

**OKUMA AUSTRALIA PTY LTD**  
**AUSTRALIAN TERMS AND CONDITIONS OF SALE – FEBRUARY 2012**

The following terms and conditions of sale ("**Terms of Sale**") shall apply to and form part of any contract for the supply of goods and services ("**Goods**") by Okuma Australia Pty Ltd ("**the Company**") to another party ("**the Purchaser**").

**1. QUOTATION**

- 1.1 No quotation given by the Company to the Purchaser shall constitute an offer. Any order from the Purchaser to the Company for the supply of Goods shall not be binding upon the Company until accepted by the Company.
- 1.2 Prices given in any quotation by the Company are applicable to that quotation only and will not apply in any other instance.
- 1.3 Quotations are valid for a period of thirty (30) days from date of issue by the Company **or otherwise specified in the quotation.**
- 1.4 The Terms of Sale may include additional terms in the quotation that are not inconsistent with these Terms of Sale.

**2. PURCHASE ORDERS**

- 2.1 When ordering, an official order in writing is to be submitted by the Purchaser to the Company quoting an order number full description of the Goods to be purchased and the delivery time and address. Reference to the Company's quote number to the Purchaser should also be made (where applicable).
- 2.2 These Terms of Sale apply exclusively to the Purchaser and to the Company in respect of Goods ordered by the Purchaser and unless otherwise agreed by the Company in writing, cannot be varied or replaced by any other terms and conditions, including any set out in the Purchaser's order notwithstanding any statement by the Purchaser in its order that its terms and conditions shall prevail over these Terms of Sale.
- 2.3 A contract shall only be or be deemed to have been entered into between the Company and the Purchaser for the supply of the Goods when the Purchaser's order has been accepted by the Company in writing.

**3. PAYMENT**

- 3.1 The extension of credit to the Purchaser by the Company shall be at the sole discretion of the Company and, where extended, unless otherwise advised in writing by the Company the Company requires payment in full within thirty (30) days of the end of the month in which delivery of the Goods occurs or as otherwise specified in the invoice.
- 3.2 Where credit is not extended, payment terms will be as set out in the Company's order confirmation to the Purchaser.
- 3.3 Without in any way limiting the Company's right to require payment in full on the due date, the Company may at its sole discretion, charge interest on overdue accounts at the rate of 2.5% above the ANZ bank's Business Finance Reference Rate as from time to time applicable.

3.4 The Purchaser agrees that the Company shall be entitled to use the services of a credit agency from time to time and may conduct a search of the Personal Property Securities Register to obtain information concerning the Purchaser (and where the Purchaser is a company, its Directors) in order to assess the Purchaser's credit worthiness.

3.5 Time specified for payment is of the essence.

#### 4. INDEMNITY

Without prejudice to any other rights the Company may have against the Purchaser, and to the extent permitted by law, the Purchaser shall indemnify the Company for, and save it harmless from, any loss, damage or expense (including, without limitation, costs, whether or not the subject of a court order) incurred by it should the Purchaser breach any of these Terms of Sale.

#### 5. DELIVERY

5.1 Unless agreed in writing the Company shall arrange for delivery of the Goods ("Delivery") to the Purchasers nominated delivery point.

5.2 The Company is entitled to charge a fee for Delivery.

5.3 Unless the Goods are to be collected by the Purchaser, the Company is deemed to have delivered the Goods when they are made available for unloading at the Purchaser's nominated delivery point.

5.4 The Purchaser is responsible for unloading the Goods from the Company's delivery vehicle.

5.5 The Purchaser indemnifies the Company against any loss or damage suffered by the Company, its sub-contractors or employees as a result of delivery, except where the Purchaser is a consumer as defined in the Australian Consumer Law Schedule of the *Competition and Consumer Act 2010* (Cth) ("ACL") and the Company has not used due care and skill.

5.6 Subject to clause 5.10, if the Goods are to be collected by the Purchaser from the Company's store Delivery occurs when the Goods are loaded on the Purchaser's vehicle.

5.7 Any date provided by the Company for Delivery or provision of the Goods is an estimate only and not a contractual commitment. The Company is not liable for any claims for non-fulfillment or late Delivery of Goods or for any loss or damage (including consequential loss or damage) suffered by the Purchaser arising from delay in Delivery or failure to deliver due to circumstances beyond the Company's reasonable control and the Purchaser shall accept and pay for the Goods notwithstanding late Delivery.

5.8 The Purchaser shall in its purchase order advise the Company of the nominated delivery point and required delivery time.

5.9 Unless otherwise agreed by the Purchaser and the Company, the Company shall be entitled to deliver the Goods in one or more lots. Where Delivery of the Goods is made by way of part Delivery the Company shall be entitled to invoice the Purchaser for pro-rata progress payments in respect thereof.

5.10 Notwithstanding the Purchaser's inability to accept Delivery of the Goods, the Company shall be deemed to have delivered the Goods in accordance with these Terms of Sale and the Goods shall be at the Purchaser's risk from:

- (a) the time when the Goods have been loaded onto the Purchaser's collecting vehicle;
- (b) delivered to the Purchaser's nominated delivery point; or

- (c) if the Goods are to be collected by the Purchaser and seven days has passed since the Company has notified the Purchaser that the Goods are ready for collection (as the case requires).

## **6. PERFORMANCE OF SERVICES**

- 6.1 Where the Company fails to provide any services, such as installation or training, on any estimated date it will provide the services within a reasonable time.
- 6.2 Where the Company is to provide services, the Purchaser must:
  - (a) be responsible for providing clean, safe and proper access to and at the place where the services are to be provided ("Site");
  - (b) ensure the Site is properly prepared for the provision of services;
  - (c) provide safe and secure conditions and comply with any occupational, health and safety laws for the Company, its sub-contractors, employees or agents whilst providing the services.
- 6.3 The Company may, at its absolute discretion, opt not to provide the services if the conditions are, in its reasonable opinion, not work safe. The Company will not be liable to the Purchaser in those circumstances.
- 6.4 The Purchaser indemnifies the Company against any loss or damage suffered by the Company, its sub-contractors or employees as a result of provision of the services at the Site, except where the Purchaser is a consumer as defined in ACL and the Company has not used due care and skill.

## **7. ADDITIONAL CHARGES**

The Company reserves the right to charge the Purchaser for any costs, charges or expenses whatsoever that the Company may incur as a result of -

- (a) Vehicle or wagon detention of the Goods (to the extent the same is not caused or contributed to by the Company);
- (b) Demurrage on ships as a consequence of any act or omission of the Purchaser;
- (c) Any special requirements or stipulations of the Purchaser accepted by the Company but not provided for in the Terms of Sale;
- (d) Any fluctuation in the exchange rate;
- (e) Any increase in duties, taxes, freight, insurance or other charges or expenses from the date of acceptance of the Purchaser's order by the Company to the date of Delivery.

## **8. STORAGE**

- 8.1 Where the Company has to store the Goods as a result of the Purchaser's inability to accept Delivery of the Goods at the nominated delivery point, or failure to collect the Goods within seven days of being notified they are ready (as the case requires) the Company shall be entitled to charge storage fees in respect of the Goods so stored.
- 8.2 If the Company notifies the Purchaser that the Goods are ready for Delivery and the Purchaser requests the Company to hold the Goods on its behalf, such Goods will be held by the Company at the Purchaser's risk, and the Company shall be entitled to charge storage fees in respect of the Goods so stored.

## **9. CLAIMS**

- 9.1 The Purchaser shall inspect the Goods immediately upon Delivery and, if the Goods are damaged or not otherwise in conformity with the contract relating to their supply shall give written notice to the Company of the details in respect thereof within seven (days) of the date of Delivery.

- 9.2 Any Goods the subject of a notice under clause 9.1 shall be left in the state and condition in which they were delivered until such time as the Company or its duly authorised agent has inspected the Goods, such inspection to be carried out within a reasonable time after notification by the Purchaser. If the Goods are not so left in the state and condition in which they were delivered, the Purchaser shall be deemed to have accepted the Goods and shall pay the purchase price for the Goods to the Company.
- 9.3 Acceptance of the Goods shall be deemed for all other purposes to have taken place when Delivery has occurred.
- 9.4 No Goods will be accepted for return by the Company unless agreed in writing by the Company prior to such return and then only upon conditions acceptable to the Company and at the Purchaser's entire risk as to loss or damage. Where the Company agrees to accept Goods for return, the Company's then current restocking charge, as varied from time to time, will be charged to the Purchaser and shall be immediately payable.
- 9.5 If the Purchaser is a consumer as defined in the ACL, nothing in this clause 9 limits any remedy available for a failure of the guarantees in sections 56 and 57 of the ACL.

## 10. PASSING OF RISK AND RETENTION OF TITLE

- 10.1 Whilst the risk in the Goods passes on Delivery, legal and equitable title remains with the Company until payment in full for all debts accrued or owed to the Company is made.
- 10.2 The Purchaser may sell or deal in the ordinary course of business with the Goods and with the interest of the Company in the Goods and may for the purpose of such sale or dealing part with possession thereof but the proceeds of any sale or dealing will be held by the Purchaser on trust for the Company in a separate account with a bank to whom the Purchaser has not given security. The Purchaser hereby agrees to accept this appointment as bailee and fiduciary.
- 10.3 Notwithstanding the above, the Company reserves the following rights in relation to the Goods until all amounts owed by the Purchaser to the Company are fully paid:
- (a) legal and equitable ownership of the Goods;
  - (b) in addition to its rights under the *Personal Property Securities Act 2009* (Cth) and associated regulations as amended ("PPSA"), to enter the Purchaser's premises (or the premises of any associated company or agent where the Goods are located) without liability for trespass or any resulting damage and retake possession of the Goods; and
  - (c) to keep or resell any of the Goods repossessed pursuant to (b) above.
- 10.4 The Purchaser must so long as the Company is entitled to the property in the Goods, store the Goods so that they are clearly identifiable as the property of the Company.
- 10.5 In the event that the Goods are resold, or goods manufactured using the Goods sold, by the Purchaser, the Purchaser holds on trust such part of the proceeds of any such sale as represents the invoice price of the Goods sold or used in the manufacture of the Goods sold in a separate identifiable account with a bank to whom the Purchaser has not given security as the beneficial property of the Company and must pay such amount to the Company upon request. Notwithstanding the provisions above the Company is entitled to maintain an action against the Purchaser for the purchase price of the Goods.
- 10.6 Where the Purchaser processes the Goods or incorporates them in or with any other product before property has passed to the Purchaser, the new product shall be separately stored or marked in a manner which makes such new product readily identifiable as the Goods of the Company.

- 10.7 If payment for the Goods is not made by the Purchaser by the due date specified by the Company to the Purchaser then the Purchaser shall return the Goods to the Company on demand. If the Purchaser does not return the Goods to the Company within 48 hours of receipt of the demand, in addition to its rights under the PPSA the Company shall be entitled to enter upon the Purchaser's premises at any time to do all things necessary to recover the Goods. The Purchaser shall be liable for and indemnify the Company against all costs associated with the exercise by the Company of its rights under this clause, which shall be repayable on demand.

## **11. PERSONAL PROPERTY SECURITIES ACT**

- 11.1 Notwithstanding anything to the contrary contained in these Terms of Sale, the PPSA applies to these Terms of Sale.
- 11.2 For the purposes of the PPSA:
- (a) terms used in this clause 11 that are defined in the PPSA have the same meaning as in the PPSA;
  - (b) these Terms of Sale are a security agreement and the Company has a Purchase Money Security Interest in all present and future Goods supplied by the Company to the Purchaser and the proceeds of the Goods;
  - (c) the security interest is a continuing interest irrespective of whether there are monies or obligations owing by the Purchaser at any particular time; and
  - (d) the Purchaser must do whatever is necessary in order to give a valid security interest over the Goods and their proceeds which is able to be registered by the Company on the Personal Property Securities Register.
- 11.3 The security interest arising under this clause 11 attaches to the Goods when the Goods are collected or dispatched from the Company's premises and not at any later time.
- 11.4 Where permitted by the PPSA, the Purchaser waives any rights to receive the notifications, verifications, disclosures or other documentation specified under sections 95, 118, 121(4), 130, 132(3)(d), 132(4), 135 and 157 of the PPSA.
- 11.5 The Company and the Purchaser agree to contract out of and nothing in the provisions of sections 96, 125, 129, 142 and 143 of the PPSA will apply to these Terms of Sale.
- 11.6 To the extent permitted by the PPSA, the Purchaser agrees that:
- (a) the provisions of Chapter 4 of the PPSA which are for the benefit of the Purchaser or which place obligations on the Company will apply only to the extent that they are mandatory or the Company agrees to their application in writing; and
  - (b) where the Company has rights in addition to those in Chapter 4 of the PPSA, those rights will continue to apply.
- 11.7 The Purchaser must immediately upon the Company's request:
- (a) do all things and execute all documents necessary to give effect to the security interest created under this agreement for the provision of Goods by the Company to the Purchaser; and
  - (b) procure from any person considered by the Company to be relevant to its security position such agreements and waivers (including as equivalent to those above) as the Company may at any time require.
- 11.8 The Company may allocate amounts received from the Purchaser in any manner the Company determines, including in any manner required to preserve any Purchase Money Security Interest it has in goods supplied by the Company.
- 11.9 For the purposes of section 275(6) of the PPSA, the parties agree and undertake that these Terms of Sale and any information pertaining to the sale of Goods and details of the Goods shall

be kept confidential at all times. Neither party may disclose any information pertaining to these Terms of Sale or the sale of Goods, except as otherwise required by law or that is already in the public domain.

## 12. DEFAULT

Should the Purchaser fail to make due payment for any Goods supplied by the Company or commit a breach of any Terms of the Sale, or being a natural person commit an act of bankruptcy, or being a corporation by act or omission enables the appointment of an administrator, scheme manager, trustee, official manager, receiver, receiver and manager, liquidator or any other person authorised to enter into possession or assume control of any property of the Purchaser pursuant to a mortgage or other security, the Company may, without prejudice to any of its other accrued or contingent rights, do any or all of the following -

- (a) Withdraw any credit facilities which may have been extended to the Purchaser and all amounts owing become immediately due and payable;
- (b) Withhold any further deliveries of Goods or performance of services required under any accepted purchase order;
- (c) In respect of Goods already delivered, enter into the Purchaser's premises to recover and resell same for its own benefit;
- (d) Suspend and/or terminate performance of any uncompleted contracts which the Company has with the Purchaser.

## 13. WARRANTIES

13.1 Except as the Terms of Sale specifically state, or as contained in any express warranty provided in relation to the Goods, the agreement for the provision of Goods by the Company to the Purchaser does not include by implication any other term, condition or warranty in respect of the quality, merchantability, acceptability, fitness for purpose, condition, description, assembly, manufacture, design or performance of the Goods or any contractual remedy for their failure.

13.2 If the Purchaser is a consumer as defined in the ACL, nothing in these Terms of Sale restricts, limits or modifies the Purchaser's rights or remedies against the Company for failure of a statutory guarantee under the ACL.

13.3 If the Purchaser on-supplies the Goods to a consumer:

- (a) if the goods or services are not of a kind ordinarily acquired for personal, domestic or household use or consumption, then the amount specified in section 276A(1) of the ACL is the absolute limit of the Company's liability to the Purchaser;
- (b) if the goods or services are of a kind ordinarily acquired for personal, domestic or household use or consumption, then payment of any amount required under section 274 of the ACL is the absolute limit of the Company's liability to the Purchaser,

howsoever arising under or in connection with the sale, installation, use of, storage or any other dealings with the Goods by the Purchaser or any third party.

13.4 If clause 13.2 or 13.3 do not apply, then other than as stated in the Terms of Sale or any written warranty statement, the Company is not liable to the Purchaser in any way howsoever arising under or in connection with the sale, installation, use of, storage or any other dealings with the Goods by the Purchaser or any third party.

13.5 The Company will not be liable for the costs of recovery of the Goods from the field, loss of use of the Goods, loss of time, inconvenience, incidental or consequential loss or damage, nor for any other loss or damage other than as stated above, whether ordinary or exemplary, caused either directly or indirectly by use of the Goods except to the extent of any liability imposed by the ACL.

#### **14. FITNESS FOR PURPOSE**

The Purchaser agrees that it does not rely on the skill or judgement of the Company in relation to the suitability of any of the Goods for a particular purpose and the Purchaser has the sole responsibility of satisfying itself that the Goods are suitable for a particular purpose unless it has indicated that purpose in writing to the Company and the Company has acknowledged in writing that the Goods will be fit for the particular purpose. Unless the Purchaser has indicated that purpose in writing to the Company, it has not made known, either expressly or by implication any purpose for which it requires the Goods.

#### **15. CANCELLATION**

- 15.1 If the Company is unable to deliver the Goods, then may cancel the Purchaser's order (even if it has been accepted) by written notice to the Purchaser.
- 15.2 Unless the agreement for the supply of Goods by the Company to the Purchaser constitutes a lay-by agreement under the ACL ("lay-by agreement") in which case the Purchaser may cancel the order prior to Delivery, no purported cancellation or suspension of an order or any part of it is binding on the Company once the order has been accepted.
- 15.3 Where the Company accepts the cancellation of an order or part of it where no lay-by agreement exists, the Company is entitled to retain the deposit and charge a cancellation fee, and the Purchaser shall indemnify the Company for any loss, damage or expense incurred as a result of the cancellation.
- 15.4 Where a lay-by agreement exists and is cancelled by the Purchaser, the Company is entitled to charge a termination fee in accordance with the ACL.

#### **16. OWNERSHIP AND CONFIDENTIALITY**

##### ***Definition***

For the purposes of this clause "Proprietary Information" means any and all information relating to the Goods or the installation thereof including designs, drawings, instruction booklets, specifications, circuit drawings, components, trademarks and patents and any and all proprietary information, intellectual property and copyright in such proprietary information.

- 16.1 The Purchaser acknowledges and accepts that the Company has a stated "Confidentiality Policy" ("Policy") and agrees to accept that Policy as being sufficient undertaking for the purpose of the protection of both the Purchaser's and the Company's confidentiality rights in law. The Company reserves the right to pass on any and all external legal costs incurred by the Company on an indemnity basis where the Purchaser requests alternative confidentiality obligations or changes to the Policy.
- 16.2 The Purchaser acknowledges that all Proprietary Information in respect of the Goods and all right title and interest therein are the sole property of the Company and the Purchaser shall gain no right title or interest in the Proprietary Information whatsoever. The Purchaser specifically acknowledges the Company's exclusive rights to ownership of any modification, translation or adaptation of the Proprietary Information and any other improvement or development based thereon which is developed, supplied, installed or paid for by or on behalf of the Purchaser or any customer of the Purchaser.
- 16.3 The Purchaser acknowledges that the Proprietary Information is confidential and contains trade secrets and that its disclosure will cause the Company to suffer financial loss.
- 16.4 The Purchaser shall implement all measures necessary to safeguard the Company's ownership and confidentiality of the Proprietary Information including without limitation:



- (a) allowing its employees, agents, and customers access to the Proprietary Information only to the extent necessary to ensure performance of the Goods and to require, as a condition to such access that such persons comply with the provisions of this part of these Terms of Sale;
- (b) to co-operate with the Company in the enforcement of such compliance by the Purchasers employees, agents and customers;
- (c) not to remove any nor permit the removal of any or alteration of any copyright or confidentiality labels placed on the Goods by the Company;
- (d) not to disassemble, decompile or reverse engineer any part of the Goods whether software or hardware;
- (e) not to reproduce any part of the Goods whether software or hardware.

The Purchaser indemnifies, and agrees to keep indemnified the Company against any loss, costs, expenses, damages, and harm suffered or incurred by the Company in connection with or arising out of or as a result of the breach by the Purchaser of any of the provisions of this clause.

## **17. SALES AND GOODS AND SERVICES TAX**

Should any sales tax or Goods & Services Tax as levied under the *A New Tax System (Goods & Services Tax) Act 1999* (Cth) (as amended) and any other tax, fee, levy or duty imposed by any competent authority be payable on any of the Goods supplied by the Company, such tax, fee, levy or duty will be to the Purchaser's account and shall be calculated using the rates and methods of assessment in force at the time of Delivery. The Purchaser is liable for any other applicable tax, including, without limitation withholding tax.

## **18. DISPUTES**

- 18.1 Subject to clause 18.3, any disputes between the parties arising from the performance of the provisions of these Terms of Sale must be settled through friendly consultation by the parties. Subject to clause 18.3, all disputes arising in respect of these Terms of Sale which are not resolved within thirty (30) days of first arising will be finally settled under the Rules of Conciliation and Arbitration of the International Chamber of Commerce by a single arbitrator appointed in accordance with the said Rules. The place of arbitration will be the State from which the Goods are sold by the Company ("the State"). The procedural law applicable to the arbitration will be that of the State. The decision of the arbitration is final and binding upon both parties.
- 18.2 During the period in which the dispute is being resolved, the parties must continue to perform all of the provisions of these Terms of Sale which are not under dispute and which are able to be performed by the parties.
- 18.3 Should the dispute relate to the Purchaser's failure to make timely payments under the Terms of Sale, the Company is not obliged to comply with the process of dispute resolution set out in this clause.

## **19. FORCE MAJEURE**

The Company shall not be liable for any claims for non-fulfillment or late Delivery should actual Delivery of the Goods or any parts be delayed in consequence of unforeseen events, including but not limited to strikes, unforeseen breakdown of machinery (save where caused by improper maintenance or operation by untrained personnel), suspension of electricity or other relevant power supply, riots, war, robbery, civil commotion, adverse non foreseeable weather conditions, disaster caused by fire and/or water, action of government or port authority, delay of vessel, rail-road embargoes, inability to obtain transportation facilities or due to a failure of an original equipment manufacturer to supply components by the due date.



## 20. ENTIRE AGREEMENT

These Terms of Sale contain the entire agreement between the parties hereto on the subject matter of this agreement, and there are no other oral or written representations, stipulations, warranties, agreements, or understandings relating to the subject matter of this agreement. Any variation or modification of these Terms of Sale must be in writing.

## 21. MISCELLANEOUS

21.1 If the Company is unable to deliver the Goods, then may cancel the Purchaser's order (even if it has been accepted) by written notice to the Purchaser.

21.2 The law of Victoria from time to time governs the Terms of Sale. The parties agree to the non-exclusive jurisdiction of the courts of Victoria, the Federal Court of Australia, and of courts entitled to hear appeals from those Courts.

21.3 The Company's failure to enforce any of these Terms of Sale shall not be construed as a waiver of any of the Company's rights.

21.4 If a clause is unenforceable it must be read down to be enforceable or, if it cannot be read down, the term must be severed from the Terms of Sale, without affecting the enforceability of the remaining terms.

21.5 The Company reserves the right to review and amend its Terms of Sale from time to time. Written notification forwarded to the Purchaser by ordinary mail shall be deemed sufficient notification to bind the Purchaser to any revised or amended terms of sale for all orders placed by the Purchaser and accepted by the Company after receipt of such notification.

**NOTHING IN THESE TERMS OF SALE SHALL BE READ OR APPLIED SO AS TO EXCLUDE, RESTRICT OR MODIFY OR HAVE THE EFFECT OF EXCLUDING, RESTRICTING OR MODIFYING THE APPLICATION OF ANY STATE OR FEDERAL LEGISLATION APPLICABLE TO THE SALE OF GOODS WHICH CANNOT BE EXCLUDED, RESTRICTED OR MODIFIED.**

I/We acknowledge receipt of and accept these Terms of Sale.

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Signed