

Eyre & Smith Re-Build Welding & Tracks Pty Ltd – Terms & Conditions of Trade

- 1. Definitions**
 - 1.1 "Eyre & Smith" means Eyre & Smith Re-Build Welding & Tracks Pty Ltd, its successors and assigns or any person acting on behalf of and with the authority of Eyre & Smith Re-Build Welding & Tracks Pty Ltd.
 - 1.2 "Client" means the person's buying the Goods as specified in any invoice, document or order, and if there is more than one Client is a reference to each Client jointly and severally.
 - 1.3 "Goods" means all Goods or Services supplied by Eyre & Smith to the Client at the Client's request from time to time (where the context so permits the terms "Goods" or "Services" shall be interchangeable for the other).
 - 1.4 "Price" means the Price payable for the Goods as agreed between Eyre & Smith and the Client in accordance with clause 4 below.
 - 2. Acceptance**
 - 2.1 The Client is taken to have exclusively accepted and is immediately bound, jointly and severally, by these terms and conditions if the Client places an order for or accepts delivery of the Goods.
 - 2.2 These terms and conditions may only be amended with Eyre & Smith's consent in writing and shall prevail to the extent of any inconsistency with any other document or agreement between the Client and Eyre & Smith.
 - 2.3 None of Eyre & Smith's agents or representatives are authorised to make any representations, statements conditions or agreements not expressed by the manager of Eyre & Smith in writing nor is Eyre & Smith bound by any such unauthorised statements.
 - 3. Change in Control**
 - 3.1 The Client shall give Eyre & Smith not less than fourteen (14) days prior written notice of any proposed change of ownership of the Client and/or any other change in the Client's details (including but not limited to, changes in the Client's name, address, contact phone or fax number, or business practice). The Client shall be liable for any loss incurred by Eyre & Smith as a result of the Client's failure to comply with this clause.
 - 4. Price and Payment**
 - 4.1 At Eyre & Smith's sole discretion the Price shall be either:
 - (a) as indicated on any invoice provided by Eyre & Smith to the Client; or
 - (b) the Price as at the date of delivery of the Goods according to Eyre & Smith's current price list; or
 - (c) Eyre & Smith's quoted price (subject to clause 4.2) which will be valid for the period stated in the quotation or otherwise for a period of thirty (30) days.
 - 4.2 Eyre & Smith reserves the right to change the Price if a variation to Eyre & Smith's quotation is requested.
 - 4.3 At Eyre & Smith's sole discretion a non-refundable 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 being of the essence, the Price will be payable by the Client on the date/s determined by Eyre & Smith, which may be:
 - (a) on delivery of the Goods;
 - (b) before delivery of the Goods;
 - (c) thirty (30) days following the end of the month in which a statement is posted to the Client's address or address for notices;
 - (d) the date which is thirty (30) days following the date of any invoice given to the Client by the Supplier;
 - (e) the date specified on any invoice or other form as being the date for payment; or
 - (f) failing any notice to the contrary, the date which is seven (7) days following the date of any invoice given to the Client by the Supplier.
 - 4.5 Payment may be made by cash, cheque, bank cheque, electronic/on-line banking, credit card (plus a surcharge of up to 2.5% of the Price), or by any other method as agreed to between the Client and Eyre & Smith.
 - 4.6 Unless otherwise stated the Price does not include GST. In addition to the Price the Client must pay to Eyre & Smith an amount equal to any GST Eyre & Smith must pay for any supply by Eyre & Smith under this or any other agreement for the sale of the Goods. The Client must pay GST, without deduction or set off of any other amounts, at the same time and on the same basis as the Client pays the Price. In addition the Client 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.
 - 5. Delivery of Goods/Services**
 - 5.1 Delivery ("Delivery") of the Goods is taken to occur at the time that:
 - (a) the Client or the Client's nominated carrier takes possession of the Goods at Eyre & Smith's address; or
 - (b) Eyre & Smith (or Eyre & Smith's nominated carrier) delivers the Goods to the Client's nominated address even if the Client is not present at the address.
 - 5.2 At Eyre & Smith's sole discretion the cost of delivery is either included in the Price or is in addition to the Price.
 - 5.3 The Client must take delivery by receipt or collection of the Goods whenever they are tendered for delivery. In the event that the Client is unable to take delivery of the Goods as arranged then Eyre & Smith shall be entitled to charge a reasonable fee for redelivery and/or storage.
 - 5.4 Eyre & Smith 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.
 - 5.5 Any time or date given by Eyre & Smith to the Client is an estimate only. The Client must still accept delivery of the Goods even if late and Eyre & Smith will not be liable for any loss or damage incurred by the Client as a result of the delivery being late.
 - 6. Risk**
 - 6.1 Risk of damage to or loss of the Goods passes to the Client on Delivery and the Client must insure the Goods on or before Delivery.
 - 6.2 If any of the Goods are damaged or destroyed following delivery but prior to ownership passing to the Client, Eyre & Smith is entitled to receive all insurance proceeds payable for the Goods. The production of these terms and conditions by Eyre & Smith is sufficient evidence of Eyre & Smith's rights to receive the insurance proceeds without the need for any person dealing with Eyre & Smith to make further enquiries.
 - 6.3 If the Client requests Eyre & Smith to leave Goods outside Eyre & Smith's premises for collection or to deliver the Goods to an unattended location then such Goods shall be left at the Client's sole risk.
 - 7. Title**
 - 7.1 Eyre & Smith and the Client agree that ownership of the Goods shall not pass until:
 - (a) the Client has paid Eyre & Smith all amounts owing to Eyre & Smith; and
 - (b) the Client has met all of its other obligations to Eyre & Smith.
 - 7.2 Receipt by Eyre & Smith 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.
 - 7.3 It is further agreed that:
 - (a) until ownership of the Goods passes to the Client in accordance with clause 7.1 that the Client is only a bailee of the Goods and must return the Goods to Eyre & Smith on request.
 - (b) the Client holds the benefit of the Client's insurance of the Goods on trust for Eyre & Smith and must pay to Eyre & Smith the proceeds of any insurance in the event of the Goods being lost, damaged or destroyed.
 - (c) the Client 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 Client sells, disposes or parts with possession of the Goods then the Client must hold the proceeds of any such act on trust for Eyre & Smith and must pay or deliver the proceeds to Eyre & Smith on demand.
 - (d) the Client should not convert or process the Goods or intermix them with other goods but if the Client does so then the Client holds the resulting product on trust for the benefit of Eyre & Smith and must sell, dispose of or return the resulting product to Eyre & Smith as it so directs.
 - (e) the Client irrevocably authorises Eyre & Smith to enter any premises where Eyre & Smith believes the Goods are kept and recover possession of the Goods.
 - (f) Eyre & Smith may recover possession of any Goods in transit whether or not delivery has occurred.
 - (g) the Client 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 Eyre & Smith.
 - (h) Eyre & Smith may commence proceedings to recover the Price of the Goods sold notwithstanding that ownership of the Goods has not passed to the Client.
 - 8. Personal Property Securities Act 2009 ("PPSA")**
 - 8.1 In this clause financing statement, financing change statement, security agreement, and security interest has the meaning given to it by the PPSA.
 - 8.2 Upon assenting to these terms and conditions in writing the Client 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 Eyre & Smith to the Client.
 - 8.3 The Client 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 Eyre & Smith 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;
 - (ii) register any other document required to be registered by the PPSA; or
 - (iii) correct a defect in a statement referred to in clause 8.3(a)(i) or 8.3(a)(ii);
 - (b) indemnify, and upon demand reimburse, Eyre & Smith 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 Eyre & Smith;
 - (d) not register, or permit to be registered, a financing statement or a financing change statement in relation to the Goods in favour of a third party without the prior written consent of Eyre & Smith;
 - (e) immediately advise Eyre & Smith of any material change in its business practices of selling the Goods which would result in a change in the nature of proceeds derived from such sales.
 - 8.4 Eyre & Smith and the Client agree that sections 96, 115 and 125 of the PPSA do not apply to the security agreement created by these terms and conditions.
 - 8.5 The Client waives their rights to receive notices under sections 95, 118, 121(4), 130, 132(3)(d) and 132(4) of the PPSA.
 - 8.6 The Client waives their rights as a grantor and/or a debtor under sections 142 and 143 of the PPSA.
 - 8.7 Unless otherwise agreed to in writing by Eyre & Smith, the Client waives their right to receive a verification statement in accordance with section 157 of the PPSA.
 - 8.8 The Client must unconditionally ratify any actions taken by Eyre & Smith under clauses 8.3 to 8.5.
 - 8.9 Subject to any express provisions to the contrary nothing in these terms and conditions is intended to have the effect of contracting out of any of the provisions of the PPSA.
 - 9. Security and Charge**
 - 9.1 In consideration of Eyre & Smith agreeing to supply the Goods, the Client charges all of its rights, title and interest (whether joint or several) in any land, realty or other assets capable of being charged, owned by the Client either now or in the future, to secure the performance by the Client of its obligations under these terms and conditions (including, but not limited to, the payment of any money).
 - 9.2 The Client indemnifies Eyre & Smith from and against all Eyre & Smith's costs and disbursements including legal costs on a solicitor and own client basis incurred in exercising Eyre & Smith's rights under this clause.
 - 9.3 The Client irrevocably appoints Eyre & Smith and each director of Eyre & Smith as the Client's true and lawful attorney/s to perform all necessary acts to give effect to the provisions of this clause 9 including, but not limited to, signing any document on the Client's behalf.
 - 10. Defects, Warranties and Returns, Competition and Consumer Act 2010 (CCA)**
 - 10.1 The Client must inspect the Goods on delivery and must within twenty eight (28) days of delivery notify Eyre & Smith in writing of any evident defect/damage, shortage in quantity, or failure to comply with the description or quote. The Client must notify any other alleged defect in the Goods as soon as reasonably possible after any such defect becomes evident. Upon such notification the Client must allow Eyre & Smith to inspect the Goods.
 - 10.2 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).
 - 10.3 Eyre & Smith acknowledges that nothing in these terms and conditions purports to modify or exclude the Non-Excluded Guarantees.
 - 10.4 Except as expressly set out in these terms and conditions or in respect of the Non-Excluded Guarantees, Eyre & Smith makes no warranties or other representations under these terms and conditions including but not limited to the quality or suitability of the Goods. Eyre & Smith's liability in respect of these warranties is limited to the fullest extent permitted by law.
 - 10.5 If the Client is a consumer within the meaning of the CCA, Eyre & Smith's liability is limited to the extent permitted by section 64A of Schedule 2.
 - 10.6 If Eyre & Smith is required to replace the Goods under this clause or the CCA, but is unable to do so, Eyre & Smith may refund any money the Client has paid for the Goods.
 - 10.7 If the Client is not a consumer within the meaning of the CCA, Eyre & Smith'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 Client by Eyre & Smith at Eyre & Smith's sole discretion;
 - (b) limited to any warranty to which Eyre & Smith is entitled, if Eyre & Smith did not manufacture the Goods;
 - (c) otherwise negated absolutely.
 - 10.8 Subject to this clause 10, returns will only be accepted provided that:
 - (a) the Client has complied with the provisions of clause 10.1; and
 - (b) Eyre & Smith has agreed that the Goods are defective; and
 - (c) the Goods are returned within a reasonable time at the Client'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.
 - 10.9 Notwithstanding clauses 10.1 to 10.8 but subject to the CCA, Eyre & Smith 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 Client failing to properly maintain or store any Goods;
 - (b) the Client using the Goods for any purpose other than that for which they were designed;
 - (c) the Client 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 Client failing to follow any instructions or guidelines provided by Eyre & Smith;
 - (e) fair wear and tear, any accident, or act of God.
 - 10.10 In the case of second hand Goods, unless the Client is a consumer under the CCA, the Client 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 Eyre & Smith as to the quality or suitability for any purpose and any implied warranty, statutory or otherwise, is expressly excluded. The Client acknowledges and agrees that Eyre & Smith has agreed to provide the Client with the second hand Goods and calculated the Price of the second hand Goods in reliance of this clause 10.10.
 - 10.11 Notwithstanding anything contained in this clause if Eyre & Smith is required by a law to accept a return then Eyre & Smith will only accept a return on the conditions imposed by that law.
 - 11. Intellectual Property**
 - 11.1 Where Eyre & Smith has designed, drawn or developed Goods for the Client, then the copyright in any designs and drawings and documents shall remain the property of Eyre & Smith.
 - 11.2 The Client warrants that all designs, specifications or instructions given to Eyre & Smith will not cause Eyre & Smith to infringe any patent, registered design or trademark in the execution of the Client's order and the Client agrees to indemnify Eyre & Smith against any action taken by a third party against Eyre & Smith in respect of any such infringement. The Client agrees that Eyre & Smith may (at no cost) use for the purposes of marketing or entry into any competition, any documents, designs, drawings or Goods which Eyre & Smith has created for the Client.
 - 12. Default and Consequences of Default**
 - 12.1 Interest on overdue invoices shall accrue daily from the date when payment becomes due, until the date of payment, at a rate of one and a quarter percent (1.25%) per calendar month (and at Eyre & Smith's sole discretion such interest shall compound monthly at such a rate) after as well as before any judgment.
 - 12.2 If the Client owes Eyre & Smith any money the Client shall indemnify Eyre & Smith from and against all costs and disbursements incurred by Eyre & Smith in recovering the debt
 - (including but not limited to internal administration fees, legal costs on a solicitor and own client basis, Eyre & Smith's collection agency costs, and bank dishonour fees).
 - 12.3 Without prejudice to any other remedies Eyre & Smith may have, if at any time the Client is in breach of any obligation (including those relating to payment) under these terms and conditions Eyre & Smith may suspend or terminate the supply of Goods to the Client. Eyre & Smith will not be liable to the Client for any loss or damage the Client suffers because Eyre & Smith has exercised its rights under this clause.
 - 12.4 Without prejudice to Eyre & Smith's other remedies at law Eyre & Smith shall be entitled to cancel all or any part of any order of the Client which remains unfulfilled and all amounts owing to Eyre & Smith shall, whether or not due for payment, become immediately payable if:
 - (a) any money payable to Eyre & Smith becomes overdue, or in Eyre & Smith's opinion the Client will be unable to make a payment when it falls due;
 - (b) the Client 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 Client or any asset of the Client.
 - 13. Cancellation**
 - 13.1 Eyre & Smith may cancel any contract to which these terms and conditions apply or cancel delivery of Goods at any time before the Goods are delivered by giving written notice to the Client. On giving such notice Eyre & Smith shall repay to the Client any money paid by the Client for the Goods. Eyre & Smith shall not be liable for any loss or damage whatsoever arising from such cancellation.
 - 13.2 In the event that the Client cancels delivery of Goods the Client shall be liable for any and all loss incurred (whether direct or indirect) by Eyre & Smith as a direct result of the cancellation (including, but not limited to, any loss of profits).
 - 13.3 Cancellation of orders for Goods made to the Client's specifications, or for non-stocklist items, will definitely not be accepted once production has commenced, or an order has been placed.
 - 14. Privacy Act 1988**
 - 14.1 The Client agrees for Eyre & Smith to obtain from a credit reporting agency a credit report containing personal credit information about the Client in relation to credit provided by Eyre & Smith.
 - 14.2 The Client agrees that Eyre & Smith may exchange information about the Client with those credit providers either named as trade referees by the Client or named in a consumer credit report issued by a credit reporting agency for the following purposes:
 - (a) to assess an application by the Client; and/or
 - (b) to notify other credit providers of a default by the Client; and/or
 - (c) to exchange information with other credit providers as to the status of this credit account, where the Client is in default with other credit providers; and/or
 - (d) to assess the creditworthiness of the Client.The Client understands that the information exchanged can include anything about the Client's creditworthiness, credit standing, credit history or credit capacity that credit providers are allowed to exchange under the Privacy Act 1988.
 - 14.3 The Client consents to Eyre & Smith being given a consumer credit report to collect overdue payment on commercial credit (Section 18(1)(h) Privacy Act 1988).
 - 14.4 The Client agrees that personal credit information provided may be used and retained by Eyre & Smith for the following purposes (and for other purposes as shall be agreed between the Client and Eyre & Smith or required by law from time to time):
 - (a) the provision of Goods; and/or
 - (b) the marketing of Goods by Eyre & Smith, its agents or distributors; and/or
 - (c) analysing, verifying and/or checking the Client's credit, payment and/or status in relation to the provision of Goods; and/or
 - (d) processing of any payment instructions, direct debit facilities and/or credit facilities requested by the Client; and/or
 - (e) enabling the daily operation of Client's account and/or the collection of amounts outstanding in the Client's account in relation to the Goods.
 - 14.5 Eyre & Smith may give information about the Client to a credit reporting agency for the following purposes:
 - (a) to obtain a consumer credit report about the Client;
 - (b) allow the credit reporting agency to create or maintain a credit information file containing information about the Client;
 - (c) the information given to the credit reporting agency may include:
 - (a) personal particulars (the Client's name, sex, address, previous addresses, date of birth, name of employer and driver's licence number);
 - (b) details concerning the Client's application for credit or commercial credit and the amount requested;
 - (c) advice that Eyre & Smith is a current credit provider to the Client;
 - (d) advice of any overdue accounts, loan repayments, and/or any outstanding monies owing which are overdue by more than sixty (60) days, and for which debt collection action has been started;
 - (e) that the Client's overdue accounts, loan repayments and/or any outstanding monies are no longer overdue in respect of any default that has been listed;
 - (f) information that, in the opinion of Eyre & Smith, the Client has committed a serious credit infringement (that is, fraudulently or shown an intention not to comply with the Client's credit obligations);
 - (g) advice that cheques drawn by the Client for one hundred dollars (\$100) or more, have been dishonoured more than once;
 - (h) that credit provided to the Client by Eyre & Smith has been paid or otherwise discharged.
 - 14.6 The information given to the credit reporting agency may include:
 - (a) personal particulars (the Client's name, sex, address, previous addresses, date of birth, name of employer and driver's licence number);
 - (b) details concerning the Client's application for credit or commercial credit and the amount requested;
 - (c) advice that Eyre & Smith is a current credit provider to the Client;
 - (d) advice of any overdue accounts, loan repayments, and/or any outstanding monies owing which are overdue by more than sixty (60) days, and for which debt collection action has been started;
 - (e) that the Client's overdue accounts, loan repayments and/or any outstanding monies are no longer overdue in respect of any default that has been listed;
 - (f) information that, in the opinion of Eyre & Smith, the Client has committed a serious credit infringement (that is, fraudulently or shown an intention not to comply with the Client's credit obligations);
 - (g) advice that cheques drawn by the Client for one hundred dollars (\$100) or more, have been dishonoured more than once;
 - (h) that credit provided to the Client by Eyre & Smith has been paid or otherwise discharged.
 - 15. Unpaid Seller's Rights**
 - 15.1 Where the Client has left any item with Eyre & Smith for repair, modification, exchange or for Eyre & Smith to perform any other service in relation to the item and Eyre & Smith has not received or been tendered the whole of any monies owing to it by the Client, Eyre & Smith shall have, until all monies owing to Eyre & Smith are paid:
 - (a) a lien on the item; and
 - (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.
 - (c) the right of stopping the goods in transit whether or not delivery has been made or ownership has passed;
 - (d) and a right of disposal
 - 15.2 The lien of Eyre & Smith shall continue despite the commencement of proceedings, or judgment for any monies owing to Eyre & Smith having been obtained against the Client.
- 16. General**
 - 16.1 The failure by Eyre & Smith to enforce any provision of these terms and conditions shall not be treated as a waiver of that provision, nor shall it affect Eyre & Smith's right to subsequently enforce that provision. If any provision of these terms and conditions shall be invalid, void, illegal or unenforceable by the validity, existence, legality and enforceability of the remaining provisions shall not be affected, prejudiced or impaired.
 - 16.2 These terms and conditions and any contract to which they apply shall be governed by the laws of New South Wales in which Eyre & Smith has its principal place of business, and are subject to the jurisdiction of the courts in that state.
 - 16.3 Subject to clause 10 Eyre & Smith shall be under no liability whatsoever to the Client for any indirect and/or consequential loss and/or expense (including loss of profit) suffered by the Client arising out of a breach by Eyre & Smith of these terms and conditions (alternatively Eyre & Smith's liability shall be limited to damages which under no circumstances shall exceed the Price of the Goods).
 - 16.4 The Client shall not be entitled to set off, against or deduct from the Price, any sums owed or claimed to be owed to the Client by Eyre & Smith nor to withhold payment of any invoice because part of that invoice is in dispute.
 - 16.5 Eyre & Smith may license or sub-contract all or any part of its rights and obligations without the Client's consent.
 - 16.6 The Client agrees that Eyre & Smith may amend these terms and conditions at any time. If Eyre & Smith makes a change to these terms and conditions, then that change will take effect from the date on which Eyre & Smith notifies the Client of such change. The Client will be taken to have accepted such changes if the Client makes a further request for Eyre & Smith to provide Goods to the Client.
 - 16.7 Neither party shall be liable for any default due to any act of God, war, terrorism, strike, lock-out, industrial action, fire, flood, storm or other event beyond the reasonable control of either party.
 - 16.8 The Client warrants that it has the power to enter into this agreement and has obtained all necessary authorisations to allow it to do so, it is not insolvent and that this agreement creates binding and valid legal obligations on it.