If Burnback is unable to supply the Goods as agreed solely due to any action or inaction of the Customer, then Burnback shall be entitled to charge a reasonable fee for redelivery and/or storage.

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### **8. Specifications of the Goods**

8.1 The Customer acknowledges and accepts that:

- (a) all descriptive specifications, illustrations, drawings, data, dimensions, ratings and weights stated in Burnback's or the manufacturer's fact sheets, price lists or advertising material, are approximate only and are given by way of identification only. The Customer shall not be entitled to rely on such information, and any use of such does not constitute a sale by description, and does not form part of the Contract, unless expressly stated as such in writing by Burnback; and
- (b) while Burnback may have provided information or figures to the Customer regarding the performance of the Goods, the Customer acknowledges that Burnback has given these in good faith and are estimates based on industry prescribed estimates.

### **9. Dimensions, Plans and Specifications**

9.1 Burnback shall be entitled to rely on the accuracy of any plans, designs, specifications, quantities, measurements and other information provided by the Customer. The Customer acknowledges and agrees that in the event that any of this information provided by the Customer is inaccurate, Burnback accepts no responsibility for any loss, damages, or costs however resulting from these inaccurate plans, designs, specifications, quantities, measurements or other information.

### **10. Risk**

- 10.1 Risk of damage to or loss of the Goods passes to the Customer on Delivery, and the Customer must insure the Goods on or before Delivery.
- 10.2 If any of the Goods are damaged or destroyed following Delivery but prior to ownership passing to the Customer, Burnback is entitled to receive all insurance proceeds payable for the Goods. The production of these terms and conditions by Burnback is sufficient evidence of Burnback's rights to receive the insurance proceeds without the need for any person dealing with Burnback to make further enquiries.
- 10.3 If the Customer requests Burnback to leave Goods outside Burnback's premises for collection or to deliver the Goods to an unattended location, then such Goods shall be left at the Customer's sole risk.
- 10.4 The Customer acknowledges and accepts that Burnback is only responsible for parts that are replaced by Burnback and that in the event that other parts/Goods, subsequently fail, the Customer agrees to indemnify Burnback against any loss or damage to the Goods, or caused by the Goods, or any part thereof howsoever arising.

### **11. Compliance with Laws**

11.1 The Customer and Burnback shall comply with the provisions of all statutes, regulations and bylaws of government, local and other public authorities that may be applicable to the Goods/Services, including any occupational health and safety laws relating or any other relevant safety standards or legislation pertaining to the Services.

### **12. Title**

- 12.1 Burnback and the Customer agree that ownership of the Goods shall not pass until:
  - (a) the Customer has paid Burnback all amounts owing to Burnback; and
  - (b) the Customer has met all of its other obligations to Burnback.
- 12.2 Receipt by Burnback of any form of payment other than cash shall not be deemed to be payment until that form of payment has been honoured, cleared or recognised.
- 12.3 It is further agreed that, until ownership of the Goods passes to the Customer in accordance with clause 12.1:
  - (a) the Customer is only a bailee of the Goods and must return the Goods to Burnback on request;
  - (b) the Customer holds the benefit of the Customer's insurance of the Goods on trust for Burnback and must pay to Burnback the proceeds of any insurance in the event of the Goods being lost, damaged or destroyed;
  - (c) the Customer must not sell, dispose, or otherwise part with possession of the Goods other than in the ordinary course of business and for market value. If the Customer sells, disposes or parts with possession of the Goods then the Customer must hold the proceeds of any such act on trust for Burnback and must pay or deliver the proceeds to Burnback on demand;
  - (d) the Customer should not convert or process the Goods or intermix them with other goods but if the Customer does so then the Customer holds the resulting product on trust for the benefit of Burnback and must sell, dispose of or return the resulting product to Burnback as it so directs;
  - (e) the Customer irrevocably authorises Burnback to enter any premises where Burnback believes the Goods are kept and recover possession of the Goods;
  - (f) Burnback may recover possession of any Goods in transit whether or not Delivery has occurred;
  - (g) the Customer shall not charge or grant an encumbrance over the Goods nor grant nor otherwise give away any interest in the Goods while they remain the property of Burnback; and
  - (h) Burnback may commence proceedings to recover the Price of the Goods sold notwithstanding that ownership of the Goods has not passed to the Customer.

### **13. Personal Property Securities Act 2009 ("PPSA")**

- 13.1 In this clause financing statement, financing change statement, security agreement, and security interest has the meaning given to it by the PPSA.
- 13.2 Upon assenting to these terms and conditions in writing the Customer acknowledges and agrees that these terms and conditions constitute a security agreement for the purposes of the PPSA and creates a security interest in all Goods that have previously been supplied and that will be supplied in the future by Burnback to the Customer, and the proceeds from such Goods.
- 13.3 The Customer undertakes to:
  - (a) promptly sign any further documents and/or provide any further information (such information to be complete, accurate and up-to-date in all respects) which Burnback may reasonably require to;
    - (i) register a financing statement or financing change statement in relation to a security interest on the Personal Property Securities Register;

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- (ii) register any other document required to be registered by the PPSA; or
    - (iii) correct a defect in a statement referred to in clause 13.3(a)(i) or 13.3(a)(ii).
  - (b) indemnify, and upon demand reimburse, Burnback for all expenses incurred in registering a financing statement or financing change statement on the Personal Property Securities Register established by the PPSA or releasing any Goods charged thereby;
  - (c) not register a financing change statement in respect of a security interest without the prior written consent of Burnback;
  - (d) not register, or permit to be registered, a financing statement or a financing change statement in relation to the Goods or the proceeds of such Goods in favour of a third party without the prior written consent of Burnback; and
  - (e) immediately advise Burnback of any material change in its business practices of selling the Goods which would result in a change in proceeds derived from such sales.
- 13.4 Burnback and the Customer agree that sections 96, 115 and 125 of the PPSA do not apply to the security agreement created by these terms and conditions.
- 13.5 The Customer waives their rights to receive notices under sections 95, 118, 121(4), 130, 132(3)(d) and 132(4) of the PPSA.
- 13.6 The Customer waives their rights as a grantor and/or a debtor under sections 142 and 143 of the PPSA.
- 13.7 Unless otherwise agreed to in writing by Burnback, the Customer waives their right to receive a verification statement in accordance with section 157 of the PPSA.
- 13.8 The Customer must unconditionally ratify any actions taken by Burnback under clauses 13.3 to 13.5.
- 13.9 Subject to any express provisions to the contrary (including those contained in this clause 13), nothing in these terms and conditions is intended to have the effect of contracting out of any of the provisions of the PPSA.
- 14. Security and Charge**
- 14.1 In consideration of Burnback agreeing to supply the Goods and/or provide its Services, the Customer grants Burnback a security interest by way of a floating charge (registerable by Burnback pursuant to the PPSA) over all of its present and after acquired rights, title and interest (whether joint or several) in all other assets that is now owned by the Customer or owned by the Customer in the future, to the extent necessary to secure the repayment of monies owed under this Contract for provision of the Goods and/or Services under this Contract and/or permit Burnback to appoint a receiver to the Customer in accordance with the *Corporations Act 2001* (Cth).
- 14.2 The Customer indemnifies Burnback from and against all Burnback's costs and disbursements including legal costs on a solicitor and own client basis incurred in exercising Burnback's rights under this clause.
- 14.3 In the event that the Customer defaults or breaches any term of this Contract and as a result, the security provided in clauses 12.1, 13.2 and 14.1 as applicable, is deemed insufficient by Burnback to secure the repayment of monies owed by the Customer to Burnback, the Customer hereby grants Burnback a security interest as at the date of the default, by way of a charge, that enables the right and entitlement to lodge a caveat over any real property and or land owned by the Customer now, or owned by the Customer in the future, to secure the performance of the Customer of its obligations under these terms and conditions (including, but not limited to, the payment of any money).
- 15. Defects, Warranties and Returns, Competition and Consumer Act 2010 (CCA)**
- 15.1 The Customer must inspect the Goods on Delivery and must within forty-eight (48) hours of Delivery (time being of the essence) and notify Burnback in writing within five (5) business days of any evident defect/damage, shortage in quantity, or failure to comply with the description or quote. The Customer must notify any other alleged defect in the Goods as soon as reasonably possible after any such defect becomes evident. Upon such notification the Customer must allow Burnback to inspect the Goods.
- 15.2 Under applicable State, Territory and Commonwealth Law (including, without limitation the CCA), certain statutory implied guarantees and warranties (including, without limitation the statutory guarantees under the CCA) may be implied into these terms and conditions (**Non-Excluded Guarantees**).
- 15.3 Burnback acknowledges that nothing in these terms and conditions purports to modify or exclude the Non-Excluded Guarantees.
- 15.4 Except as expressly set out in these terms and conditions or in respect of the Non-Excluded Guarantees, Burnback makes no warranties or other representations under these terms and conditions including but not limited to the quality or suitability of the Goods. Burnback's liability in respect of these warranties is limited to the fullest extent permitted by law.
- 15.5 If the Customer is a consumer within the meaning of the CCA, Burnback's liability is limited to the extent permitted by section 64A of Schedule 2.
- 15.6 If Burnback is required to replace the Goods under this clause or the CCA, but is unable to do so, Burnback may refund any money the Customer has paid for the Goods.
- 15.7 If the Customer is not a consumer within the meaning of the CCA, Burnback's liability for any defect or damage in the Goods is:
- (a) limited to the value of any express warranty or warranty card provided to the Customer by Burnback at Burnback's sole discretion;
  - (b) limited to any warranty to which Burnback is entitled, if Burnback did not manufacture the Goods; and/or
  - (c) otherwise negated absolutely.
- 15.8 Subject to this clause 15, returns will only be accepted provided that:
- (a) the Customer has complied with the provisions of clause 15.1; and
  - (b) Burnback has agreed that the Goods are defective; and
  - (c) the Goods are returned within a reasonable time at the Customer's cost (if that cost is not significant); and
  - (d) the Goods are returned in as close a condition to that in which they were delivered as is possible.
- 15.9 Notwithstanding clauses 15.1 to 15.8 but subject to the CCA, Burnback shall not be liable for any defect or damage which may be caused or partly caused by or arise as a result of:
- (a) the Customer failing to properly maintain or store any Goods;
  - (b) the Customer using the Goods for any purpose other than that for which they were designed;
  - (c) the Customer continuing the use of any Goods after any defect became apparent or should have become apparent to a reasonably prudent operator or user;
  - (d) the Customer failing to follow any instructions or guidelines provided by Burnback; and/or
  - (e) fair wear and tear, any accident, or act of God.

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- 15.10 In the case of second-hand Goods, unless the Customer is a consumer under the CCA, the Customer acknowledges that it has had full opportunity to inspect the second-hand Goods prior to Delivery and accepts them with all faults and that to the extent permitted by law no warranty is given by Burnback as to the quality or suitability for any purpose and any implied warranty, statutory or otherwise, is expressly excluded. The Customer acknowledges and agrees that Burnback has agreed to provide the Customer with the second-hand Goods and calculated the Price of the second-hand Goods in reliance of this clause 15.10.
- 15.11 Burnback may in its absolute discretion accept non-defective Goods for return in which case Burnback may require the Customer to pay handling fees of up to twenty percent (20%) of the value of the returned Goods plus any freight costs.
- 15.12 Notwithstanding anything contained in this clause if Burnback is required by a law to accept a return, then Burnback will only accept a return on the conditions imposed by that law.
- 15.13 Subject to clause 15.1, customised, or non-stocklist items or Goods made or ordered to the Customer's specifications are not acceptable for credit or return.

### 16. Intellectual Property

- 16.1 Where Burnback has designed or developed Goods for the Customer, then the copyright in any designs and documents shall remain the property of Burnback. Under no circumstances may such designs and documents be used without the express written approval of Burnback.
- 16.2 The Customer warrants that all designs, specifications, or instructions given to Burnback will not cause Burnback to infringe any patent, registered design or trademark in the execution of the Customer's order and the Customer agrees to indemnify Burnback against any action taken by a third party against Burnback in respect of any such infringement.
- 16.3 The Customer agrees that Burnback may (at no cost) use for the purposes of marketing or entry into any competition, any documents, designs or Goods which Burnback has created for the Customer.

### 17. Default and Consequences of Default

- 17.1 Interest on overdue invoices shall accrue daily from the date when payment becomes due, until the date of payment, at a rate of two and a half percent (2.5%) per calendar month (and at Burnback's sole discretion such interest shall compound monthly at such a rate) after as well as before any judgment.
- 17.2 If the Customer owes Burnback any money, the Customer shall indemnify Burnback from and against all costs and disbursements:
- (a) incurred; and/or
  - (b) which would be incurred and/or
  - (c) for which by the Customer would be liable;
- in regard to legal costs on a solicitor and own client basis incurred in exercising Burnback's rights under these terms and conditions, internal administration fees, Burnback's Contract fees owing for breach of these terms and conditions', including, but not limited to, contract default fees and/or recovery costs (if applicable), as well as bank dishonour fees.
- 17.3 Further to any other rights or remedies Burnback may have under this Contract, if a Customer has made payment to Burnback, and the transaction is subsequently reversed, the Customer shall be liable for the amount of the reversed transaction, in addition to any further costs incurred by Burnback under this clause 17 where it can be proven that such reversal is found to be illegal, fraudulent or in contravention to the Customer's obligations under this Contract.
- 17.4 Without prejudice to Burnback's other remedies at law Burnback shall be entitled to cancel all or any part of any order of the Customer which remains unfulfilled and all amounts owing to Burnback shall, whether or not due for payment, become immediately payable if:
- (a) any money payable to Burnback becomes overdue, or in Burnback's opinion the Customer will be unable to make a payment when it falls due;
  - (b) the Customer has exceeded any applicable credit limit provided by Burnback;
  - (c) the Customer becomes insolvent, convenes a meeting with its creditors or proposes or enters into an arrangement with creditors, or makes an assignment for the benefit of its creditors; or
  - (d) a receiver, manager, liquidator (provisional or otherwise) or similar person is appointed in respect of the Customer or any asset of the Customer.

### 18. Cancellation

- 18.1 Without prejudice to any other remedies the parties may have, if at any time either party is in breach of any obligation (including those relating to payment) under these terms and conditions ("**the Breaching Party**") the other party may suspend or terminate the supply or purchase of Goods and/or Services to the other party, with immediate effect, by providing the Breaching Party with written notice. Neither party will be liable for any loss or damage the other party suffers because one of the parties has exercised its rights under this clause.
- 18.2 If Burnback, due to reasons beyond Burnback's reasonable control, is unable to deliver any Goods and/or Services to the Customer, Burnback may cancel any Contract to which these terms and conditions apply or cancel Delivery of Goods and/or Services at any time before the Goods and/or Services are delivered by giving written notice to the Customer. On giving such notice Burnback shall repay to the Customer any money paid by the Customer for the Goods and/or Services. Burnback shall not be liable for any loss or damage whatsoever arising from such cancellation.
- 18.3 The Customer may cancel Delivery of the Goods and/or Services by written notice served within forty-eight (48) hours of placement of the order, prior to the Goods being dispatched. If the Customer cancels Delivery in accordance with this clause 18.3, the Customer will not be liable for the payment of any costs of Burnback.
- 18.4 However, cancellation of orders for Goods made to the Customer's specifications, or for non-stocklist items, will not be accepted once production has commenced, or an order has been placed.

### 19. Privacy Policy

- 19.1 All emails, documents, images, or other recorded information held or used by Burnback is Personal Information, as defined and referred to in clause 19.4, and therefore considered Confidential Information. Burnback acknowledges its obligation in relation to the handling, use, disclosure and processing of Personal Information pursuant to the Privacy Act 1988 ("the Act") including the Part IIIC of the Act being Privacy Amendment (Notifiable Data Breaches) Act 2017 (NDB) and any statutory requirements, where relevant in a European Economic Area ("EEA"),

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- under the EU Data Privacy Laws (including the General Data Protection Regulation "GDPR") (collectively, "EU Data Privacy Laws"). Burnback acknowledges that in the event it becomes aware of any data breaches and/or disclosure of the Customer's Personal Information, held by Burnback that may result in serious harm to the Customer, Burnback will notify the Customer in accordance with the Act and/or the GDPR. Any release of such Personal Information must be in accordance with the Act and the GDPR (where relevant) and must be approved by the Customer by written consent, unless subject to an operation of law.
- 19.2 Notwithstanding clause 19.1, privacy limitations will extend to Burnback in respect of Cookies where the Customer utilises Burnback's website to make enquiries. Burnback agrees to display reference to such Cookies and/or similar tracking technologies, such as pixels and web beacons (if applicable), such technology allows the collection of Personal Information such as the Customer's:
- (a) IP address, browser, email client type and other similar details;
  - (b) tracking website usage and traffic; and
  - (c) reports are available to Burnback when Burnback sends an email to the Customer, so Burnback may collect and review that information ("collectively Personal Information").
- If the Customer consents to Burnback's use of Cookies on Burnback's website and later wishes to withdraw that consent, the Customer may manage and control Burnback's privacy controls via the Customer's web browser, including removing Cookies by deleting them from the browser history when exiting the site.**
- 19.3 The Customer agrees for Burnback to obtain from a credit reporting body (CRB) a credit report containing personal credit information (e.g. name, address, D.O.B, occupation, driver's license details, electronic contact (email, Facebook or Twitter details), medical insurance details or next of kin and other contact information (where applicable), previous credit applications, credit history) about the Customer in relation to credit provided by Burnback.
- 19.4 The Customer agrees that Burnback may exchange information about the Customer with those credit providers and with related body corporates for the following purposes:
- (a) to assess an application by the Customer; and/or
  - (b) to notify other credit providers of a default by the Customer; and/or
  - (c) to exchange information with other credit providers as to the status of this credit account, where the Customer is in default with other credit providers; and/or
  - (d) to assess the creditworthiness of the Customer including the Customer's repayment history in the preceding two (2) years.
- 19.5 The Customer consents to Burnback being given a consumer credit report to collect personal credit information relating to any overdue payment on commercial credit.
- 19.6 The Customer agrees that personal credit information provided may be used and retained by Burnback for the following purposes (and for other agreed purposes or required by):
- (a) the provision of Goods; and/or
  - (b) analysing, verifying and/or checking the Customer's credit, payment and/or status in relation to the provision of Goods; and/or
  - (c) processing of any payment instructions, direct debit facilities and/or credit facilities requested by the Customer; and/or
  - (d) enabling the collection of amounts outstanding in relation to the Goods.
- 19.7 Burnback may give information about the Customer to a CRB for the following purposes:
- (a) to obtain a consumer credit report;
  - (b) allow the CRB to create or maintain a credit information file about the Customer including credit history.
- 19.8 The information given to the CRB may include:
- (a) Personal Information as outlined in 19.4 above;
  - (b) name of the credit provider and that Burnback is a current credit provider to the Customer;
  - (c) whether the credit provider is a licensee;
  - (d) type of consumer credit;
  - (e) details concerning the Customer's application for credit or commercial credit (e.g. date of commencement/termination of the credit account and the amount requested);
  - (f) advice of consumer credit defaults (provided Burnback is a member of an approved OAIC External Disputes Resolution Scheme), overdue accounts, loan repayments or outstanding monies which are overdue by more than sixty (60) days and for which written notice for request of payment has been made and debt recovery action commenced or alternatively that the Customer no longer has any overdue accounts and Burnback has been paid or otherwise discharged and all details surrounding that discharge (e.g. dates of payments);
  - (g) information that, in the opinion of Burnback, the Customer has committed a serious credit infringement; or
  - (h) advice that the amount of the Customer's overdue payment is equal to or more than one hundred and fifty dollars (\$150).
- 19.9 The Customer shall have the right to request (by e-mail) from Burnback:
- (a) a copy of the Personal Information about the Customer retained by Burnback and the right to request that Burnback correct any incorrect Personal Information; and
  - (b) that Burnback does not disclose any Personal Information about the Customer for the purpose of direct marketing.
- 19.10 Burnback will destroy Personal Information upon the Customer's request (by e-mail) or if it is no longer required unless it is required to fulfil the obligations of this Contract or is required to be maintained and/or stored in accordance with the law.
- 19.11 The Customer can make a privacy complaint by contacting Burnback via e-mail. Burnback will respond to that complaint within seven (7) days of receipt and will take all reasonable steps to reach a decision on the complaint within thirty (30) days of receipt of the complaint. If the Customer is not satisfied with the resolution provided, the Customer can make a complaint to the Information Commissioner at [www.oaic.gov.au](http://www.oaic.gov.au).
- 20. Unpaid Seller's Rights**
- 20.1 Where the Customer has left any item with Burnback for repair, modification, exchange or for Burnback to perform any other service in relation to the item and Burnback has not received or been tendered the whole of any monies owing to it by the Customer, Burnback shall have, until all monies owing to Burnback are paid:
- (a) a lien on the item; and

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- (b) the right to retain or sell the item, such sale to be undertaken in accordance with any legislation applicable to the sale or disposal of uncollected goods.
- 20.2 The lien of Burnback shall continue despite the commencement of proceedings, or judgment for any monies owing to Burnback having been obtained against the Customer.

### 21. Service of Notices

- 21.1 Any written notice given under this Contract shall be deemed to have been given and received:
- (a) by handing the notice to the other party, in person;
  - (b) by leaving it at the address of the other party as stated in this Contract;
  - (c) by sending it by registered post to the address of the other party as stated in this Contract;
  - (d) if sent by facsimile transmission to the fax number of the other party as stated in this Contract (if any), on receipt of confirmation of the transmission; or
  - (e) if sent by email to the other party's last known email address.
- 21.2 Any notice that is posted shall be deemed to have been served, unless the contrary is shown, at the time when by the ordinary course of post, the notice would have been delivered.

### 22. Trusts

- 22.1 If the Customer at any time upon or subsequent to entering in to the Contract is acting in the capacity of trustee of any trust or as an agent for a trust ("Trust") then whether or not Burnback may have notice of the Trust, the Customer covenants with Burnback as follows:
- (a) the Contract extends to all rights of indemnity which the Customer now or subsequently may have against the Trust, the trustees and the trust fund;
  - (b) the Customer has full and complete power and authority under the Trust or from the Trustees of the Trust as the case may be to enter into the Contract and the provisions of the Trust do not purport to exclude or take away the right of indemnity of the Customer against the Trust, the trustees and the trust fund. The Customer will not release the right of indemnity or commit any breach of trust or be a party to any other action which might prejudice that right of indemnity;
  - (c) the Customer will not during the term of the Contract without consent in writing of Burnback (Burnback will not unreasonably withhold consent), cause, permit, or suffer to happen any of the following events:
    - (i) the removal, replacement or retirement of the Customer as trustee of the Trust;
    - (ii) any alteration to or variation of the terms of the Trust;
    - (iii) any advancement or distribution of capital of the Trust; or
    - (iv) any resettlement of the trust fund or trust property.

### 23. General

- 23.1 Any dispute or difference arising as to the interpretation of these terms and conditions or as to any matter arising herein, shall be submitted to, and settled by, mediation before resorting to any external dispute resolution mechanisms (including arbitration or court proceedings) by notifying the other party in writing setting out the reason for the dispute. The parties shall share equally the mediator's fees. Should mediation fail to resolve the dispute, the parties shall be free to pursue other dispute resolution avenues.
- 23.2 The failure by either party to enforce any provision of these terms and conditions shall not be treated as a waiver of that provision, nor shall it affect that party's right to subsequently enforce that provision. If any provision of these terms and conditions shall be invalid, void, illegal or unenforceable, that provision shall be severed from this Contract, and the validity, existence, legality and enforceability of the remaining provisions shall not be affected, prejudiced or impaired.
- 23.3 These terms and conditions and any Contract to which they apply shall be governed by the laws of Western Australia and are subject to the jurisdiction of the Fremantle Courts in that state. These terms prevail over all terms and conditions of the Customer (even if they form part of the Customer's purchase order).
- 23.4 Burnback may licence and/or assign all or any part of its rights and/or obligations under this Contract without the Customer's consent provided the assignment does not cause detriment to the Customer.
- 23.5 The Customer cannot licence or assign without the written approval of Burnback.
- 23.6 Burnback may elect to subcontract out any part of the Services but shall not be relieved from any liability or obligation under this Contract by so doing. Furthermore, the Customer agrees and understands that they have no authority to give any instruction to any of Burnback's sub-contractors without the authority of Burnback.
- 23.7 Burnback reserves the right to change any of the Terms and Conditions displayed on its website and/or associated websites (including its Privacy Policy) at any time by notifying the Customer through the respective websites and/or by disclosing such to the Customer in writing for any future contracts. The Customer's continued use of Burnback's website/s, or otherwise at such time as the Customer makes a further request for Burnback to provide Goods or Services to the Customer, shall be deemed acceptance of the terms and conditions which takes effect from that date. Burnback's current terms and conditions can be viewed on all associated websites: [www.burnback.com.au](http://www.burnback.com.au).
- 23.8 Neither party shall be liable for any default due to any act of God, war, terrorism, strike, lock-out, industrial action, fire, flood, storm, national or global pandemics and/or the implementation of regulation, directions, rules or measures being enforced by Governments or embargo, including but not limited to, any Government imposed border lockdowns (including, worldwide destination ports), etc, ("Force Majeure") or other event beyond the reasonable control of either party. This clause does not apply to a failure by the Customer to make a payment to Burnback, once the parties agree that the Force Majeure event has ceased.
- 23.9 Both parties warrant that they have the power to enter this Contract and have obtained all necessary authorisations to allow them to do so, they are not insolvent and that this Contract creates binding and valid legal obligations on them.
- 23.10 The rights and obligations of the parties will not merge on completion of any transaction under this Contract, and they will survive the execution and Delivery of any assignment or other document entered, for the purpose of, implementing any transaction under this Contract.
- 23.11 If part or all of any term of this Contract is or becomes invalid, illegal or unenforceable, it shall be severed from this Contract and shall not affect the validity and enforceability of the remaining terms of this Contract.