

TERMS AND CONDITIONS OF SUPPLY
SMC Corporation (Australia) Pty Ltd ACN 000 543 519
(Issue Date: 28 February 2024)

The following Terms and Conditions govern all Orders placed by the Buyer and will be incorporated into each Contract between the Buyer and the Company.

1. Definitions

In these Terms and Conditions:

- (a) **Amount Payable** means, at any time, all amounts payable by the Buyer to the Company at that time (whether or not those amounts have become due for payment) in connection with the Contract including any invoiced amount, interest, fees, costs or expenses;
- (b) **Approval** means any approval, authorisation, certificate, consent, determination, exemption or permit of any Government Authority;
- (c) **Australian Consumer Law** means the *Australian Consumer Law* which is set out in Schedule 2 of the *Competition and Consumer Act 2010* (Cth);
- (d) **Australian Design Rules** means the national standards for vehicle safety and other matters, published as the Australian Design Rules and administered by the Commonwealth Government under the *Motor Vehicle Standards Act 1989*.
- (e) **Business Day** means a day that is not a Saturday, Sunday, or bank or public holiday in New South Wales;
- (f) **Buyer** means the person to whom a Quotation is addressed. In the event that no Quotation is issued, Buyer means the person to whom Goods and/or Services are supplied or are to be supplied by the Company;
- (g) **Change in Law** means:
 - (i) the adoption, enactment or application to the Company of any relevant Law not existing, foreseeable or otherwise applicable to the Company on the Relevant Date; or
 - (ii) any change in a relevant Law or the application or interpretation of a relevant Law after the Relevant Date,in either case that materially and adversely affects (in time and/or cost) the ability of the Company to perform its obligations under the Contract;
- (h) **Consumer** means a Buyer that is a consumer as that term is defined in the Australian Consumer Law in respect of the particular Supply;
- (i) **Company** means SMC Corporation (Australia) Pty Ltd ACN 000 543 519 or any of its Related Bodies Corporate which accepts the Buyer's Order;
- (j) **Confidential Information** means any information provided by or on behalf of the Disclosing Party to the Receiving Party;

- (i) which the Disclosing Party has identified as confidential; or
- (ii) the Receiving Party ought reasonably to know is confidential,

and includes all prices, rebates and allowances offered by the Company to the Buyer in relation to an Order or Quotation, but excludes any information of the Disclosing Party that:

- (iii) is in or becomes part of the public domain other than through a breach of the Contract by the Receiving Party; or
- (iv) was already in the Receiving Party's possession at the time of receipt from the Disclosing Party without any obligation of confidentiality to the Disclosing Party;

(k) **Contract** means:

- (i) any contract to which these Terms and Conditions are expressed to form part; or
- (ii) for the supply of Goods and/or Services pursuant to an Order, the contract (which includes these Terms and Conditions) formed for the supply of Goods and/or Services to the Buyer upon the issue of an Order Confirmation;

(l) **Contract Date** means the date on which a Contract is entered between the Buyer and the Company, including under clause 4.5;

(m) **Credit Account Application** means the document by which a Buyer applies to the Company for a credit account;

(n) **Defaulting Party** means a party subject to an insolvency event in accordance with clause 24;

(o) **Delay Event** means:

- (i) a Force Majeure Event;
- (ii) a breach of this agreement by the Buyer; and
- (iii) a delay attributable to any act or omission of the Buyer or any other contractor or sub-contractor of the Buyer including a delay in the performance of works, providing instructions, giving consent or providing access to any site to enable the performance of the Services or delivery of the Goods;

(p) **Delivery Claim** has the meaning given in clause 14.3;

(q) **Developed IP** means all Intellectual Property Rights created, discovered or otherwise brought into existence in the course of the performance of the Contract;

(r) **Disclosing Party** means a party whose Confidential Information is disclosed, communicated or delivered or otherwise made known to the other party;

- (s) **Force Majeure Event** means any event or cause beyond the reasonable control and without default or negligence of the party claiming force majeure (provided such party has taken reasonable precautions);
- (t) **Goods** means any goods supplied or to be supplied by the Company to the Buyer pursuant to the Contract;
- (u) **Governing Jurisdiction** means:
 - (i) the state of Australia identified in an Order Confirmation as the governing jurisdiction for the Order;
 - (ii) if no governing jurisdiction is identified in the Order Confirmation, the state of Australia in which the Issuing Facility for the Order, if any, is located; or
 - (iii) if neither (i) nor (ii) applies, New South Wales.
- (v) **Government Authority** means any Federal, State or local government (including any local council), and any agency, department, directorate or instrumentality thereof, including any independent regulator deriving power from statute, within Australia or elsewhere;
- (w) **GST Act** means the *A New Tax System (Goods and Services Tax) Act 1999* (Cth);
- (x) **GST Law** has the meaning given to that term in the GST Act;
- (y) **Heavy Vehicle National Law** means the road safety regime contained in the *Heavy Vehicle (Adoption of National Law) Act 2013* (NSW) and related State or Territory legislation.
- (z) **Insolvency Event** means any of the following events in respect of any party:
 - (i) the party disposes of the whole or part of its assets, operations or business other than in the ordinary course of business;
 - (ii) the party ceases to carry on business or is deregistered;
 - (iii) the party ceases to be able to pay its debts as they become due;
 - (iv) any step is taken by a mortgagee to take possession or dispose of the whole or part of the party's assets, operations or business;
 - (v) any step is taken to enter into any arrangement between the party and its creditors;
 - (vi) any step is taken to appoint a receiver, a receiver and manager, a trustee in bankruptcy, a provisional liquidator, an administrator or other like person to the whole or part of the party's assets, operations or business;
 - (vii) where the party is a partnership, any step is taken to dissolve that partnership or a partner dies; or
 - (viii) where the party is an individual, the party dies;

- (aa) **Intellectual Property Rights** means any and all intellectual property rights granted by law or equity from time to time, including copyright and related rights, designs, patents, trade marks, trade names and service marks, obligations of confidentiality and rights to use and protect the confidentiality of confidential information, know-how, moral rights, business names, domain names, rights in get-up and trade dress, goodwill and the right to sue for passing off, rights to inventions, and all other rights in intangible property including rights of present and future intangible property and all similar rights in any part of the world including any rights to claim priority and, where those rights are obtained or enhanced by registration, any registration, renewal or extension of those rights and applications and rights to apply for and be granted those registrations, renewals or extensions;
- (bb) **Interest Rate** means 5% per annum;
- (cc) **Ipsa Facto Law Reform** means the law reform outlined in the *Corporations Amendment (Stay on Enforcing Certain Rights) Regulations 2018* (Cth) which prevents a party from enforcing a provision to terminate or amend a contract because the counterparty enters into voluntary administration, receivership or a scheme of arrangement to avoid being wound up in insolvency;
- (dd) **Issuing Facility** means the office or other facility of the Company, if any, from, or on behalf of, which an Order Confirmation is issued, as identified in the Order Confirmation;
- (ee) **Law** means any present and future applicable law including legislation, ordinances, regulations, codes, by-laws, orders, judgments, ordinances and other subordinate legislation, in force from time to time in any applicable jurisdiction;
- (ff) **Loss** means damage, loss, cost, expense, suit, charge, action, right or action, or liability (whether actual or contingent);
- (gg) **Order** means an order placed by the Buyer with the Company for the purchase of Goods or Services, whether made in writing, electronically (including by email) or verbally;
- (hh) **Order Confirmation** means the confirmation of an Order issued by the Company to the Buyer;
- (ii) **Personnel** of a party means officers, employees, agents, contractors, subcontractors and secondees of that party and its Related Bodies Corporate, except that:
 - (i) the Company and its officers, employees, agents, contractors, subcontractors and secondees are not Personnel of the Buyer; and
 - (ii) the Buyer and its officers, employees, agents, contractors, subcontractors and secondees are not Personnel of the Company;
- (jj) **PPSA** means the *Personal Property Securities Act 2009* (Cth);

- (kk) **Price** means the price payable for the Supply as agreed between the Company and the Buyer in accordance with clause 9 of these Terms and Conditions;
- (ll) **Privacy Laws** means the data protection and information privacy laws in Australia, including the *Privacy Act 1988* (Cth);
- (mm) **Quotation** means a written quotation by the Company setting out the proposed terms of a Supply;
- (nn) **Receiving Party** means a party who is in receipt of Confidential Information of the other party;
- (oo) **Related Body Corporate** has the same meaning as in the *Corporations Act 2001* (Cth);
- (pp) **Relevant Date** means the date which is 14 days before the Contract Date;
- (qq) **Services** means any services supplied or to be supplied by the Company to the Buyer pursuant to the Contract;
- (rr) **Specification** means any specification or standard for the Goods or Services expressly incorporated in the Contract;
- (ss) **Supply** means the supply of Goods and/or Services pursuant to the Contract;
- (tt) **Third Party Goods** means Goods purchased by the Company from a third party for sale to the Buyer;
- (uu) **Terms and Conditions** means these terms and conditions of supply; and
- (vv) **Variation** has the meaning given in clause 23.1.

2. Interpretation

2.1 In the Contract, headings and bold text are for ease of reference only and do not affect the interpretation of this agreement and, unless the context otherwise requires:

- (a) the singular includes the plural and vice versa;
- (b) another grammatical form of a defined word or expression has a corresponding meaning;
- (c) a reference to a clause, paragraph or schedule is to a clause or paragraph of or schedule to the Contract and a reference to the Contract includes any schedule or annexure;
- (d) a reference to a document or instrument, includes the document or instrument as novated, altered, supplemented or replaced from time to time;
- (e) a reference to a party to the Contract, and a reference to a party to a document includes the party's executors, administrators, successors and permitted assigns and substitutes;

- (f) a reference to a person includes a natural body, partnership, body corporate, association, governmental or local authority or agency or other entity;
 - (g) a reference to a statute, ordinance, code or other law includes regulations and other instruments under it and consolidations, amendments, re-enactments or replacements of any of them;
 - (h) the meaning of general words is not limited by specific examples introduced by including, for example or similar expressions; and
 - (i) a rule of construction does not apply to the disadvantage of a party because the party was responsible for the preparation of the Contract or any part of it.
- 2.2 If a day on or by which an obligation must be performed or an event must occur is not a Business Day, the obligation must be performed, or the event must occur on or by the next Business Day.
- 2.3 If the Buyer consists of more than one person, the obligations of each person are joint and several.

3. Application of these Terms and Conditions

- 3.1 The Terms and Conditions apply to every Order, unless otherwise agreed in writing by the Company. Placement of an Order by the Buyer is conclusive evidence of the Buyer's acceptance that the Terms and Conditions apply and are binding on the Buyer.
- 3.2 The Contract constitutes the entire agreement between the Buyer and the Company with respect to an Order. All prior negotiations, proposals, previous dealings, correspondence, trade custom and/or trade usage are superseded by and will not affect the interpretation of the Contract.
- 3.3 Any purported incorporation of other standard terms and conditions by the Buyer is void and of no effect, unless specifically identified in the Contract.
- 3.4 Where there is any discrepancy between the Terms and Conditions and those that may be included in or implied by any document forming part of any enquiry, order or contract, the Terms and Conditions will prevail, except in so far as they are expressly varied by the Company in writing or otherwise by law.

4. Quotations, Orders and Contract Formation

- 4.1 A Quotation issued by the Company to the Buyer is an offer to perform the Supply and will not create any contract except in accordance with clause 4.5.
- 4.2 Unless the Quotation states otherwise, the Quotation is provided on the basis that the Supply will be subject to these Terms and Conditions.
- 4.3 The Company may withdraw, revoke or vary a Quotation at any time prior to its acceptance.
- 4.4 Unless otherwise stated in writing by the Company, all Quotations will automatically lapse thirty (30) days after the date of the Quotation.

- 4.5 A Contract is formed and binding on the parties:
- (a) if the Buyer issues an Order validly accepting a Quotation, without any qualification, when the Company receives the Order; or
 - (b) if there is no Quotation or if the Buyer purports to qualify its acceptance of a Quotation or vary the terms of a Quotation, when the Company issues an Order Confirmation to the Buyer.

5. General Obligations

5.1 The Company will carry out the Supply on the basis of information available to the Company at the time when the Supply is being carried out. The Company will not take any responsibility, nor accept any liability, for Loss arising out of matters relevant to the Supply that arise due to circumstances that become known to the Company after completion of the Supply.

5.2 The Buyer must:

- (a) pay the Price to the Company in consideration for the Supply in accordance with clause 9;
- (b) provide the Company with any technical information, approval or drawings or other information reasonably required by the Company in carrying out its obligations regarding the Supply; and
- (c) provide all reasonable support and co-operation reasonably requested by the Company in connection with the Supply.

6. Supply of Goods

6.1 The Company agrees to Supply the Goods in accordance with the Contract.

6.2 The Company will make all reasonable efforts to have the Goods delivered to the Buyer not later than the time set out in the Contract or otherwise quoted by the Company in writing. If no time is stated or quoted, the Company must use reasonable endeavours to deliver the Goods in a timely manner.

6.3 Unless otherwise stated in writing, times quoted for delivery by the Company are given in good faith and are estimates only. The Buyer will not be relieved of any obligation to accept or pay for Goods by reason of any delay in delivery.

6.4 The Company will not be liable for:

- (a) any damage or loss due to unloading or packaging; or
- (b) damage to property caused upon entering premises to deliver the Goods,

except to the extent that such damage was caused by the negligent act or omission of the Company.

6.5 Unless the Contract provides otherwise delivery of the Goods, including Goods for export, will be on an ex-works basis and the Buyer must collect the Goods from the Company's premises.

- 6.6 In all circumstances and whatever the agreed method or place of delivery, the Buyer will be responsible at its own cost for unloading the Goods, or for arranging for a suitable means of unloading the Goods, from the relevant delivery vehicle. The Buyer will indemnify the Company against any loss, liability, costs or expenses incurred by the Company in relation to the unloading of the Goods.
- 6.7 If the Buyer fails to accept, or requests the delay of, delivery of the Goods or fails to give proper instructions to the Company for their delivery within fourteen (14) days after receiving notification in writing from the Company that the Goods are ready for delivery:
- (a) the Company may store such Goods at a location of its choosing and at the Buyer's risk;
 - (b) the Buyer must pay the Company on demand all reasonable costs for storage, protection and insurance of the Goods after expiration of such fourteen (14) day period; and
 - (c) the Company may invoice the Buyer for the Goods in accordance with any previously agreed delivery schedule.
- 6.8 No defect or claim in respect of Goods delivered will entitle the Buyer to reject delivery of other Goods, which are not subject to any defect or claim, delivered as part of the Order.
- 6.9 The Company will accept the return of Goods by the Buyer within fourteen (14) days after the date of delivery provided that:
- (a) the Goods are complete and in their original condition;
 - (b) the Goods have not been specifically manufactured, customised or modified for the Buyer or procured by the Company as a special order from overseas;
 - (c) the Buyer complies with all return arrangements notified by the Company, including delivery arrangements;
 - (d) the Goods are returned to the location nominated by the Company at the Buyer's cost and risk; and
 - (e) the Buyer pays a restocking fee of:
 - (i) 20% of the Price or
 - (ii) \$150,whichever is greater.
- 6.10 Unless the Contract provides otherwise, the Goods are at the Buyer's risk from the time at which:
- (a) the Company gives the Buyer written notice that the Goods are available for collection by the Buyer or its nominee or agent from the Company;
 - (b) the Goods are made available to the Buyer or its nominee or agent on an ex-works basis; or

- (c) the Goods are otherwise dispatched by the Company to the Buyer or its nominee or agent,

whichever occurs first, and regardless of whether, and on what terms, the Company elects or agrees to store the Goods on behalf of the Buyer.

6.11 Legal and equitable title in the Goods sold by the Company to the Buyer remains with the Company until payment in full of the Price by the Buyer, at which time it will pass to the Buyer.

6.12 The Company and the Buyer agree that, until property and ownership (including legal and equitable title) of the Goods has passed to the Buyer:

- (a) the Buyer will not supply any of the Goods to any person outside its ordinary or usual course of business;
- (b) the Buyer will not allow any person to have or acquire any security interest in the Goods;
- (c) the Buyer will not create any absolute or defeasible interest in the Goods in relation to any third party except as may be authorised by the Company;
- (d) the Buyer must not remove, deface or obliterate any identifying mark, number or other indicia on any of the Goods;
- (e) where the Buyer is in actual or constructive possession of the Goods:
 - (i) the Buyer holds the Goods as fiduciary bailee and agent for the Company;
 - (ii) after giving reasonable notice to the Buyer, the Company will be entitled to enter upon the Buyer's premises at any reasonable time to inspect the Goods;
 - (iii) the Buyer will not deliver the Goods, or any document of title to the Goods, to any person except as directed or approved by the Company in writing;
 - (iv) the Buyer must store the Goods separately and in a manner that enables the Goods to be identified and cross-referenced to particular invoices issued to the Buyer by the Company; and
 - (v) the proceeds of any Goods sold must be kept in a separate account by the Buyer and must not be mixed with any other moneys, including funds of the Buyer;
- (f) the Buyer acknowledges that if it mixes the Goods with other products or items such that the Goods are no longer separately identifiable, then the Buyer and the Company will be owners in common of the new product; and
- (g) the Buyer has no right to claim any interest in the Goods to secure any amount or obligation the Company owes to the Buyer.

6.13 Unless the Contract provides otherwise, the Buyer is responsible for obtaining and maintaining all Approvals required to own, possess, use or operate the Goods.

7. Services

- 7.1 This clause 7 applies to the extent the Supply includes Services.
- 7.2 The Company agrees to provide the Services in accordance with the Contract.
- 7.3 The Company must do and provide all things reasonably necessary for the provision of the Services in accordance with the description of the Services in the Contract.
- 7.4 The Company must use all reasonable endeavours to perform the Services by the date specified in the Contract (**Completion Date**) or as otherwise agreed in writing by the parties and subject to any extension of time under the Contract. If no Completion Date is specified or agreed, the Company must use reasonable endeavours to undertake the Services in a timely manner.
- 7.5 If the Company is likely to be delayed in completing the Services by the Completion Date by a Delay Event, the Company will be entitled to an extension of the Completion Date by a period of not less than the duration of a Delay Event.
- 7.6 Within a reasonable time after the Company becomes aware of a Delay Event, the Company must notify the Buyer of the Delay Event and the new date for completion of the Services.
- 7.7 If:
- (a) a Force Majeure Event; or
 - (b) a breach of this agreement by the Buyer,
- occurs and the Company incurs additional costs in relation to such event, the Company is entitled to claim, and the Buyer must reimburse the Company for, the actual costs reasonably incurred by the Company in relation to the delay.
- 7.8 Unless the Contract provides otherwise, the Buyer is responsible for:
- (a) obtaining all Approvals in connection with the Services;
 - (b) ensuring that the Company has clear and uninterrupted access to any site to enable the performance of the Services;
 - (c) securing any such site during the performance of the Services;
 - (d) obtaining all necessary insurances for the Goods or Services (including contract works and public liability insurance) during the performance of the Services; and
 - (e) notifying the Company of the precise location of all hidden services at any site of the Supply.

8. Chain of Responsibility

- 8.1 The Buyer acknowledges that under the Heavy Vehicle National Law, all parties in the road transport supply chain (including consignor, consignee, packer, loader and scheduler, drivers, owner-drivers and operators as well as directors, partners and managers) could be held responsible for their actions (or inactions) relating to

breaches of the road transport, fatigue, speed, mass, dimension and load restraint laws.

- 8.2 The Buyer must ensure that it, at all times, takes all reasonable steps to comply with the Heavy Vehicle National Law and the Chain of Responsibility provisions it contains.
- 8.3 Without limiting any of its other compliance, reporting or record keeping requirements, the Buyer must create and maintain, and must ensure that its Personnel create and maintain, records covering compliance with obligations under the Heavy Vehicle National Law, which must be provided to the Company upon request, including after any identification of non-compliance by the Company and after any incident.
- 8.4 The Buyer must notify the Company in writing immediately in the event that it or any of its Personnel is issued with any warning, request for information, notice or fine in respect of any breach of the Chain of Responsibility provisions in respect of any Supply and must provide the Company with a copy of any such warning, request, notice or fine and any response or submission made.
- 8.5 The Company will not comply with any direction or instruction by the Buyer that might have the effect of contributing to a breach of the Heavy Vehicle National Law or preventing the Company from taking all steps that it considers to be reasonably necessary to prevent any breach of the Heavy Vehicle National Law.

9. Pricing

- 9.1 The Price charged will be the price set out in the Contract or as otherwise agreed in writing by the Company and the Buyer, subject to any rise and fall or other adjustment in accordance with the Contract.
- 9.2 Unless expressly stated otherwise in the Contract, the Price excludes fees, duties, taxes, surcharges and all other imposts of any Government Authority, which amounts the Purchaser must bear or pay in addition to the Price.
- 9.3 Unless otherwise provided in the Contract:
 - (a) the Price, including Goods for export, is on an ex-works basis and does not include the cost of delivery of the Goods, including freight, handling, insurance, or customs clearance (if applicable) charges,; and
 - (b) if the Company agrees, in its absolute discretion, to arrange delivery of the Goods, the Buyer must bear all costs and charges of delivery and the Company may invoice the Buyer, and the Buyer must pay the Company, for any such costs and charges. Costs may be estimated using a standard formula or on an actual cost basis.
- 9.4 Unless expressly stated otherwise in the Contract, the Supply does not include, and no allowance has been made by the Company in the Price for:
 - (a) Change in Law; or
 - (b) obtaining Approvals by the Company.
- 9.5 If any of the circumstances identified in clause 9.4 occur and result in an increase in the cost to the Company of performing the Supply, and the Contract does not state

otherwise, the Company is entitled to make a reasonable adjustment to the Price to recover the additional costs.

10. Invoicing and Payment

- 10.1 The Company will issue an invoice for the Supply upon formation of a Contract or as otherwise set out in the Quotation (**Invoice**).
- 10.2 If the Buyer holds a current and valid credit account with the Company in accordance with clause 11 and is not in default under the credit account terms or any other Contract, the Buyer must make payment according to the agreed account terms.
- 10.3 Unless clause 10.2 applies or the Contract provides otherwise and subject to the remaining provisions in this clause 10, the Buyer must pay the Price not more than thirty (30) days following the date of the invoice and in any event prior to delivery of the Goods.
- 10.4 If the Supply includes any customised Goods, the Buyer must pay 50% of the Price before the Company will commence production of the Goods, unless the Contract provides otherwise.
- 10.5 Where the Buyer has defaulted in its payment obligations under the Contract, any amounts owing by the Buyer to the Company for any Goods or Services supplied pursuant to the Contract may be offset by the Company against any amount payable by the Company to the Buyer under any other contract.
- 10.6 Clause 10.5 does not preclude or otherwise limit the rights of the Company to pursue legal remedies in the event of default by the Buyer.
- 10.7 The Company may charge a surcharge on payments made by credit card to reimburse the cost of any bank or processing charges incurred by the Company in respect of the payment.
- 10.8 To the maximum extent permitted by law, the Buyer will be liable for all costs incurred with the recovery of any unpaid invoiced amounts, including legal and collection agents' fees, court costs, interest and the Company's fees for time incurred with the recovery process.
- 10.9 The Buyer is not entitled to set off against, or deduct from the Price, any sums owed or claimed to be owed to the Buyer by the Company, nor is the Buyer entitled to withhold payment of any invoice because part of that invoice is in dispute.
- 10.10 If the Buyer does not pay any amount owing to the Company by the due date for payment, the Company may charge default interest on the unpaid amount at the Interest Rate, calculated on a daily basis from the due date until payment is received in full (after as well as before judgment).

11. Credit

- 11.1 Any agreement by the Company to grant the Buyer credit has been or will be made on the basis of a Credit Account Application and any additional information (including references) required by the Company.

- 11.2 If the Company approves the Buyer's Credit Account Application and grants the Buyer credit, the Buyer must pay the Price within the period of credit and in accordance with any agreed credit terms.
- 11.3 Until the Company grants the Buyer credit by notice in writing, or if the Company withdraws, suspends or limits credit (which it may do at any time and for any reason, in its absolute discretion), the Company will only Supply the Goods or Services to the Buyer on the basis of payment by cash in advance.
- 11.4 By completing a Credit Account Application and applying for credit with the Company, the Buyer agrees to be bound by the Terms and Conditions for each Supply made by the Company to the Buyer unless and until the Company and the Buyer agree in writing to the contrary.
- 11.5 If the Buyer holds a credit account with the Company, the Buyer must immediately notify the Company in writing of any change in the shareholding or ownership of the Buyer or any material adverse change in the Buyer's financial position or any other information provided by the Buyer in the Credit Account Application.

12. GST

- 12.1 In this clause 12, a word or expression defined in the GST Law has the meaning given to it in that law.
- 12.2 All amounts payable or to be provided under a Contract are expressed exclusive of GST.
- 12.3 If a party makes a supply under or in connection with a Contract in respect of which GST is payable, the consideration for the supply but for the application of this clause 12.3 (**GST exclusive consideration**) is increased by an amount equal to the GST exclusive consideration multiplied by the rate of GST prevailing at the time the supply is made unless that consideration is stated to already include GST.
- 12.4 If a party must reimburse or indemnify another party for a loss, cost or expense, the amount to be reimbursed or indemnified is first reduced by any input tax credit the other party is entitled to for the loss, cost or expense, and then increased in accordance with clause 12.3.
- 12.5 Each party agrees to do all things, including providing tax invoices and other documentation, that may be necessary or desirable to enable or assist the other party to claim any input tax credit, adjustment or refund in relation to any amount of GST paid or payable in respect of any supply made under or in connection with a Contract.
- 12.6 A party need not make a payment for a taxable supply made under or in connection with a Contract until it receives a tax invoice for the supply to which the payment relates.

13. GST-free supply for Export

- 13.1 This clause 13 applies if:
- (a) the Company is not responsible under the Contract for the export of the Goods from Australia; and
 - (b) the Buyer gives the Company notice in writing before the Company:

- (i) receives any of the consideration for the supply of the Goods; or
 - (ii) gives the Buyer an invoice for the supply of the Goods,
- that the Buyer intends to export the Goods from Australia.

13.2 The Buyer warrants that:

- (a) it intends to export the Goods from Australia before, or within, 60 days after:
 - (i) the day on which the Company receives any of the consideration for the supply of the Goods; or
 - (ii) if, on an earlier day, the Company gives the Buyer an invoice for the supply of the Goods,

(60-day timeframe);
- (b) it is not registered or required to be registered for GST on the Contract Date;
- (c) it will not be registered or required to be registered for GST on the date that the Goods are exported from Australia; and
- (d) it intends to enter the Goods for export within the meaning of section 113 of the *Customs Act 1901*.

13.3 Where the consideration for the supply of the Goods is provided in instalments under this Contract, the 60-day timeframe ends on the day which is:

- (a) 60 days after the day on which the Company receives any of the final instalment of the consideration for the supply of the Goods; or
- (b) if, on an earlier day, 60 days after the Company gives an invoice for that final instalment.

13.4 Where:

- (a) the Buyer fulfils each and every warranty mentioned in clause 13 (or clause 13.3 if relevant); and
- (b) the Buyer provides the Company with sufficient documentary evidence to the Company's satisfaction within five (5) Business Days of the Goods being exported from Australia within the 60-day timeframe mentioned in subclause 13.2(a) and clause 13.3,

the Company will treat the supply of the Goods as a GST-free supply, pursuant to subsection 38-185(3) of the GST Act.

13.5 For the purposes of this clause 13, sufficient documentary evidence takes its meaning from that term as used in Goods and Services Tax Ruling GSTR 2002/6 and includes:

- (a) those transport and commercial documents which substantiate that the Goods were exported by the Buyer within the 60-day timeframe;
- (b) transport documents such as the bill of lading, house bill, certificate of shipment, consignment note and a sea or air waybill; and

- (c) commercial documents such as the customs certificate of clearance, export entry / permit (including details of the Export Declaration Number), contract or invoice from the international transport provider and invoices for loading and handling charges.
- 13.6 For the avoidance of doubt, the Company will treat any supply of Goods under this Contract as a taxable supply unless all the requirements of subclauses 13, 13.3, 13.3(a) and 13.5 (as relevant) are satisfied.

14. Delivery Claims

- 14.1 No defect or claim in respect of Goods delivered will entitle the Buyer to reject delivery of other Goods, which are not subject to any defect or claim, delivered as part of the Order.
- 14.2 The Buyer must inspect all Goods received as soon as practicable following delivery.
- 14.3 The Buyer must, within five (5) Business Days of delivery of the Goods, notify the Company of any error, omission, shortage in quantity or damage to the Goods delivered (**Delivery Claim**).
- 14.4 The Buyer must provide such substantiation of any Delivery Claim as reasonably requested by the Company and must assist the Company to investigate the Delivery Claim.
- 14.5 The Buyer must allow the Company or its nominee to inspect the alleged error, omission, shortage in quantity or damage within a reasonable time of receiving the Delivery Claim.
- 14.6 The Company will endeavour to rectify any error, omission, shortage in quantity or damage, properly notified and verified in accordance with this clause 14 as soon as reasonably practicable after receiving the Delivery Claim but will not be liable for any delay in respect of such rectification.
- 14.7 If the Buyer fails to give notice in accordance with clause 14.3, the Company will be deemed to have fulfilled the contract and no Delivery Claim by the Buyer need be recognised by the Company.

15. Testing

- 15.1 The Company will, at its own expense, carry out any tests required by the Contract.
- 15.2 Where the Goods, or any part of the Goods, fail to pass the tests carried out in accordance with this clause 15, the Company will be given reasonable opportunity to carry out that work which it considers necessary to achieve the required performance, and to reperform the tests.

16. Representations and Fitness for Purpose

- 16.1 The Buyer acknowledges and agrees that, if the Goods subject of an Order are for a particular purpose, are required to possess special characteristics or are required to meet certain legislative requirements due to the proposed application of the Goods, the Buyer must clearly specify such information in their Order.

- 16.2 The Buyer warrants that it has made its own enquiries in relation to the suitability of the Goods and does not rely on representations by the Company or any of the Company's Personnel in relation to their suitability for a particular purpose or any steps which may need to be taken in relation to their use.
- 16.3 To the maximum extent permitted by Law, and except as otherwise expressly set out in the Contract, and without limiting clauses 16.1 or 16.2, the Buyer is responsible for ensuring:
- (a) the suitability and safety of the Goods, including any modification of the Goods, for incorporation by the Buyer or any third party into any application or other product or works;
 - (b) any use or application of the Goods complies with all applicable Laws; and
 - (c) if the Goods are used in any transport application, that the application meets Australian Design Rules for vehicle or rail safety, including the incorporation of a failsafe mode.
- 16.4 The Buyer acknowledges that, to the maximum extent permitted by law, and except as otherwise expressly set out in the Contract, the Company does not warrant that any control system or control circuit, including any hardware or software, complies with any specific standard or safety measures.

17. Warranties

- 17.1 The Company warrants that subject to clause 17.2 and except as otherwise stated in the Contract:
- (a) the Company is the legal and beneficial owner of the Goods and has the right to sell the Goods to the Company free from all mortgages, charges, encumbrances, liens and other third party rights and claims;
 - (b) the Goods and Services will be free from defects in material and workmanship under normal use for a period of twelve (12) months from the date of delivery of the Goods or performance of the Services (**Warranty Period**) (**Warranty Against Defects**); and
 - (c) the Goods comply with the Specifications in all material respects.
- 17.2 Third Party Goods purchased by the Company from a third party for sale to the Buyer are subject to any warranties provided by the supplier or manufacturer. To the maximum extent permitted by law, the Company does not give any warranty with regard to such goods, but will provide reasonable assistance to the Buyer to enforce the Buyer's rights against the supplier or manufacturer.
- 17.3 The Buyer must notify the Company promptly of any Goods or Services that it believes do not meet the warranties in clause 17.1 and if requested by the Company, allow the Company or its nominee to inspect the Goods or results of the Services within a reasonable time after such notification.
- 17.4 If, within the Warranty Period, the Company agrees that the Goods or Services do not meet the warranties in clause 17.1, and provided the Buyer returns the affected Goods to the Company, at the Buyer's cost the Company must, at its option:

- (a) repair or replace the defective goods or pay the cost of the repair or replacement of those Goods; and/or
 - (b) re-perform the defective Services or pay the cost of their reperformance.
- 17.5 To the maximum extent permitted by law, the Buyer is responsible, at its own cost, for the removal and return to the Company of any actual or alleged defective Goods, together with the return and reinstallation of the Goods or any replacement Goods following assessment or repair by the Company.
- 17.6 The Company makes no other warranty to any person (including the Buyer) in relation to the Goods or Services except those expressly set out in the Contract and those warranties which cannot be specifically excluded under law and the Company expressly excludes all other terms, conditions, warranties, undertakings, inducements or representations, whether expressly or implied or implied by statute.
- 17.7 The Warranty Against Defects is provided by:
- SMC Corporation (Australia) Pty Ltd
14-18 Hudson Avenue, Castle Hill, NSW 2154
Telephone: 1800 763 862
Email: ausales@smcanz.com
- 17.8 If the Buyer is a Consumer:
- (a) the benefits given by the Warranty Against Defects are in addition to any rights or remedies available to the Consumer under the Australian Consumer Law or any other applicable consumer protection laws in relation to the Goods or Services; and
 - (b) the Company provides the following statement:

Our goods and services come with guarantees that cannot be excluded under the Australian Consumer Law. For major failures with the service, you are entitled:

 - 1. to cancel your service contract with us; and*
 - 2. to a refund for the unused portion, or to compensation for its reduced value.*

You are also entitled to choose a refund or replacement for major failures with goods. If a failure with the goods or a service does not amount to a major failure, you are entitled to have the failure rectified in a reasonable time. If this is not done you are entitled to a refund for the goods and to cancel the contract for the service and obtain a refund for any unused portion. You are also entitled to be compensated for any other reasonably foreseeable loss or damage from a failure in the goods or service.
- 17.9 All drawings, descriptions, specifications, performance claims and capability claims given by the Company or any of its Personnel, including in the Quotation or contained in any website or publication are approximations only, do not form part of the Contract and the Company does not warrant the accuracy or completeness of any such information, unless expressly guaranteed in the Contract.

17.10 To the maximum extent permitted by law the Company is not liable for any defect in the Goods caused or contributed to by any modification of the Goods made by the Buyer or any third party (other than a third party engaged by the Company) without the express authorisation of the Company.

18. Liability and Indemnities

18.1 Nothing in the Contract excludes, restricts or modifies any terms, conditions or warranties or the Company's liability for them which are imposed or implied by any statute, including to the Competition and Consumer Act 2010 (Cth), and which by statute cannot be excluded, restricted or modified. Limitations and exclusions are made only to the extent that the Company may legally do so.

18.2 Subject to clause 18.1, the Company's liability for any kind of loss or damage suffered by the Buyer in connection with the Contract, whether in contract, negligence or other tort, misrepresentation, breach of any statutory or equitable duty, or otherwise, and whether the Company's act or omission is wilful or otherwise, is excluded and/or limited (as the case may be) as set out in this clause 18.

18.3 The Company accepts liability for personal injury or death to the extent that it directly results from the Company's negligence, but subject to the contributory liability of any other person.

18.4 Subject to clauses 18.1 and 18.3, to the maximum extent permitted by law, the Buyer acknowledges and agrees that the Company's liability to the Buyer (and any party claiming through the Buyer against the Company) for any claim for loss or damages (including legal expenses) made in connection with the Contract whether in contract, tort (including negligence), under statute, in equity or otherwise will be limited as follows:

(a) for any liability for Goods that are claimed to be defective or deficient, the Company's liability is limited to the cost of repair or replacement of those Goods as soon as reasonably practicable, or repayment to the Buyer of the Price of those Goods, at the Company's election; and

(b) for any liability for Services forming part of the Supply or otherwise provided by, or on behalf of, the Company, not meeting the specification or otherwise claimed to be defective or deficient the Company's liability is limited to the provision of the Services again or the payment of the price of having the Services provided again, at the Company's election.

18.5 Subject to clause 18.1 and to the maximum extent permitted by law, the Buyer acknowledges and agrees that the Company will not be liable for, and the Buyer waives any right it has to claim, any loss not arising naturally according to the usual course of things, any loss of income, loss of actual or anticipated profit, loss of production, loss of contract, loss of customers, goodwill, opportunity or business, or loss of data arising under or in connection with the Contract, whether in contract, tort (including negligence), under statute, in equity or otherwise.

18.6 The Buyer acknowledges and agrees, subject to clause 18.1 and to the maximum extent permitted by law, that any other liability falling outside the application of clauses 18.3, 18.4 or 18.5 above, for any loss or damage arising from or caused in any way by the Company, the Goods or Services or this Contract, is excluded.

19. Personal Property Securities Act

- 19.1 In this clause 19, terms defined in the PPSA have the meaning given in the PPSA, unless the context requires otherwise.
- 19.2 The Buyer acknowledges and agrees that, with respect of the Goods identified in the Contract or otherwise supplied to the Buyer, the Contract constitutes a security agreement and that the Company may register a financing statement in respect of the security interest provided by the Contract.
- 19.3 The Buyer grants to the Company a security interest in the Goods supplied to the Buyer by the Company to secure payment of the Amount Payable. The security interest:
- (a) extends to and continues in all proceeds; and
 - (b) is a purchase money security interest to the extent to which it secures payment of the unpaid Price.
- 19.4 The Buyer must:
- (a) promptly do anything required by the Company to ensure the Company's security interest is a perfected security interest and has priority over all other security interests in the Goods;
 - (b) not do or permit anything to be done that may result in the purchase money security interest granted to the Company ranking in priority behind any other security interest;
 - (c) not cause or knowingly permit any person to take a security interest over, or to register a financing statement in relation to, the Goods without the prior written consent of the Company; and
 - (d) immediately notify the Company if it becomes aware of any person taking steps to register a financing statement in relation to the Goods.
- 19.5 The Buyer:
- (a) waives the right under the PPSA to receive a copy of the verification statement verifying registration of a financing statement or a financing charge statement relating to a security interest created under the Contract;
 - (b) waives any right it may have under section 115 of PPSA upon enforcement;
 - (c) to the fullest extent permitted by the PPSA, contracts out of its rights to receive any other notice or statement under any other provision of the PPSA;
 - (d) agrees to pay all costs incurred by the Company in registering and maintaining a financing statement (including registering a financing change statement) on the PPSR or enforcing or attempting to enforce the security interest created by the Contract including executing subordination agreements; and

- (e) is responsible for the full costs incurred by the Company (including actual legal fees and disbursements on a solicitor and client basis) in obtaining an order pursuant to section 182 of the PPSA.
- 19.6 If the Buyer defaults in the performance of any obligation to the Company under the Contract or any other agreement for the Company to provide Goods to the Buyer, the Company may enforce its security interest in any Goods by exercising all or any of its rights under the Contract or the PPSA.
- 19.7 To the extent (if at all) that the Supply gives rise to a security interest in favour of the Buyer, the Buyer agrees that it must not register any such security interest against the Company on the PPSR.

20. Intellectual Property Rights

- 20.1 The Buyer warrants that all drawings, designs, production requirements or other documents provided by or on behalf of the Buyer (if any) in relation to the Supply are accurate and that the Company is entitled to use such materials for the purposes of the Supply (**Buyer's Materials**) and that such use does not infringe the Intellectual Property Rights of any third party.
- 20.2 The Buyer indemnifies the Company from and against all claims and losses and damages incurred by the Company in relation to any actual or alleged breach of a third party's Intellectual Property Rights as a result of the Company using or relying on any Buyer's Materials.
- 20.3 All Intellectual Property Rights in any Goods or other materials created or provided by the Company to the Buyer in relation to the Supply, (**Company Materials**), remain the property of the Company and the Buyer warrants that it will not infringe those rights.
- 20.4 Subject to the Buyer's payment of the Price in accordance with the Contract, the Company grants the Buyer a non-exclusive, royalty-free, revocable, non-transferable licence to use Company Materials for any purpose related to the use of the Goods or Services in accordance with the Contract and otherwise to receive the benefit of the Supply. The Buyer must not use the Company Materials for any other purpose.
- 20.5 Without limiting clause 20.3, unless the Contract provides otherwise, all drawings and information issued by the Company remain the property of the Company and may not be distributed or copied without the Company's permission.

21. Confidential Information

- 21.1 The Receiving Party must:
- (a) take all reasonable steps to safeguard the confidentiality of the Confidential Information; and
 - (b) not disclose, make public or use for purposes other than for the purposes of the Contract any Confidential Information of the Disclosing Party without the prior written consent of the Disclosing Party.
- 21.2 Any obligation of the Receiving Party under this clause 21 will not be taken to have been breached if the Confidential Information was required to be disclosed by law or court order, provided that the Receiving Party, to the extent reasonably practicable,

gives the Disclosing Party prompt notice of the existence of such an obligation and makes a reasonable effort to otherwise protect the confidentiality of such information.

22. Privacy

22.1 Each party must comply with its obligations under the Privacy Laws.

22.2 The Company will deal with personal information in accordance with its published privacy policy. This policy is available on request or on the Company's website.

23. Variations

23.1 The Buyer may, by written notice, request the Company to do any one or more of the following:

- (a) increase, decrease or omit any part of the Supply;
- (b) change the character or quality of any material or work (including a change in specified performance requirements or functional requirements);
- (c) alter the program for the performance of the Supply; or
- (d) perform additional work,

(Variation).

23.2 If the Buyer requests a Variation, the Company must consider the request in good faith and notify the Buyer in writing whether or not the Company is willing to perform the Variation, and if so, any cost and time implications of the proposed Variation.

23.3 A Variation will not be binding on the parties unless and until:

- (a) the Company has accepted the proposed Variation in writing; and
- (b) the Company and the Buyer have agreed in writing any adjustment to the Price or the time form performance, or that no such adjustments are required.

23.4 Unless and until the requirements of clause 23.3 are satisfied, the parties remain bound by the Contract, without the Variation.

24. Termination

24.1 The Company may terminate the Contract by written notice to the Buyer if:

- (a) the Buyer has not complied with the terms of payment pursuant to clause 10;
- (b) the Buyer is subject to an Insolvency Event; or
- (c) the Buyer is otherwise in breach of its obligations under the Contract and fails to remedy the breach within 10 Business Days after receipt of written notice from the Company requesting the breach be remedied.

- 24.2 The Company may issue a termination notice for all or part of the Contract for convenience in its absolute discretion on at least 30 days' notice and upon such termination will not be liable to the Buyer for any amounts.
- 24.3 The Buyer may terminate the Contract by written notice to the Company if:
- (a) the Company is subject to an Insolvency Event; or
 - (b) the Company is otherwise in breach of its obligations under the Contract and fails to remedy the breach within 10 Business Days after receipt of written notice from the Buyer requesting the breach be remedied.
- 24.4 Clauses 24.1(b) and 24.3(b) do not apply if the Defaulting Party enters into voluntary administration, receivership or is subject to a scheme of arrangement, as contemplated by the Ipso Facto Law Reform. For clarity, this clause 24.4 will only apply while the administration, receivership or scheme of arrangement is ongoing, and will cease in the event that the Defaulting Party is wound up.
- 24.5 Without limiting any other remedy available to the Company, to the maximum extent permitted by law:
- (a) the Buyer must pay for all parts of the Supply performed prior to the termination of the Contract; and
 - (b) if the Contract is terminated by the Company under clause 24.1, the Buyer must indemnify the Company from and against all liability, claims, costs and expenses, losses and damages incurred by the Company arising out of or in connection with the termination.

25. Disputes

- 25.1 Nothing in this clause 25 prevents the Company or the Buyer seeking urgent injunctive or other interim relief from a court, or from continuing existing court proceedings.
- 25.2 It is a condition precedent to the commencement of any proceedings in any court in any jurisdiction (other than for urgent interlocutory relief) that the parties first follow the procedure in this clause 25.
- 25.3 A party claiming that a dispute has arisen out of or in connection with the Contract (**Dispute**) must provide the other party with written notice of the nature of the Dispute and the relevant facts.
- 25.4 In the first instance, the Dispute will be referred to the representatives of each party. A meeting of the representatives must be convened and held by the Company and the Buyer as soon as reasonably practicable to attempt to resolve the Dispute.
- 25.5 If a Dispute is not resolved within twenty (20) Business Days after the issue of a notice under clause 25.3, either party may commence court proceedings for the resolution of the Dispute.
- 25.6 Each party must bear its own costs of complying with this clause 25.

26. Force Majeure

Neither party will be liable for failure to perform its obligations under the Contract to the extent and for so long as its performance is prevented or delayed by a Force Majeure Event provided that it gives notice to the other party of the delay and uses reasonable efforts to remedy the cause of the delay as soon as reasonably practicable.

27. Notices

27.1 A notice, demand, consent, approval or communication under this agreement (**Notice**) must be:

- (a) in writing, in English and signed by a person duly authorised by the sender; and
- (b) marked for the attention of the person, and hand delivered or sent by prepaid post or email to the recipient's address specified in the Parties section of this agreement, as varied by any Notice given by the recipient to the sender.

27.2 Communications by email need not be marked for the attention in the way required by clause 27.1(b). However, the email must state the first and last name of the sender. Communications sent by email are taken to be signed by the named sender.

27.3 A Notice given in accordance with clause 27.1 takes effect when taken to be received (or at a later time specified in it), and is taken to be received:

- (a) if hand delivered, on delivery;
- (b) if sent by prepaid post, six (6) Business Days after the date of posting (or ten (10) Business Days after the date of posting if posted to or from a place outside the country of delivery); or
- (c) if sent by email, at the time the email was sent unless the sender receives an automated message that the email has not been delivered,

but if receipt is not on a Business Day or is after 5.00pm on a Business Day (in the time zone of the addressee), the Notice is taken to be received at 9.00am on the next Business Day.

28. Variation of Terms and Conditions

28.1 The Company may at any time vary the Terms and Conditions applicable to future Orders and may notify the Buyer of these changes or provide any other notice of a variation of the Terms and Conditions, by publishing the revised Terms and Conditions or notice on its website.

28.2 If the Company publishes the revised Terms and Conditions on its website:

- (a) the revised Terms and Conditions are effective from the effective date noted in the Terms and Conditions or the date of publication on the website, whichever is later; and
- (b) it may (but is not obliged to) notify the Buyer that it has done so on any invoice or Order Confirmation.

29. Subcontracting and Assignment

- 29.1 The Company reserves the right to subcontract any part of the Supply without the Buyer's consent.
- 29.2 The Company may assign its rights or novate its rights or obligations under the Contract (in whole or in part) to any person without the consent of the Buyer.
- 29.3 The Buyer must not assign or otherwise transfer its rights under the Contract without prior notice to and consent from the Company, which consent must not be unreasonably withheld.

30. Severance

If any provision or part of any provision of these Terms and Conditions is invalid, illegal or unenforceable, such provision or part thereof will be severed from the Terms and Conditions and the remainder will continue in full force and effect.

31. Waiver

Waiver of any power or right under this agreement must be in writing signed by the party entitled to the benefit of that power or right and is effective only to the extent set out in that written waiver.

32. Governing Law and Jurisdiction

- 32.1 The Contract will be governed by and construed in accordance with the laws in force in the Governing Jurisdiction.
- 32.2 Each party submits to the non-exclusive jurisdiction of the courts of the Governing Jurisdiction.