

## **GENERAL TERMS & CONDITIONS OF SALE**

The following words have the following meanings in these General Terms & Conditions, unless the context requires otherwise:

**"Amounts Outstanding"** means, at any time, all amounts owed by You to Us at that time whether arising under the Contract or otherwise;

**"Contract"** means the agreement between You and Us for the supply of the Goods on these Conditions and includes the details appearing on the Purchase Order accepted by the Us;

**"Conditions"** means the terms and conditions set out in this document;

**"Goods"** means all goods described in a Purchase Order/ Order and Pricing Confirmation;

**"GST"** has the same meaning as in the GST Law; **"GST Law"** means the A New Tax System (Goods and Services Tax) Act 1999 (Cth);

**"Intellectual Property"** means any patent, registered design, trade mark, copyright or any other industrial or intellectual property rights whether registered or not;

**"Invoice"** means a written invoice from Us to You for the Goods;

**"Loss"** means any loss, liability, damage, expense or cost whatsoever and includes (without limitation) indirect or consequential loss or damage, loss of profits or business opportunity, and damage to equipment or property;

**"Purchase Order"** means a purchase order or alternative form of order or offer to purchase provided by You to Us;

**"You" "Your", customer"** means the customer (including its successors, personal representatives and permitted assigns) acquiring Goods from Kelco as named in the Purchase Order, Order and Pricing Confirmation or an Invoice, and where this consists of more than one person the obligations in the Contract are deemed to be joint and several;

**"Us" "We" "Kelco"** means Kelco Engineering Pty Ltd (ABN **20 002 834 844**), and that entity's successors and assigns.

### **1.0 APPLICATION OF THESE TERMS AND CONDITIONS**

These Conditions apply to all supplies of Goods made by Kelco to You. Where the Purchase Order purports to be made on or subject to terms and conditions other than these Conditions, You agree that such other terms and conditions are disregarded and form no part of the Contract unless We expressly agree otherwise in writing. A Contract shall only be or be deemed to have been entered into between Kelco and You for the supply of Goods when, upon a Purchase Order having been placed with Kelco for Goods, that Purchase Order has been accepted by Kelco. This acceptance will be made and communicated by Kelco in writing in the form of an Order and Pricing Confirmation.

#### **2.0 PAYMENT TERMS**

2.1 All Invoices for account holding customers are net and are due and payable thirty (30) days from End of Month. Kelco may terminate account holding arrangements at any time by notice.

2.2 All Non-account holding customers are required to pre-pay and will be provided an Invoice setting out the price for the Goods ordered.

2.3 Each consignment of Goods shall be considered a separate and independent transaction and payment shall be made accordingly.

#### **3.0 PRICES**

3.1 All account holding customers will be provided a price list for the Goods. All retail prices quoted are recommendations only. All Order and Pricing Confirmations are based on the current prices for the Goods that You order and are firm for a period of thirty (30) days from the date thereof, unless otherwise stated in writing, after that time they are subject to confirmation by Kelco in writing.

3.2 All sales are ex-warehouse point of consignment. Property in Goods passes to You when the Goods in the consignment have been paid for. Freight cost and risk of loss in transit are Your responsibility.

3.3 All prices of imported Goods are payable in Australian dollars and are based on the F.O.B. price and the rates of exchange, freight insurance and customs or primage duty ruling at the date of Order and Pricing Confirmation. The prices quoted may be varied as a result of any change in these

rates.

- 3.4** All price lists are subject to review at any time and can be changed without notice.
- 3.5** If payment is not made in accordance with clause 2.1. We are entitled to charge an account keeping fee at a rate of 5 % per annum calculated daily on any amounts outstanding (in addition to any other rights that We have on a Default). The parties agree that such amounts are not a penalty, but a true measure of the damages incurred by Us.
- 3.6** If delivery of the Goods is suspended or delayed because of Your actions, inaction, instructions, lack of instructions, or failure to supply any required information or parts additional charges may be made by Us. We will not be liable for any losses incurred by You because of any delay as referred to above.
- 3.7** .DEFAULT: (a) If You default in payment; (b) an application is made or resolution passed to wind You up , or You become bankrupt or insolvent, or a liquidator, receiver or administrator is appointed to You, or You make or propose to make any arrangement with creditors or cease to carry on business; (c) You breach any other provisions of these Conditions, then Kelco without prejudice to any other remedy that may be available to Us, has the immediate right to do any one or more of the following: (d) demand that You immediately account to Us for any money or property owed to Us under these Conditions or on any other account (and You shall comply with such demand); (e) withhold further deliveries; (f) re-take possession of Goods in relation to which title has not passed to You under clause 3.2, without notice to You and for that purpose You authorise Us to enter into any premises occupied by You or any other place where such Goods are stored free from trespass; and (g) Cancel the Contract at Our discretion and demand immediate payment of all sums owing to Us in addition to Our Losses.

#### **4.0 TRANSPORT**

Unless otherwise stated by You, We will make transport arrangements and the cost will be added to Your invoice. No Free Into Store applies. If You request delivery by means other than normally used by Us, then You must pay all additional costs associated with the means chosen. If, within 7 days after the Goods are available for dispatch, We are unable or find it impractical to transport the Goods by the means chosen, We may transport the Goods by any means We consider suitable.

#### **5.0 TAX**

Unless otherwise stated by Kelco in an Invoice the prices are exclusive of duty and taxes, and You will be responsible for them. Where you are exempt from duty or tax you must furnish Kelco with the appropriate tax exemption certificate. In particular consideration expressed for any supply pursuant to these Conditions is exclusive of the Kelco's liability for GST. On sale:

- i) You will pay to Kelco, in addition to the total purchase price, the amount payable by Kelco as GST on the taxable supply made by Kelco under these Conditions on the date the invoice is issued.
- ii) Kelco will deliver to You a tax Invoice for the supply in a form which complies with the GST Act and regulations

#### **6.0 DELIVERY TIME**

- 6.1** All quoted delivery or consignment dates in Order and Pricing Confirmations are estimates only. While We will use all reasonable endeavours to deliver by the date specified in the Order and Pricing Confirmation, We do not guarantee delivery on that date and are not liable for any Loss resulting from late or early delivery. Delivery of the Goods shall be deemed to be effected when the Goods are unloaded from the delivery vehicle or placed on Your or Your agent's nominated carrier. If no date for delivery has been specified, then the Goods shall be supplied to You and You shall receive the Goods as soon as practicable after the Purchase

Order has been accepted by Us and the Goods have been manufactured.

**6.2** You agree that title to and property in the Goods is retained by Us until payment by You of the Price for the Goods and all other Amounts Outstanding ("Unpaid Goods"). You agree that you are in possession of the Goods solely as a bailee for Us until all Amounts Outstanding have been made and until such payment You must store the Unpaid Goods so that they are identifiable as those supplied by Us, and ensure they are properly stored and adequately insured. If You sell or purport to sell any of the Unpaid Goods supplied by the Us in which property has not passed to You, then You do so as a fiduciary for Us. The proceeds of such sale are the property of Kelco to the extent of any money owed to Us by You and are to be held on trust for Us. The You must account to Us for that portion of the proceeds of sale on demand.

## **7.0 ACCEPTANCE**

**7.1** Any claim by You arising out of the Contract must be made in writing and may be delivered by post, hand delivery, or email as soon as practicable after discovery by You of the problem and in any event no later than 7 days after delivery of the Goods. If You fail to notify Kelco in writing of the Goods rejection and the reasons therefore, within such time period, You will be deemed to have accepted the Goods. You must supply information to the extent that We can identify the product and the date of manufacture. We have the right at any time within 30 days after receipt of the claim to inspect the relevant Goods. If You dispose of any of the Goods within the 30-day period, except with Our written consent, all claims in respect of the Goods disposed of are deemed to have been waived by the You.

**7.2** Goods rejected by You will be returned only on Kelco's prior written authorisation.

**7.3** Returns for any reason cannot be made:

- a) Without prior written authorisation from Kelco; in the form of a completed Return Goods Authorisation (RGA);
- b) Unless accompanied by delivery docket and invoice showing Kelco's authorisation in writing.

**7.4** Kelco will apply a handling charge (currently AU\$50.00) to any unauthorised return and will re-consign to You, freight collect.

## **8 DESCRIPTION AND SPECIFICATIONS**

The Goods shall be manufactured and delivered in accordance with the description set out in the Kelco brochures and technical data sheets unless agreed with You otherwise for specific Purchase Orders. All drawings, photographs, illustrations, specifications, performance data, dimensions, weights and the like, contained in Our brochures advertising matter and other publications have been provided by Us in the belief that they are as accurate as reasonably possible, but We provide no warranty for their accuracy and they do not constitute a description of the Goods. (a) We may carry out alterations or improvements in design, materials or methods of manufacture from time to time and reserves the right to substitute such altered or improved Goods for those ordered by You where it is reasonable to do so. (b) Where We consider any Goods or parts thereof ordered by You to be unobtainable, unobtainable in sufficient quantities or only obtainable with unreasonable difficulty or at an excessive cost/price We may substitute other reasonably similar parts for those ordered by You. (c) Where We consider there to be no reasonable substitute as referred to in clause 8(b) Our obligation to deliver the Goods shall be suspended until such time as a substitute becomes available.

## **9.0 WARRANTY and limitation of Liability**

We warrant that we have taken all reasonable steps to ascertain that all materials used in all Goods manufactured by us conform to any applicable local Standards. You acknowledge that neither Kelco nor any person acting on their behalf have made any representations or given any promise or undertaking in relation to the quality of the Goods, their fitness for purpose or their usage. The Goods are warranted by Kelco as manufacturers against defective workmanship and materials as set out in our Warranty and limitation of Liability <http://www.kelco.com.au/warranty>. Goods sold shall only have the benefit of a manufacturer's warranty if the buyer has complied with Kelco's instructions in relation to maintenance and operation of the Goods. The above terms may, at Kelco's discretion, be varied or

replaced by specific warranty conditions issued in respect of particular Products. To the extent permitted by law any and all other implied terms and conditions are expressly excluded. Nothing in these Conditions is to be interpreted as having the effect of excluding, restricting or modifying any condition or warranty, or right or liability implied by any applicable legislation (including the Competition and Consumer Act 2010 (Cth)) into the Contract, if such exclusion, restriction or modification would be void or prohibited by the legislation. To the extent permitted by law that We breach any condition or warranty implied into the Contract which cannot be excluded, or breach any condition or warranty expressly included in the Contract, then Our liability is limited to, and completely discharged by, either: (i) replacement of the Goods that are the subject of the breach, or supply of equivalent goods; (ii) payment of the cost of replacing the Goods or acquiring equivalent goods; (iii) repair of the Goods; or (iv) payment of the cost of having the Goods repaired. Subject to the above, Kelco is not liable to You (or to any third party claiming through You) for any Loss caused by any act or omission of Kelco, its employees or agent, and whether based on negligence or other tort, contract or otherwise. In no event shall Kelco be liable for indirect or consequential losses (including loss of production, profit, goodwill or reputation).

#### **10.0 INTELLECTUAL PROPERTY**

All right, title and interest in and to any Goods, materials or developments in which copyright or other Intellectual Property subsisting, created by or on behalf of Us or otherwise supplied by Us to You, shall vest absolutely in and remain the sole property of Kelco. The supply of Goods shall imply a licence to You to use the same but for no other purpose. You undertake not to utilise, copy, reproduce or disclose or permit others to utilise, copy, reproduce or disclose any such Intellectual Property without Our prior written consent. You will indemnify and hold Kelco harmless against any Loss resulting from Your infringement of Kelco's Intellectual Property.

#### **12.0 CANCELLATION BY YOU**

**12.1** Except as provided in this clause 12, no Purchase Order may be cancelled by You. A Purchase Order that has been accepted in whole or in part by Kelco cannot be cancelled by You without obtaining the prior written approval of Kelco, which it may refuse in its absolute discretion. You agree to indemnify Kelco against all loss arising out of the Purchase Order or any part of the order being cancelled by You including cartage, bank charges and other incidental expenses. Where Kelco agrees to accept goods for return a restocking charge of 10% of the price of Goods returned must be paid by You.

**12.2** You shall pay for non-standard Goods, which are in the work-in-process inventory, at a price based on the percentage of completion of such inventory applied to the order price for finished Goods.

**12.3** No application for cancellation under this clause will be considered unless made by You in writing to Kelco.

#### **13.0 SECURITY INTEREST UNDER THE *Personal Property Securities Act 2009(Cth)* ("PPSA")**

(a) You agree that: (i) each Purchase Order accepted by Us, being a Purchase Order under these Conditions, creates a registrable security interest under (and as defined in) the PPSA; (ii) You acknowledge Our right to register a financing statement under the PPSA with respect to the security interest created by these Conditions; (iii) if We register a security interest under the PPSA, We may exercise any or all remedies afforded to Us as a secured party under it without prejudice to any other rights or remedies arising out of a breach by You of any agreement with Us.; and (iv) the Goods are collateral for the purposes of the PPSA. (b) You waive any right You have under the PPSA to receive notice in relation to registration events. (c) You and Kelco agree that neither of us will disclose information of the type specified in section 275(1) of the PPSA. (d) At Our election to be exercised at any time in Our absolute discretion, any section specified in section 115 will not apply to the extent permitted by section 115 of the PPSA.

#### **14.0 FORCE MAJEURE**

Neither party is liable for any Loss incurred by the other party as a result of any delay or failure to observe any of these Conditions (other than an obligation to pay money) as a result of any circumstance beyond the party's control, including but not limited to any strike, lock-out, labour

dispute, act of God, fire, flood, accidental or malicious damage, shortage of raw materials, breakdown in machinery or action of government or port authority. During the continuance of such circumstance the obligations of the party affected (other than an obligation to pay money), to the extent they are affected by the circumstance, are suspended and resume as soon as possible after the circumstance has ceased to have effect

#### **15.0 GENERAL**

(a) Any of these Conditions may be varied in writing by Us at any time by notice to You and will apply to your next Purchase Order. (b) You may not exercise any right of withholding, deduction or setoff. (c) Neither party may assign or novate any of their rights or obligations under the Contract without the other parties prior written consent. (d) Failure by Us to insist on strict performance of any of these Conditions shall not be deemed a waiver thereof. The waiver by Us of any provision, or breach of any provision, of the Contract is not to be construed as a waiver of any other provision or a breach of any other provision, or of any further breach of the same or any other provision of the Contract. (e) If any provision of the Contract is unenforceable or void either in whole or in part for any reason, then that provision (or part) is deemed to be deleted without in any way affecting the validity or enforceability of any other provision. (f) The Contract (including the details appearing on the accepted Purchase Order and Invoice) constitutes the entire agreement between You and Kelco and no modification is binding in relation to the Contract unless agreed to in writing by Us. (g) Any dispute arising out of the Contract is governed by the laws of the State of New South Wales and You submit to the jurisdiction of and agree to be bound by the Courts of the State of New South Wales without application of conflict of laws. The UN convention on the international sale of goods will not apply. (h) All costs and expenses incurred by Us to remedy any breach by You of the Contract or to enforce the Our rights under the PPSA or the Contract shall be recoverable from You in addition and without prejudice to the Our right to damages for breach of the Contract. (j) Neither party will divulge to any person the terms of the Contract or any information provided by the other party in relation to the Contract without their prior written consent, except as required by law or for the purposes of obtaining professional legal, financial or taxation advice.