

ebm-papst A&NZ Pty Ltd
Terms & Conditions (version 4)
Date of Publication: 15 September 2011

1 Parties

In these Terms:

- (a) **“you”** or **“your”** or **“Customer”** is a reference to the party agreeing to these Terms as a customer of ebm; and
- (b) **“we”**, **“us”**, **“our”** or **“ebm”** is a reference to ebm-papst A&NZ Pty Ltd, ABN 33 115 927 556.

2 Governing Terms and Conditions

- (a) Subject to clause 2(d), these terms and conditions (**“Terms”**) apply to the sale of goods by us to you and any other contracts, engagements or work that we undertake for you.
- (b) These Terms prevail over any terms and conditions in your documents and represent the entire agreement between us.
- (c) When you place an order for goods with us, accept delivery of goods, make any payment for any goods, visit our website at www.ebmpapst.com.au or www.ebmpapst.co.nz or otherwise comply with these Terms, you are taken to have accepted them.
- (d) Where a sale of goods by us to you is pursuant to a written quotation from ebm which includes terms and conditions appearing on the quotation form, those terms and conditions prevail over these Terms where these Terms are inconsistent with the terms and conditions appearing on a written quotation given by ebm to you.

3 Quotations, Orders and Price

- (a) If we give you a quotation, we are not making you an offer. We may withdraw or alter the quotation without giving you notice. If we do not withdraw the quotation, it is valid for the period stated. If no period is stated, it is valid for 30 days from the date the quotation was given.
- (b) Any price list circulated or price lists are subject to change without notice.
- (c) Unless otherwise specified or agreed in writing, all prices quoted are ex-works and do not include GST, which is payable in addition to the invoice price where applicable.
- (d) Any price concession or discount we provide you is conditional on your full compliance with these Terms.
- (e) Any order of goods cannot be cancelled by you without our written consent. Where you request that an order be cancelled, you irrevocably agree to indemnify us in relation to any costs or other amounts payable to third parties that we have paid in anticipation of or as a consequence of your order.
- (f) If at any time you default in respect of your payment obligations under these Terms, you agree that we may cancel or suspend any uncompleted order that has been accepted by us and that we are not liable to you in any way whatsoever.

4 Cancellation

- (a) You cannot cancel any order or contract or return any goods unless we first agree in writing. We will not agree to any cancellation or return unless you indemnify us for all loss or damage we suffer or incur as a result of the cancellation or return. We may cancel any order or contract if we consider we may be unable to supply you the goods.
- (b) If anything in clauses 6(d)(i) to 6(d)(vii) inclusive occurs or if the goods remain uncollected after 14 days from when we tell you that the goods are ready for collection, we may cancel the whole or part of an order or contract by giving you notice. If we cancel in these circumstances, you must pay us for any loss, liability, cost or expense we incur as a result of the cancellation and a reasonable cancellation fee we fix.
- (c) You have no claim against us and we are not liable to you for any loss, liability, cost or expense which you may incur as a result of a cancellation under this clause.

5 GST

- (a) Unless we state otherwise, the price for any goods is GST exclusive.
- (b) In addition to the price for the goods payable by you to us, you must pay to us an amount equal to any GST we are liable for on any supply by us under these Terms.
- (c) You must pay amounts for GST, without deduction or set off of any other amounts, at the same time and on the same basis as you pay the price (or the first part of it if we agree to your paying the price by instalments).

6 Payment

- (a) Unless we otherwise agree in writing, you must pay us for the goods you buy within 30 days from the end of the month in which we deliver the goods to you.
- (b) Where you make a payment to us via cheque, negotiable instrument or electronic funds transfer, such payment will be deemed to be made on the date on which the full amount of that payment is available to us as cleared funds.
- (c) You must make all payments on or before the due date for such payments in accordance with these Terms. You agree that we may suspend the supply or delivery of goods to you if full payment is not made on or before the due date. This suspension will continue until all overdue payments are made.
- (d) We may require immediate payment of all unpaid monies (whether or not actually due and payable by you) if any of the following occurs:
- (i) we consider (in our absolute discretion) that your creditworthiness has become unsatisfactory;

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(ii) an order is made, or a resolution is passed, to wind you up, a meeting is called to consider a resolution to wind you up or a provisional liquidator is appointed;

(iii) a receiver or receiver and manager is appointed over the whole or part of your business or assets;

(iv) you enter any arrangement or composition with any of your creditors;

(v) you are placed under administration or a meeting is called or some other step taken to place you under administration;

(vi) you cannot pay your debts as they fall due; or

(vii) you do not comply with, or commit a breach of, these Terms.

(e) We may charge you interest if full payment is not made by the due date. Interest will be charged at 2% per annum above the prevailing penalty interest set under section 2 of the *Penalty Interest Rate Act 1983* (Vic) from the due date until full payment is made.

(f) You must pay all expenses incurred by us in enforcing our rights under these Terms, including without limitation all collection fees in commissions, administrative costs, out-of-pocket expenses and legal costs (calculated on a solicitor/own client basis) incurred by us as a direct or indirect consequence of your default in payment according to these Terms.

7 Delivery

(a) Unless we otherwise agree in writing, delivery takes place when we notify you that you may collect the goods from our premises. You must collect any goods made available from our premises within 7 days of us notifying you that the goods are available for collection.

(b) Any goods delivered by us to you will be the subject of a separate agreement for delivery between you and us, for which a separate delivery charge will be payable.

(c) Any delivery time or time for collection that we give you is only an estimate. We are not liable to you for any loss or damage you suffer or incur as a result of our late delivery.

(d) You must still accept and pay for the goods even if we deliver the goods late.

(e) We may deliver, or make available, the goods in instalments. Each instalment must be treated as a sale under a separate contract. If we fail to deliver or make available any instalment, you must still accept and pay for the remaining instalments. If you do not pay for an instalment, we may treat the non-payment as a breach of contract relating to the other instalments.

(f) You may request in writing that we extend the date for delivery of the goods by a maximum of up to 90 days. We may agree to or deny any such request in our sole and unfettered discretion. By making any request, you irrevocably agree to pay on demand our reasonable costs of storage and handling of any goods that are held by us until the extended date of delivery.

(g) If the dispatch date on an order is extended beyond 90 days from the initial dispatch date, ebm reserves the right to unilaterally dispatch the order to you on a date determined by ebm as a valid fulfilment of your order.

(h) If the quantity of goods delivered is less than the amount you ordered, you must notify us in writing of the shortfall within 7 days after delivery, otherwise we will take it that the correct quantity of goods has been delivered, and you must accept the goods and pay for them in full despite the shortfall.

(i) If the quantity of goods delivered is more than the amount you ordered, you must immediately inform us in writing and we are entitled to charge you for the excess goods or recover the excess goods from you.

8 Storage and Handling

(a) We may charge you for storage if you do not collect the goods or provide adequate delivery instructions within 7 days after we tell you that the goods are ready for collection. You must pay the charges we specify when we ask you. Any goods we store on your behalf are at your risk.

(b) In storing and handling the goods, you must comply with our company policies and all applicable laws, especially those relating to health, safety and the environment.

9 Reserve stock

(a) You have the obligation to purchase from us all reserve stock within three months of any change that significantly reduces or brings to an end the ongoing supply of that product to you.

(b) Reserve stock includes:

(i) products ordered on our factories however cannot be cancelled prior to manufacture,

(ii) products in the process of being manufactured,

(iii) stock in transit, and

(iv) stock held in our warehouse for you.

10 Return of goods

(a) You are not permitted to return goods to us, except as otherwise permitted in these Terms. Any such return of goods will not be accepted by us unless we have otherwise agreed in writing.

(b) Except in accordance with clause 11, any return of goods to us may be subject of a 20% handling charge (of contract price) at our absolute discretion.

11 Damage to goods and defects

(a) You must notify us in writing within 7 days after delivery or collection of:

(i) any goods that you claim to have been physically damaged before risk in the goods passed to you in accordance with clause 12; or

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(ii) any goods that you claim to be defective.

(b) You may not bring any claim for physical damage to, or any defect in, any goods, and our liability for any such claims is at our absolute discretion unless you have given us written notice with details of the damage or defect within 7 days of delivery to you, or collection by you, of the goods.

(c) If following the initial operation or usage of our product you become aware that our product may be defective, you must contact us in writing within 7 days and provide us details of the possible defect, otherwise our liability for any subsequent claim is at our absolute discretion.

(d) Where you make a claim of any physical damage to, or defect in, the goods you must allow our employees or agents full and free access to the goods in relation to which the claim is made for the purpose of conducting any tests and examinations that we may in our sole and unfettered discretion consider necessary to determine whether the claim is justified or not.

(e) No return of goods that are found to have been damaged or that are defective will be accepted and no credit will be issued for returned goods unless we first agree in writing.

(f) All returns of goods to us that are claimed to be damaged or defective will be at the cost of the customer unless otherwise agreed in writing.

12 Risk

(a) Risk of damage to, or loss of, the goods passes to you:

(i) if we are responsible for delivering the goods to you, at the time of delivery; or

(ii) if we are not responsible for delivering the goods to you, at the time that we notify you that the goods are available for collection.

(b) We are not liable to you for any loss or damage or deterioration of the goods after actual delivery, even if we arrange freight.

13 Title

(a) We retain title to and ownership of the goods until you have paid all monies you owe us (and all cheques, negotiable instruments and electronic funds transfer have been paid and cleared).

(b) Until title passes to you, you hold the goods on our behalf. You must return the goods to us if we ask you to. We can retake possession of any goods in your possession (notwithstanding they are fixed to or incorporated with other goods) which have not been paid for in full if anything in clauses 6(d)(i) to 6(d)(vii) inclusive occurs.

(c) In relation to any goods supplied to you but for which you have not yet paid us in full for, you agree and acknowledge that we may register these Terms, or our rights under these Terms, as a security interest in personal property under the *Personal Property*

Securities Act 2009 (Cth) or any other similar legislation providing for the registration and/or enforcement of security interests.

(d) You agree to promptly execute all documents and do all things that we may require of you to assist us in the registration and perfection of any security interest referred to in clause 13(c).

(e) You must allow us to enter any premises under your control where the goods are kept.

14 Force Majeure

(a) We are not liable for failure to comply with these Terms if the failure (directly or indirectly) arises out of any circumstances which are not within our reasonable control. If such circumstances occur, we may delay or cancel delivery of the goods or reduce the quantity to be delivered.

(b) Examples of situations beyond our reasonable control include, but are not limited to, strikes, lock-outs, accidents, war, fire, flood, explosion, shortage of power, breakdowns of plant or machinery, shortage of raw or other materials from normal sources of supply, acts of God and any order or direction of any local, State or Federal Government, Government authority or instrumentality (within the Commonwealth of Australia or elsewhere).

(c) We are not obliged to remedy such circumstances. We are especially not obliged to settle any strike, lock-out or any other kind of labour dispute.

15 Loan Stock and Sample Products

(a) From time to time we may provide you with loan stock. This will be noted on any invoice or delivery document that we provide to you. This stock is provided to you for the sole purpose of enabling you to examine and trial the product.

(b) Unless we agree otherwise in writing, loan stock is provided to you for a period of two months, at the end of which you must return the products to us at your cost.

(c) Notwithstanding anything else in these Terms, we retain title to all such products at all times.

(d) We reserve the right to request the return of any loan stock from you at any time. You must return the loan stock to us within seven (7) days of any such request from us.

(e) You must return any loan stock in near-new condition. You agree that you may be charged for any excessive damage or wear to any loan stock or for any period of possession longer than two months, or any other such period as we agree to in writing.

(f) From time to time we may also provide you with sample stock.

(g) For both loan stock and sample stock, these products are not to be sold, loaned, provided to or displayed to any third party without our express written permission.

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16 Product Operation and Safety

You must take all reasonable steps to ensure that any end users and installers carefully read and apply our operating and/or safety instructions prior to any usage or application of our products. If you have any queries regarding these instructions or require a copy of these instructions, please contact an ebm office for clarification prior to operating the product. These instructions can also be accessed via our website at:

<http://www.ebmpapst.com/instructions>

17 Limitation of Liability

(a) Subject to these Terms and any written warranty we provide to you and any rights which cannot be excluded by law ("**Non-Excludable Rights**"), all warranties, conditions, liabilities or representations (whether express, implied, statutory or otherwise) as to the quality or fitness of the goods or as to the accuracy of information, advice or other services concerning the goods, are expressly excluded.

(b) Our goods come with guarantees that cannot be excluded under the Australian Consumer Law. You are entitled to a replacement or refund for a major failure and for compensation for any other reasonably foreseeable loss or damage. You are also entitled to have the goods repaired or replaced if the goods fail to be of acceptable quality and the failure does not amount to a major failure.

(c) In addition to other rights and remedies you may have under a law in relation to our goods and services:

(i) We warrant that any products that are manufactured within the ebmpapst group of companies will be free of defects in workmanship and/or materials for a period of two years from the date of delivery.

(ii) We warrant that all other products that we supply to you will be free of defects in workmanship and/or materials for a period of one year from the date of delivery.

(d) Where we agree to deliver any goods to you, we will take reasonable care in the packing and handling of these goods.

(e) Subject to paragraph 17(b), our liability for a breach of these express warranties, these Terms, any Non-Excludable Rights or any other written warranty that we provide to you is limited, at our option, to one or more of the following:

(i) replacing the goods or supplying equivalent goods; or

(ii) paying the cost of replacing the goods or of acquiring equivalent goods.

(f) We are not liable to you for any expenses associated with a claim by you against the warranties in clauses 17(c)(i) and 17(c)(ii); or

(g) You indemnify us for all liabilities, losses, damages, costs or expenses suffered or incurred by us as a result of any of the following:

(i) our compliance with your instructions regarding the goods;

(ii) your failure to:

(A) provide or display safety information on or relating to the goods;

(B) comply with laws relating to the use, sale, marketing, labelling or marking of goods; or

(C) detect and bring to our attention matters for which we may become liable, whether for negligence, under legislation or otherwise;

(iii) any statement you make about the goods without our written approval;

(iv) the use of goods by you or a third party;

(v) your negligence or breach of these Terms.

(h) You agree that:

(i) the goods are not of a kind ordinarily acquired for personal, domestic or household use or consumption; and

(ii) you are acquiring the goods for resupply or for using them up or transforming them in the course of a process of production or manufacture in your business.

(i) With regard to our warranties against defects in clauses 17(c)(i) and 17(c)(ii), if you have a query or claim, please contact our Commercial Manager in writing in accordance with the contact details in clause 23.3(b). Once we receive your written claim, we will notify you within 5 business days that we have received your claim and that we have commenced processing and assessing your claim.

18 Privacy Authority

(a) For the purposes of assessing your creditworthiness, you irrevocably authorise us, our servants and agents to make such enquiries as we deem necessary for this purpose, including without limitation, making enquiries with and obtaining such reports as may be allowed by law from:

(i) persons nominated by you as trade referees;

(ii) your creditors, bankers and financiers;

(iii) your credit providers;

(iv) your mortgage and trade insurers; and

(v) credit reporting agencies

("the Information Sources")

(b) You agree and consent to the Information Sources providing us with any such information requested by us and permitted to be given by law for the purpose of assessing your creditworthiness.

(c) You consent to us disclosing the contents of any credit report or personal information to a credit reporting

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agency or commercial credit reporting agency for the purpose of that credit reporting agency creating or adding to any credit information filed in relation to you or any other person or business.

19 Intellectual Property

(a) In these Terms, "**Intellectual Property Rights**" means all present and future rights throughout the world conferred by statute, common law or equity in or in relation to inventions, discoveries, innovations, know how, technical information and data, prototypes, processes, improvements, patent rights, circuitry, drawings, plans, specifications, copyright, trade mark rights, design rights, plant variety rights and other results of intellectual activity in the industrial, commercial, scientific, literary or artistic fields, whether or not registrable, registered, or patentable. These include all rights in all applications to register these rights, all renewals and extensions of these rights and all rights in the nature of these rights.

(b) You acknowledge that there is no transfer of title or ownership to you of any Intellectual Property Rights in any goods, documents and other materials delivered or supplied to you by us.

(c) You must not take, appropriate or represent as your own any Intellectual Property Rights in any goods, documents and other materials delivered or supplied to you by us under these Terms.

20 Product Design/Manufacture

(a) Where you bring a sample product for us to reproduce, or where you otherwise provide instructions to us in relation to the manufacturing, design or construction of a product, you:

(i) warrant that any manufacture or supply of, or any other dealing with, such products will not infringe the Intellectual Property Rights of any third party;

(ii) agree and acknowledge that all Intellectual Property Rights in such products, all prototypes and any documents or other materials created in connection with or otherwise associated with such products will be owned by and vest solely in us upon creation; and

(iii) assign any right, interest or title in any Intellectual Property Rights that you might have in relation to the product and any associated design ideas, documents and other related material.

(b) You must promptly execute all documents and do all things that we reasonably require from time to time of you to effect, perfect or complete any obligations under this clause.

21 Infringement

(a) If you learn of:

(i) any infringement or threatened infringement of the Intellectual Property Rights of ebm or its suppliers; or

(ii) any common law passing-off or any conduct which may cause deception or confusion to the public by a third party,

you must immediately notify us in writing giving particulars of the infringement.

(b) You agree to assist us in the protection of and enforcement of the Intellectual Property Rights of ebm or its suppliers.

(c) We may in our sole discretion commence or prosecute any claim or suits ("**Infringement Proceedings**") in our own name or join you as a party to the Infringement Proceedings.

(d) You agree to execute all documents and do all things reasonably necessary to aid and cooperate in the prosecution of any Infringement Proceedings brought by us under this clause.

(e) With respect to all Infringement Proceedings in which you are joined as a party, we have the exclusive right to instruct solicitors and counsel (as applicable) of our choosing and to direct the handling of the Infringement Proceedings and any settlement.

22 Confidential Information

(a) In these terms and conditions "**Confidential Information**" means any information including all know-how, financial information and other valuable or sensitive information of any nature, trade secrets, formulae, graphs, drawings, designs, samples, devices, functional specifications and other material of whatever description provided to you by us for the purposes of these terms and conditions, in any form whatsoever (including oral, written, and electronic information) of a technical, business, corporate, commercial or financial nature of or in relation to ebm, its related bodies corporate, associated entities and its business, shareholders or unitholders, or which we makes you or your agents aware is considered by us to be confidential and / or proprietary, or which is evident on its face as being confidential and / or proprietary, and includes:

(i) customer lists and contact details;

(ii) reports or advice from professional advisers or other experts;

(iii) marketing, sales and pricing information;

(iv) financial information and records;

(v) supplier information;

(vi) employee information and records;

(vii) product information;

(viii) trade secrets; and

(ix) all information that is personal information for the purposes of the *Privacy Act 1988* (Cth).

but does not include information which:

(x) is or becomes readily available in the public domain, other than as a result of a breach of this these terms and conditions;

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(xi) is known to you before you received it and is not subject to an existing obligation of confidence between the parties; or

(xii) is provided to you by a third party who is not under an obligation of confidence in respect of the information.

(b) You must:

(i) keep the Confidential Information private and secret;

(ii) not access, use or reproduce Confidential Information for any purpose other than in connection with the goods delivered or supplied to you by us, nor assist or permit any other person to do so;

(iii) not disclose Confidential Information except as permitted under these Terms; and

(iv) take all steps reasonably necessary to safeguard Confidential Information from unauthorised access, use or disclosure.

(c) You may disclose Confidential Information:

(i) to your representatives if they need to know the Confidential Information and provided that you:

(A) ensure that your representatives do not use, reproduce or disclose the Confidential Information other than in accordance with these terms and conditions; and

(B) accept liability to us for any failure of your representatives to do so;

(ii) if disclosure is required by law or the rules of any stock exchange, provided that you first notify us of the required disclosure (where practicable); or

(iii) with our prior written consent.

(i) Post: **ebm-papst A&NZ Pty Ltd**
10 Oxford Road
Laverton North VIC 3026

(ii) Facsimile: **(03) 9360 6464**

(iii) Email: **sales@ebmpapst.com.au**

sales@ebmpapst.co.nz

23.4 Severability

If any of these Terms are invalid or unenforceable in any jurisdiction, they are, if possible, to be read down so as to be valid and enforceable. The read down provision will only apply in the relevant jurisdiction. If the provision cannot be read down, and it can be severed to the extent of the invalidity or unenforceability, it is to be severed. The rest of the provisions, and the validity or enforceability of the affected provision in any other jurisdiction, will not be affected.

23.5 Governing Law and Jurisdiction

These Terms and conditions are governed by the law in force in the State of Victoria, Australia. You agree to submit to the non-exclusive jurisdiction of the courts of Victoria and any courts which may hear appeals from those courts.

23 General Conditions

23.1 Variation

We are entitled to vary these Terms at any time by publishing our revised terms to our website.

Refer to: www.ebmpapst.com.au, or
www.ebmpapst.co.nz.

23.2 Waiver

Even if we do not insist on strict performance of these Terms, we are not taken to have waived our right to later require strict performance. Even if we provide an express waiver, this is not to be taken as a waiver of a subsequent breach of a term or condition.

23.3 Notices

(a) Notices under these Terms must be in writing. A notice must be delivered personally or sent by facsimile transmission, email or post to the other person at their last known address.

(b) Subject to any notice in writing to you providing a new address for the service of notices under these Terms, our address for notices is as follows: