

N R WELDING SUPPLIES PTY LTD
TRADING AS
MIGWELL AUSTRALIA
WELDING, SAFETY & ABRASIVE SUPPLIES

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TERMS AND CONDITIONS (SALE GOODS & SERVICES)

1 Interpretation

“ACL” means the Australian Consumer Law as set out in Schedule 2 of the *Competition and Consumer Act 2010* (Cth).

“Act of Default” means:

- a. Committing a material breach of these Terms which includes but is not limited to the failure to make payment for our Goods or Services by the due date;
- b. Becoming bankrupt, committing an act of bankruptcy or having judgment entered against you in any court.

“Agreement” means the agreement between Migwell Australia and the Customer for the supply of Goods and/or Services as constituted by these Terms.

“Business Day” means a day on which banks are open for business in Victoria but does not include a Saturday, Sunday or public holiday in Victoria.

“Consumer” has the meaning prescribed to it in the ACL.

“Credit Application” means an application for a commercial credit trading account with Migwell Australia (which must include a Customer’s ABN).

“Customer/ you/your” means the person or entity named as the customer in the Credit Application, Quotation or order form or any person or entity purchasing the Goods or Services (including any person or entity acting on their behalf).

“Goods” means any goods specified in a Quotation or a sales order, or Goods that are purchased from our retail outlet.

“GST” has the meaning prescribed to it in the *A New Tax System (Goods and Services Tax) Act 1999* (Cth) (as amended).

“Invoice” means the document entitled “Tax Invoice” which constitutes a tax invoice for the purposes of *A New Tax System (Goods and Services Tax) Act 1999* (Cth) (as amended).

“Migwell Australia/we/us/our” means N R Welding Supplies Pty Ltd ABN 97 007 276 46 trading as Migwell Australia Welding Safety & Abrasive Supplies.

“PPSA” means the *Personal Property Securities Act 2009* (Cth).

“PPSR” means the Personal Property Securities Register under the PPSA.

“Quotation” means any written quotation provided by us for the provision of Goods and/or Services.

“Services” means any services of repair or maintenance of goods that are provided by us.

“Site” means the location specified in the Quotation or sales order where the Goods shall be delivered, or the location where the Customer requests in writing that the Goods be delivered or the Services are required.

“Small Business Contract” means a small business contract as that term is defined in the ACL.

“Terms” means these terms and conditions of trade.

2 General

These Terms plus any implied terms which cannot be excluded are the whole agreement between you and us. No other contractual terms of a Customer (such as on a purchase order or otherwise) apply and, if provided, they don’t constitute a counteroffer. After you have received a copy of these Terms, if you place an order for the supply of all or a portion of Goods or Services supplied under these Terms, you will be deemed to have accepted these Terms and they will apply to the exclusion of all other written agreements with us.

3 Payment Terms

3.1 We may require payment for our Services to be made, in our discretion:

- 3.1.1 Upfront on placing an order for the Services; or
- 3.1.2 Before the goods requiring servicing are collected from our premises or returned to you, or before we attend the Site to provide the Services.

3.2 For any Goods purchased from our retail outlet, we require full payment at the time of purchase for all non-account customers.

3.3 For any other Goods, payment shall be made as follows (unless we tell you otherwise in writing):

- 3.3.1 A deposit of 20% of the total order amount on placing the order.
- 3.3.2 The remaining payment is due:
 - o If credit is given, within 30 days of the beginning of the following month from the date of invoice.
 - o If credit is not given, before the Goods are delivered to you or collected from our premises.

3.4 If we don’t receive payment on the due date, we may:

- 3.4.1 Charge interest (as liquidated damages) at the rate of 2% above the rate of interest fixed from time to time under section 2 of the *Penalty Interest Rates Act 1983*; and

3.4.2 Suspend or discontinue supply of the Goods or Services to you and/or cancel your account with us.

3.5 We may revoke our express or implied approval for giving you credit at any time.

3.6 We can set-off against any money owing to you amounts owed to us by you on any account whatsoever.

3.7 Any payments received from you on overdue accounts may be applied first to satisfy interest which may have accrued, second to reasonable expenses and legal costs, and then to principal.

3.8 You are liable for all reasonable expenses (including contingent expenses such as debt collection commission) and legal costs (on a full indemnity basis) incurred by us for enforcement of obligations and recovery of monies due from you to us.

3.9 All sums outstanding become immediately due and payable by you to us if you make default in paying any sums due to us, you become bankrupt or commit any act of bankruptcy, or have judgment entered against you in any court, notwithstanding the provisions of any other clause in these Terms.

4 Quotations and Pricing

4.1 Prices charged will be according to a current Quotation or determined by us by reference to our standard prices in effect at the date of the order. Subject to clause 20, we reserve the right to increase the prices, however, we will not change any prices for an existing order that has been accepted by us; the prices that apply to the order are the prices that applied at the time you placed the order.

4.2 A Quotation shall not constitute an offer and will remain valid only for 30 days from the date of the Quotation. A Quotation is subject to variation without notice to you prior to your acceptance of the Quotation. You are responsible for ensuring the accuracy of all specifications, details, sizes and quantities which form the basis of a Quotation and otherwise in accordance with clause 20. We do not accept any responsibility for any errors in such specifications, details, sizes and quantities and shall fulfil the order in conformity with the information supplied by you.

4.3 Documents requiring signature may be signed in electronic form and are binding from the time a person affixes a signature on your behalf.

4.4 Prices in Quotations don’t include (unless specified): (1) any statutory tax, including any GST, duty or impost levied in respect of the Goods or Services and not allowed for by us in calculating the price; or (2) costs and charges in relation to insurance, packing (other than our standard packing), crating, delivery (whether by road, rail, ship or air) and export of the Goods. Any of these charges that apply will be payable by you and we shall not be liable for them.

4.5 You shall pay any variations in the Invoice or contract price as a consequence of currency fluctuations.

4.6 This agreement shall not be affected by any impositions or alterations of customs duties or by decisions of the Customs Department with regard to either classification or value of duty or landing charges. Any such impositions shall be payable by you.

5 Delivery and Supply

5.1 Except to the extent of any gross negligence or wilful default on our behalf, we shall not be liable for any delay in delivery/supply. If we quote a time for delivery/supply, it’s an estimate only. We can stop supply/delivery if you fail to comply with these Terms.

5.2 We may refuse to supply any order in our absolute discretion (except where these Terms constitute a Small Business Contract) and may make acceptance of an order conditional upon receiving a satisfactory credit assessment of the Customer.

5.3 If you tell us to deliver the Goods over different times or to different addresses from the Site, then you: (1) shall be liable for any additional cost, charge and expense incurred by us in complying with your direction; (2) shall pay for the whole of the invoiced value of the Goods pursuant notwithstanding the staggered deliveries; and (3) such action shall be deemed to be delivery to you.

5.4 By signing a copy of the delivery docket on receipt of the Goods, you are deemed to accept delivery of the Goods where they are either delivered to the Site or when we notify you that the Goods are available for collection.

5.5 If you are unable or fail to accept delivery of the Goods, we may deliver them to a place of storage nominated by you and, failing such nomination, to a place determined by us. Such action shall be deemed to be delivery to you.

You shall be liable for all cost, charge and expense incurred by us on account of storage, detention, double cartage/delivery or similar causes.

- 5.6 Subject to clause 5.1, you agree that you will be obliged to and shall pay for the Goods on the due date notwithstanding that delivery is made after the agreed delivery date, and notwithstanding that the Goods may not yet be delivered.

6 Property

- 6.1 Until full payment has been made for all Goods, and any other sums in any way outstanding from you from time to time:

6.1.1 Title to the Goods shall not pass to you and you shall hold the Goods as bailee for us (returning the same to us on request). The Goods shall nevertheless be at your risk from the time of delivery/supply and you must insure the Goods from the time of delivery/supply.

6.1.2 You are only authorised to sell the Goods (or any portion of them) to third parties as our fiduciary agent provided that there shall be no right to bind us to any liability to such third party by contract or otherwise. All payments (direct or indirect) received from such third parties by you for the Goods (or any portion of them) shall be held on trust for us pursuant to the fiduciary relationship, except where clause 7.6 applies.

6.1.3 If you incorporate or transform the Goods (or any portion of them) into any other goods or products produced by you (or a third party), then you must hold a proportion of any payment ('relevant proportion') received by you for such goods or products on trust for us. You expressly acknowledge that the relevant proportion shall be equal to the dollar value of the Goods incorporated or transformed.

6.1.4 We are irrevocably authorised to enter the Site or any other premises where the Goods are kept, and to use your name and to act on your behalf, if necessary, to recover possession of the Goods without liability for trespass or any resulting damage.

- 6.2 In addition to any lien to which we may, by statute or otherwise, be entitled, we shall in the event of your insolvency, bankruptcy or winding up, be entitled to a general lien over all property or goods belonging to you in our possession (although all or some of such property or goods may have been paid) for the unpaid price of any Goods sold or delivered to you under this or any other contract.

7 Personal Property Security Interest

- 7.1 You grant a security interest in the Goods and the proceeds (as defined in the PPSA) to secure the obligation to pay the purchase price of the Goods and other of your obligations to us under this agreement (together the "Indebtedness"). You warrant that the Goods are not purchased for personal, domestic or household purposes.

- 7.2 Where the Goods and/or proceeds are not readily identifiable and/or traceable or their recoverable value is insufficient to pay the Indebtedness, the security interest shall also extend to all the goods present and after acquired by the Customer, of which the Goods form part, to the extent required to secure the Indebtedness.

- 7.3 You waive any right to receive notice in relation to any registration or amendment to a registration on the PPSR. At your own expense, you will provide all reasonable assistance and relevant information to enable us to register on the PPSR and generally to obtain, maintain, register and enforce the security interests created by this agreement.

- 7.4 Any payments received from you shall be deemed to be made and applied by us in the following order (unless we otherwise determine): (1) to any obligation owed by you which is unsecured, in the order in which the obligations were incurred; (2) to any obligations that are secured, but not by a purchase money security interest ('PMSI'), in the order in which those obligations were incurred (3) to obligations that are secured by a PMSI, in the order in which those obligations were incurred.

- 7.5 Until you have paid all money owing to us, you must at all times ensure that (1) all Goods, while in your possession, can be readily identified and distinguished, and/or (2) all proceeds (in whatever form) that you receive from the sale of any of the Goods are readily identifiable and traceable.

- 7.6 Subject to clause 6.1.2, if the Goods are held by you as inventory (as defined in the PPSA), then you may sell or lease the Goods in the ordinary course of business. Otherwise until you have paid all money owing to us you must not sell or grant a security interest in the Goods without our written consent.

- 7.7 To the extent permissible by law, you agree that the following provisions of the PPSA will not apply and you will have no rights under them: Section 95 (to the extent that it requires the secured party to give notices to the grantor); section 96; section 118 (to the extent that it allows a secured party to give notice to the grantor); section 121(4); section 125; section 130; section 132(3)(d); section 132(4); section 135; section 142; section 143.

- 7.8 Section 115(7) of the PPSA allows for the contracting out of provision of the PPSA, the following provisions of the PPSA will not apply and the Customer will not have any rights under them: section 127; section 129(2),(3); section 130(1); section 132; section 134(2); section 135; section 136(3), (4) and (5) and section 137.

- 7.9 Unless otherwise agreed and to the extent permitted by the PPSA, the parties agree not to disclose any information of a kind referred to in section 275(1) of the PPSA to an interested person or any other person. You waive any right you may have, or but for this clause may have had, under section 275(7)(c) of the PPSA to authorise the disclosure of the above information.

8 Lien and Rights of Sale

Until full payment has been made for all Goods and/or Services supplied by us and any other sums in any way outstanding from the Customer to us from time to time:-

- 8.1 Any goods that belong to you which are in our possession, custody, power or control shall be subject to a lien in favour of us to secure payment.

- 8.2 We may retain and sell any of your goods which are in our possession, custody, power or control. We may only sell the goods after first giving 28 days written notice to you at your last known postal or email address that if the amount owing is not paid by you within that period it may sell all or any of your goods by public auction or private treaty. To determine the amount owing, we may also charge all reasonable costs of storage of the goods, and transportation to and from the storage area.

- 8.3 We may pay ourselves out of the sale proceeds for the goods any monies owing pursuant to these Terms plus an amount sufficient to cover the reasonable costs of the giving of notice, transportation to and from storage, storage of goods and the sale. Any surplus shall be remitted to you by cheque sent to your last known address by ordinary pre-paid post and remittance in this manner shall be deemed to have been received by you.

9 Availability of Stock

Any order that cannot be fulfilled on its receipt will automatically be back ordered and processed when stock becomes available unless it is your stated standard policy not to accept back orders or you specifically mark your order, "Do Not Back Order". Deliveries at any time are subject to availability of stock and we will not be liable for any charges due to product unavailability.

10 Restrictions

You acknowledge and accept that we sell our Goods only through persons who have been authorised by us to sell specific product categories at specific locations and who comply with our Terms and Conditions. Subject to the provisions of the *Competition and Consumer Act 2010*: (1) under no circumstances may you sell Goods through the Internet or the mail without prior written authorisation from us; (2) you are prohibited from selling Goods on the international market without our express written consent; and (3) we do not grant to you the exclusive right to sell our Goods. We reserve the right to authorise and/or supply additional retailers in any market area that it deems necessary to adequately cover the market.

11 Returns, Cancellations and Claims

- 11.1 You shall not return any Goods to us without obtaining prior authorisation from us. Unauthorised returns will not be accepted. No returns will be accepted unless a copy of the relevant Invoice is enclosed with the returned Goods. A list of the Goods returned including product descriptions, quantity, date of return and the Customer's name and address must also be enclosed. All Goods must be returned in the original packaging and you shall be responsible for all damage incurred during return shipment. Subject to clause 14, if we accept the return of any Goods that have been ordered, we may charge you 20% of the Invoice price as a handling fee with freight costs and risk remaining your responsibility.

- 11.2 *Change of mind* - A request to return Goods for change of mind must be made within 5 Business Days of the date that the Goods are collected or delivered to you. You may return the Goods to our premises, but if they are shipped, freight charges must be paid by you. We will issue a refund, credit note or exchange only after Goods returned are either collected by our authorised representative or agent or returned to us, in our discretion. You must not deduct the amount of any anticipated refund or credit from any payment due to us. All Goods returned for change of mind must be of merchantable and reasonable quality such that the Goods are complete in their original packaging, not shop-soiled, are not price ticketed and are still listed in the current price list.

- 11.3 *Cancellation* - We will not accept cancellations or partial cancellations of an order placed in respect of Goods or Services (before Goods are delivered to you or collected, or the Services have been performed) unless we have first consented in writing to such cancellation or partial cancellation and unless a cancellation charge has been paid which, as determined by us, will indemnify us against all direct loss, without limitation. Cancellation will not be accepted on orders for Goods that are not regular stock which are in the process of manufacture or ready for shipment.

- 11.4 *Complaints* - Subject to clause 14, all complaints, claims, or notification of lost Goods, incomplete Goods or Services, Goods damaged in transit or Goods or Services that do not comply with your purchase order must be submitted to us in writing within 5 Business Days of delivery of the Goods or Services. We may issue a refund, credit note or exchange in respect of the Goods or Services. Otherwise, you are deemed to have accepted the Goods or Services and shall not refuse to pay for the Goods or Services on the basis that they were lost, incomplete, damaged in transit, or do not comply with your purchase order (as applicable).

12 Privacy Act 1988

- 12.1 If you have applied for a credit account with us, to enable us to assess your application for credit, you authorise us: (1) to obtain from a credit reporting agency/body a consumer or commercial credit report containing personal information about you and any guarantors; and (2) to obtain a report from a credit reporting agency/body and other information in relation to your commercial credit activities, and (3) to give to a credit reporting agency/body information including identity particulars and application details.

- 12.2 You authorise us to give to and obtain from any credit provider named in the accompanying Credit Application and credit providers that may be named in a credit report issued by a credit reporting agency/body information about

your credit arrangements. You understand that this information can include any information about your credit worthiness.

- 12.3 You understand that information can be used for the purposes of assessing your application for credit, assisting you to avoid defaulting on your credit obligations, assessing your credit worthiness and notifying other credit providers and credit reporting agencies of a default by you under these Terms.

13 Notification

You must notify us in writing within seven (7) days of: (1) any alteration of your name or ownership; (2) the issue of any legal proceedings against you; (3) the appointment of any provisional liquidator, liquidator, receiver, receiver manager or administrator to you; and (4) any change in the ownership of your business name. You agree that you shall be liable to us for all Goods or Services supplied to the new owner by us until notice of any such change is received.

14 Warranties

- 14.1 No warranties except those implied and that by law cannot be excluded are given by us in respect of Goods and Services supplied. If you are a Consumer, our liability for a breach of a condition or warranty is limited to:
- 14.1.1 The repair of the Good(s) or resupply of the Services or the cost of repairing the Good(s) or resupplying the Services if we determine that there has been a minor fault; or
 - 14.1.2 If it is not possible to repair the Good(s), or if we determine that there has been a major fault (which may include multiple minor faults), the replacement of the Good(s) or refund of the price paid for the Good(s), as determined by you; or
 - 14.1.3 If a minor fault prevents the Good(s) from being used for their intended purpose within 30 days after purchase, the replacement of the Good(s) or refund of the price paid for the Good(s) as determined by you; or
 - 14.1.4 Cancelling the agreement and granting a refund if there is a major fault with the Services.
- 14.2 If the Goods are returned in accordance with this clause 14, you are responsible for returning the Goods to our premises. If the Goods are confirmed to have a minor fault or major fault, you may recover reasonable postage or transportation costs from us and no handling fee is payable by you.
- 14.3 You acknowledge and warrant that you have relied on your own skill and judgment or, alternatively, on the skill and judgment of tradesmen and professional advisers retained by you to provide advice and assistance on the suitability of the Goods or Services for specific purposes and procedures and, in this respect, you shall indemnify us from and against any suit, claim, demand or compensation which, but for these Terms, you may have had against us, except if you are a Consumer or these Terms are deemed to be a Small Business Contract.
- 14.4 You warrant to us that you are purchasing Goods or Services as the principal and not as an agent.

15 Assignment

- 15.1 We may subcontract or assign the performance of any of our obligations or the benefit of any of our rights under this Agreement to any party without your consent.
- 15.2 You shall not attempt to assign or assign any of your rights or obligations under this Agreement without our prior written consent.

16 Termination

We may terminate this Agreement if you commit an Act of Default which is not remedied within 7 days of written notice of the Act of Default given by us.

17 Intellectual Property

- 17.1 All intellectual property rights (including all rights resulting from intellectual activity and includes copyright, inventions, patent rights, registered and unregistered trademarks, design rights, circuit layouts and all rights and interests of a like nature, including but not limited to methods and techniques, together with any documentation relating to such our rights and interests), including those developed during the supply of the Goods or Services, remain our sole property at all times.
- 17.2 If we terminate this Agreement, we may immediately reclaim any material incorporating our intellectual property and you grant us an irrevocable licence to enter upon your premises to reclaim such material without incurring liability to you or any other person.

18 Force Majeure

We shall be released from our obligations in the event of national emergency, war, prohibitive governmental regulation or if any other cause beyond the control of the parties renders provision of the Goods or Services impossible, where all money due to us shall be paid immediately and, unless prohibited by law, we may elect to terminate the Agreement.

19 Equitable Charge

If we give you credit, you as beneficial owner and/or registered proprietor now charge in favour of us all of your estate and interest in any real property (including but not limited to any applicable land owned by you or described as the Street Address in the Credit Application if applicable) ("Land") to secure payment of accounts rendered by us to you for the delivery and/or supply of the Goods or Services including interest payable on these accounts and costs (including legal costs on a full indemnity basis) incurred by us and including the costs to prepare and lodge a Caveat against the Land and to remove the Caveat.

20 Variation

- 20.1 We may vary these Terms or our price list by providing written notice to you (by email, conventional mail or by posting the amended terms on our website).
- 20.2 If you are a Consumer, or this agreement is deemed to be a Small Business Contract, and you do not deem the variation acceptable, you may elect not to proceed with the purchase of the Goods or Services ordered before the date of the variation but which are intended to be subject to the variation.
- 20.3 If you are not a Consumer and this agreement is not deemed to be a Small Business Contract, you agree that the variation applies from the date of receiving notice of the varied Terms.
- 20.4 You acknowledge that our prices may be increased due to factors outside our control, such as increased manufacturing costs.

21 Failure to Act

Our failure to enforce or insist upon the timely performance of any term, condition, covenant or provision in these Terms, or our failure to exercise any right or remedy available under these Terms or at law, or our failure to insist upon timely payment of monies when due or to demand payment of any charges or fees which accrue or any extension of creditor forbearance under these Terms shall not constitute a waiver of any subsequent default or a waiver of our right to demand timely payment of future obligations or strict compliance with the Terms.

22 Legal Construction

- 22.1 These Terms shall be governed by and interpreted according to the laws of Victoria and the parties consent and submit to the jurisdiction of the Courts of Victoria.
- 22.2 Notwithstanding that any provision of the Terms may prove to be illegal or unenforceable pursuant to any statute or rule of law or for any other reason that provision is deemed omitted without affecting the legality of the remaining provisions and the remaining provisions of the Terms shall continue in full force and effect.

(creditor)watch
member