

Warner Electric Australia Terms and Conditions of Trade (AUS)

Rev. 10/16/12

1. DEFINITIONS

- 1.1 "Seller" shall mean Warner Electric Australia Pty Ltd and its successors and assigns.
- 1.2 "Buyer" shall mean the Buyer or any person acting on behalf of and with the authority of the Buyer. Where more than one Buyer has entered into this agreement, the Buyers shall be jointly and severally liable for all payments of the Price.
- 1.3 "Guarantor" means that person (or persons), or entity who agrees herein to be liable for the debts of the Buyer if a Limited Liability Buyer on a principal debtor basis.
- 1.4 "Goods" shall mean Goods supplied by the Seller to the Buyer (and where the context so permits shall include any supply of Services as hereinafter defined).
- 1.5 "Services" shall mean all services supplied by the Seller to the Buyer and includes any advice or recommendations (and where the context so permits shall include any supply of Services as defined supra).
- 1.6 "Price" shall mean the cost of the Goods as agreed between the Seller and the Buyer subject to clause 4 of this contract.

2. ACCEPTANCE

- 2.1 All quotations, offers and tenders are made subject to these Terms and Conditions, and the Buyer shall be deemed to have accepted these Terms and Conditions upon communication of its purchase order number to the Seller via telephone, electronic communication or other means, sending its purchase order to the Seller via facsimile, electronic communication, mail or other means, or performing any other act that indicates acceptance. Any additional or different terms and conditions must be proposed by the Buyer prior to acceptance and expressly agreed to by the Seller in writing. Any additional or different terms and conditions not presented to the Seller prior to acceptance by the Buyer and not specifically agreed to by the Seller in writing shall be deemed expressly rejected.
- 2.2 These Terms and Conditions are intended by the Seller to be part and parcel of any offer, counteroffer, acceptance or confirmation addressed to the Buyer and shall constitute the final written expression of the entire agreement between the Buyer and the Seller. All prior, contemporaneous and subsequent representations, negotiations, and agreements, whether written or oral, including, but not limited to, terms and conditions submitted by the Buyer, shall have no legal effect and shall not become part of the agreement between the Seller and the Buyer unless expressly agreed to in writing by the Seller and made a part hereof. No statement or recommendation made or assistance offered by the Seller or its representatives shall constitute a waiver of any portion of these Terms and Conditions, change the Seller's liability or constitute any guarantee or warranty.
- 2.3 Upon acceptance of these terms and conditions by the Buyer the terms and conditions are irrevocable and can only be rescinded in accordance with these terms and conditions or with the written consent of an authorized officer of the Seller.
- 2.4 None of the Seller's agents or representatives are authorised to make any representations, statements, conditions or agreements not expressed by an authorized officer of the Seller in writing nor is the Seller bound by any such unauthorised statements.

3. GOODS

- 3.1 The Goods and/or Services are as described on the invoices, quotation, work authorisation or any other work commencement forms as provided by the Seller to the Buyer.

4. PRICE AND PAYMENT

- 4.1 At the Sellers sole discretion;
 - (a) The Price shall be as indicated on invoices provided by the Seller to the Buyer in respect of Goods supplied; or
 - (b) The Price shall be the Seller's current price at the date of delivery of the Goods according to the Sellers current Price list; or
 - (c) The Price of the Goods shall, subject to clause 4.2, be the Sellers quoted Price which shall be binding upon the Seller provided that the Buyer shall accept in writing the Sellers quotation within thirty (30) days.
- 4.2 Any variation from the plan of scheduled works or specifications will be charged for on the basis of the Seller's quotation and will be shown as extras on the invoice. Payment for all extras must be made in full at their time of completion.
- 4.3 At the Sellers sole discretion a deposit may be required. The deposit amount or percentage of the Price will be stipulated at the time of the order of the Goods/ Services and shall become immediately due and payable.
- 4.4 Time for payment for the Goods/Services shall be of the essence and will be stated on the invoice, quotation or any other order forms. If no time is stated then payment shall be on delivery of the Goods/Service.
- 4.5 At the Seller's sole discretion, payment for approved Buyers shall be due on thirty (30) days following date of invoice.
- 4.6 Payment will be made by cash, or by cheque, or by bank cheque, or by direct credit, or by any other method as agreed to between the Buyer and the Seller.
- 4.7 The Price shall be increased by the amount of any GST and other taxes and duties which may be applicable, except to the extent that such taxes are expressly included in any quotation given by the Seller.

5. DELIVERY OF GOODS/SERVICES

- 5.1 Delivery of the Goods shall be made to the Buyer's address. The Buyer shall make all arrangements necessary to take delivery of the Goods whenever they are tendered for delivery, or delivery of the Goods shall be made to the Buyer at the Sellers address.
- 5.2 Delivery of the Goods to a carrier, either named by the Buyer or failing such naming to a carrier at the discretion of the Seller for the purpose of transmission to the Buyer, is deemed to be a delivery of the Goods to the Buyer.
- 5.3 The costs of carriage and any insurance which the Buyer reasonably directs the Seller to incur shall be reimbursed by the Buyer (without any set-off or other withholding whatever) and shall be due on the date for payment of the Price. The carrier shall be deemed to be the Buyer's agent.
- 5.4 Where there is no agreement that the Seller shall send the Goods to the Buyer, delivery to a carrier at limited carrier's risk at the expense of the Buyer is deemed to be delivery to the Buyer.
- 5.5 The failure of the Seller to deliver shall not entitle either party to treat this contract as repudiated.
- 5.6 The Seller shall not be liable for any loss or damage whatever due to failure by the Seller to deliver the Goods (or any of them) promptly or at all.

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6. RISK

- 6.1 If the Seller retains property in the Goods nonetheless, all risk for the Goods passes to the Buyer on delivery.
- 6.2 If any of the Goods are damaged or destroyed prior to property in them passing to the Buyer, the Seller is entitled, without prejudice to any of its other rights or remedies under these Terms and Conditions of Trade (including the right to receive payment of the balance of the Price for the Goods), to receive all insurance proceeds payable for the Goods. This applies whether or not the Price has become payable under the Contract. The production of these terms and conditions by the Seller is sufficient evidence of the Seller's rights to receive the insurance proceeds without the need for any person dealing with the Seller to make further enquiries.

7. DEFECTS/RETURNS

- 7.1 The Buyer shall inspect the Goods on delivery and shall within fourteen (14) days of delivery notify the Seller of any alleged defect, shortage in quantity, damage or failure to comply with the description or quote. The Buyer shall afford the Seller or the Sellers agent an opportunity to inspect the Goods within a reasonable time following delivery if the Buyer believes the Goods are defective in any way. If the Buyer shall fail to comply with these provisions the Goods shall be conclusively presumed to be in accordance with the terms and conditions and free from any defect or damage.
- 7.2 For defective Goods which the Seller has agreed in writing that the Buyer is entitled to reject, the Seller's liability is limited to either (at the Seller's discretion) replacing the Goods or repairing the Goods provided that:
- (a) the Buyer has complied with the provisions of clause 7.1;
 - (b) the Goods are returned at the Buyers cost within fifteen (15) days of the delivery date along with a "Goods Returned Number" (GR) as provided by the Seller;
 - (c) the Seller will not be liable for Goods which have not been stored or used in a proper manner;
 - (d) the Goods are returned in the condition in which they were delivered and with all packaging material, brochures and instruction material in as new condition as is reasonable possible in the circumstances.
- 7.3 The Seller may (in its discretion) accept the Goods for credit but this may incur a handling fee of 20% of the value of the returned Goods plus any freight.

8. WARRANTY

- 8.1 Subject to the conditions of warranty set out in Clause 8.2 the Seller warrants that if any defect in any workmanship manufactured by the Seller becomes apparent and is reported to the Seller within twelve (12) months of the date of the invoice (time being of the essence) then the Seller will (at the Sellers sole discretion) repair the defect or replace the workmanship.
- 8.2 The conditions applicable to the warranty given by Clause 8.1 are:
- (a) The warranty shall not cover any defect or damage which may be caused or partly caused by or arise through:
 - i) Failure on the part of the Buyer to properly maintain any Goods; or
 - ii) Failure on the part of the Buyer to follow any instructions or guidelines provided by the Seller; or
 - iii) Any use of any Goods otherwise than for any application specified on a quote or order form; or
 - iv) The continued use of any Goods after any defect becomes apparent or would have become apparent to a reasonably prudent operator or user; or
 - v) Failure to resist corrosion or erosion from any corrosive agent or fluid, or due to deposits of foreign material from any fluid; or
 - vi) Modifications not executed by the Seller; or
 - vii) Improper installation or operation; or
 - viii) Defects or failures arising out of, in any way related to, or as a result, either direct or indirect, of the Buyer's failure to properly advise the Seller of all normal and special operating conditions, known to or suspected by the Buyer, when the Seller is manufacturing the Goods for a specific operation; or
 - ix) Fair wear and tear, any accident or act of God.
 - (b) The warranty shall cease and the Seller shall thereafter in no circumstances be liable under the terms of the warranty if the workmanship is repaired, altered or overhauled without the Seller's consent.
 - (c) In respect of all claims the Seller shall not be liable to compensate the Buyer for any delay in either replacing or repairing the workmanship/Goods or in properly assessing the Buyers claim.
 - (d) Except as expressly set forth in this Section 8.2, the Seller makes no other warranty with respect to the Goods delivered hereunder and expressly disclaims all other warranties, express or implied, including warranties of merchantability and of fitness for a particular purpose, arising by operation of law or otherwise.
- 8.3 For Goods not manufactured by the Seller the warranty shall be the current warranty provided by the manufacturer of the Goods. The Seller shall be under no liability whatsoever except for the express conditions as detailed and stipulated in the manufacturers warranty.
- 8.4 In the case of second hand Goods the Buyer acknowledges that he has had full opportunity to inspect the same and that he accepts the same with all faults and that no warranty is given by the Seller as to the quality or suitability for any purpose and any implied warranty, statutory or otherwise, is expressly excluded. The Seller shall not be responsible for any loss or damage to the Goods, or caused by the Goods, or any part thereof however arising.

9. BUYERS DISCLAIMER

- 9.1 The Buyer hereby disclaims any right to rescind, or cancel the contract or to sue for damages or to claim restitution arising out of any misrepresentation made to him by any servant or agent of the Seller and the Buyer acknowledges that he buys the Goods relying solely upon his own skill and judgement. and that the Seller shall not be bound by nor responsible for any term, condition, representation or warranty other than the warranty given by the Manufacturer which warranty shall be personal to the Buyer and shall not be transferable to any subsequent Buyer.

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10. THE COMMONWEALTH TRADE PRACTICES ACT 1974 AND FAIR TRADING ACTS

10.1 Nothing in this agreement is intended to have the effect of contracting out of any applicable provisions of the Commonwealth Trade Practices Act 1974 or the Fair Trading Acts in each of the States and Territories of Australia, except to the extent permitted by those Acts where applicable.

11. INTELLECTUAL PROPERTY

11.1 Where the Seller has designed or drawn Goods for the Buyer, then the copyright in those designs and drawings shall remain vested in the Seller, and shall only be used by the Buyer at the Seller's discretion.

11.2 Conversely, in such a situation, where the Buyer has supplied drawings, the Seller in its sale conditions may look for an indemnity (the specifications and design of the Goods (including the copyright, design right or other intellectual property in them) shall as between the parties be the property of the Seller). Where any designs or specifications have been supplied by the Buyer for manufacture by or to the order of the Seller then the Buyer warrants that the use of those designs or specifications for the manufacture, processing, assembly or supply of the Goods shall not infringe the rights of any third party.

12. DEFAULT & CONSEQUENCES OF DEFAULT

12.1 Interest on overdue invoices shall accrue from the date when payment becomes due daily until the date of payment at a rate of 2.5% per calendar month and shall accrue at such a rate after as well as before any judgement.

12.2 If the Buyer defaults in payment of any invoice when due, the Buyer shall indemnify the Seller from and against all the Seller's costs and disbursements including on a solicitor and own Buyer basis and in addition all of the Seller's nominees costs of collection.

12.3 Without prejudice to any other remedies the Seller may have, if at any time the Buyer is in breach of any obligation (including those relating to payment), the Seller may suspend or terminate the supply of Goods to the Buyer and any of its other obligations under the terms and conditions. The Seller will not be liable to the Buyer for any loss or damage the Buyer suffers because the Seller exercised its rights under this clause.

12.4 If any account remains unpaid at the end of the second month after supply of the goods or services the following shall apply: An immediate amount of the greater of \$50.00 or 10.00% of the amount overdue shall be levied for administration fees which sum shall become immediately due and payable.

12.5 In the event that:

- (a) any money payable to the Seller becomes overdue, or in the Seller's opinion the Buyer will be unable to meet its payments as they fall due; or
- (b) the Buyer 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
- (c) a receiver, manager, liquidator (provisional or otherwise) or similar person is appointed in respect of the Buyer or any asset of the Buyer; then without prejudice to the Seller's other remedies at law
- (i) the Seller shall be entitled to cancel all or any part of any order of the Buyer which remains unperformed in addition to and without prejudice to any other remedies; and
- (ii) all amounts owing to the Seller shall, whether or not due for payment, immediately become payable.

13. TITLE

13.1 It is the intention of the Seller and agreed by the Buyer that property in the Goods shall not pass until

- (a) The Buyer has paid all amounts owing for the particular Goods, and
- (b) The Buyer has met all other obligations due by the Buyer to the Seller in respect of all contracts between the Seller and the Buyer, and that the Goods, or proceeds of the sale of the Goods, shall be kept separate until the Seller shall have received payment and all other obligations of the Buyer are met.

13.2 It is further agreed that:

- (a) The Buyer shall not deal with the money of the Seller in any way which may be adverse to the Seller.
- (b) Until such time as ownership of the Goods shall pass from the Seller to the Buyer the Seller may give notice in writing to the Buyer to return the Goods or any of them to the Seller. Upon such notice the rights of the Buyer to obtain ownership or any other interest in the Goods shall cease.
- (c) If the Buyer fails to return the Goods to the Seller then the Seller or the Seller's agent may enter upon and into land and premises owned, occupied or used by the Buyer, or any premises as the invitee of the Buyer, where the Goods are situated and take possession of the Goods, without being responsible for any damage thereby caused.
- (d) Receipt by the Seller 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 and until then the Seller's ownership of rights in respect of the Goods shall continue.
- (e) The Buyer shall not charge the Goods in any way nor grant nor otherwise give any interest in the Goods while they remain the property of the Seller.
- (f) The Seller may require payment of the Price or the balance of the Price due together with any other amounts due from the Buyer to the Seller arising out of these terms and conditions, and the Seller may take any lawful steps to require payment of the amounts due and the Price.
- (g) The Seller can issue proceedings to recover the Price of the Goods sold notwithstanding that ownership of the Goods may not have passed to the Buyer.

14. RESERVED.

15. CANCELLATION

15.1 The Seller may cancel these terms and conditions or cancel delivery of Goods at any time before the Goods are delivered by giving written notice. The Seller shall not be liable for any loss or damage whatever arising from such cancellation.

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16. PRIVACY ACT 1988

- 16.1 The Buyer and/or the Guarantor/s agree for the Seller to obtain from a credit-reporting agency a credit report containing personal credit information about the Buyer and Guarantor/s in relation to credit provided by the Seller.
- 16.2 The Buyer and/or the Guarantor/s agree that the Seller may exchange information about Buyer and Guarantor/s with those credit providers named in the Application for Credit account or named in a consumer credit report issued by a reporting agency for the following purposes:
- (a) To assess an application by Buyer;
 - (b) To notify other credit providers of a default by the Buyer;
 - (c) To exchange information with other credit providers as to the status of this credit account, where the Buyer is in default with other credit providers; and
 - (d) To assess the credit worthiness of Buyer and/or Guarantor/s.
- 16.3 The Buyer consents to the Seller being given a consumer credit report to collect overdue payment on commercial credit (Section 18K(1)(h) Privacy Act 1988).
- 16.4 The Buyer agrees that Personal Data provided may be used and retained by the Seller for the following purposes and for other purposes as shall be agreed between the Buyer and Seller or required by law from time to time:
- (a) provision of Services & Goods;
 - (b) marketing of Services and or Goods by the Seller, its agents or distributors in relation to the Services and Goods;
 - (c) analysing, verifying and/or checking the Buyer's credit, payment and/or status in relation to provision of Services/Goods;
 - (d) processing of any payment instructions, direct debit facilities and/or credit facilities requested by Buyer; and
 - (e) enabling the daily operation of Buyer's account and/or the collection of amounts outstanding in the Buyer's account in relation to the Services and Goods.
- 16.5 The Seller may give, information about the Buyer to a credit reporting agency for the following purposes:
- (a) to obtain a consumer credit report about the Buyer; and or
 - (b) allow the credit reporting agency to create or maintain a credit information file containing information about the Buyer.

17. UNPAID SELLERS RIGHTS TO DISPOSE OF GOODS

- 17.1 In the event that:
- (a) the Seller retains possession or control of the Goods; and
 - (b) payment of the Price is due to the Seller; and
 - (c) the Seller has made demand in writing of the Buyer for payment of the Price in terms of this contract; and
 - (d) the Seller has not received the Price of the Goods, then, whether the property in the Goods has passed to the Buyer or has remained with the Seller, the Seller may dispose of the Goods and may claim from the Buyer the loss to the Seller on such disposal.

18. LIEN & STOPPAGE IN TRANSIT

- 18.1 Where the Seller has not received or been tendered the whole of the price, or the payment has been dishonoured, the Seller shall have:
- (a) a lien on the goods;
 - (b) the right to retain them for the price while the Seller is in possession of them;
 - (c) a right of stopping the goods in transit whether or not delivery has been made or ownership has passed; and
 - (d) a right of resale, the foregoing right of disposal, provided that the lien of the Seller shall continue despite the commencement of proceedings or judgement for the price having been obtained.

19. GENERAL

- 19.1 If any provision of these terms and conditions shall be invalid, void or illegal or unenforceable the validity existence, legality and enforceability of the remaining provisions shall not be affected, prejudiced or impaired.
- 19.2 All Services/Goods supplied by the Seller are subject to the laws of New South Wales and the Seller takes no responsibility for changes in the law which affect the Services/Goods supplied.
- 19.3 In no event shall the Seller be liable hereunder to the Buyer, any successors in interest, or any beneficiary of this contract, for any claims for indirect, incidental, special, consequential or punitive damages or losses, loss of production and loss of profit, all of which are expressly excluded. In the event of any breach of this contract by the Service Provider the remedies of the Buyer shall be limited to damages. Under no circumstances shall the liability of the Service Provider exceed the Price of the Services.
- 19.4 The Buyer shall not set off against the Price amounts due from the Seller.
- 19.5 The Seller may license or sub-contract all or any part of its rights and obligations without the Buyer's consent.
- 19.6 The Seller reserves the right to review these terms and conditions at any time and from time to time. If, following any such review, there is to be any change in such terms and conditions, that change will take effect from the date on which the seller notifies the Buyer of such change.
- 19.7 Neither party shall be liable for any default due to any act of God, war, terrorism, strike, lock out, industrial action, fire, flood, drought, storm or other event beyond the reasonable control of either party.
- 19.8 All drawings, models, documents, confidential records, software and other information supplied by the Seller are supplied on the express understanding that all copyright and design rights are reserved to the Seller and that the Buyer will not, without the written consent of the Seller, either give away, loan, exhibit, or sell such drawings, models, documents, confidential records, computer software or other information or extracts therefrom or copies thereof or use them in any way except in connection with the Goods in respect of which they are issued. The Buyer shall consider all information furnished by the Seller, which was for commercial purposes, nor make copies of such information without written permission from the Seller. Buyer shall not disclose any information relating to any order without the Seller's written permission. Unless otherwise agreed in writing by the parties, no commercial, financial or technical information disclosed in any manner or at any time by the Buyer to the Seller shall be deemed secret or confidential and Buyer shall have no rights against the Seller with respect thereto.
- 19.9 The Buyer agrees to comply with all applicable national, state, local and foreign laws, statutes, ordinances, regulations, rules or orders or other requirements of any governmental, regulatory or administrative agency or authority or court or other tribunal to which the Buyer may be subject as a result of the activities contemplated by these Terms and Conditions.