

TERMS AND CONDITIONS OF SALE

ENCOPARTS agrees to sell the Goods and Services to the Buyer on the Terms.

1. GENERAL

The relevant Order together with these Terms constitute a legally binding contract between the Buyer and ENCOPARTS (“**Contract**”) and set out the terms and conditions upon which the Buyer purchases the Goods and Services from ENCOPARTS.

2. DEFINITIONS

In these Terms:

- 2.1 **Action** means any claim, action, suit, proceeding or demand.
- 2.2 **Authority** means any public or government body or authority of any kind.
- 2.3 **Business Day** means Monday to Friday.
- 2.4 **Buyer** means the buyer of the Goods or Services specified in the Order and, wherever the context permits, includes its officers, employees, servants, agents, assigns and contractors and any persons claiming through, under or in trust of the Buyer.
- 2.5 **Commercial Credit Terms and Conditions** means the terms and conditions upon which ENCOPARTS agrees to provide a credit facility to the Buyer and which are available at <https://www.ENCOPARTS.com.au>.
- 2.6 **Consequential Loss** means any indirect, special or consequential loss, including but not limited to loss of revenue, loss of profit or anticipated profit, loss of production, loss of use of any plant or facility, business interruption of any nature, loss of business opportunity, loss of business reputation, loss of contract, value of shares, wasted overheads or any other indirect, remote, consequential, punitive, exemplary or special loss or damage, but does not include:
- (a) damage or losses which may be recoverable under a policy of insurance:
 - (i) effected pursuant to the requirements of the Contract; or
 - (ii) which would have been effected pursuant to the requirements of the Contract (or under which such damages or losses would have been recoverable), but for the Buyer’s failure to comply with its obligations under the Contract in respect of such policy or under such policy; or
 - (b) damage or losses which may be recoverable by ENCOPARTS under clause 17.5.
- 2.7 **Convention** means the United Nations Convention on Contracts for the International Sale of Goods, adopted at Vienna, Austria on 10 April 1980.
- 2.8 **Damage** means loss, theft, damage, destruction or defacement.
- 2.9 **Date for Delivery** means the date for delivery stated in the Order or, if no date is stated, a reasonable time following ENCOPARTS’ receipt of the Order.
- 2.10 **Date of Delivery** means the date of delivery of the Goods by ENCOPARTS to the Buyer.
- 2.11 **Delivery Address** means the delivery address stated in the Order or, if no address is stated, ENCOPARTS’ premises at which the Goods are located (or will be located immediately prior to delivery).
- 2.12 **ENCOPARTS** means ENCOPARTS Pty Ltd (ACN 643 409 689) and, wherever the context permits, includes its officers, employees, assigns, contractors, agents and any persons claiming through, under or in trust of ENCOPARTS.
- 2.13 **Force Majeure** means a circumstance:
- (a) beyond the reasonable control of a Party;
 - (b) which could not have reasonably been foreseen by that Party;
 - (c) which results in that affected Party being unable to observe or perform on time an obligation under these Terms; and
 - (d) which cannot be reasonably be prevented, overcome or remedied by that Party,
- and includes a Pandemic Event.
- 2.14 **Goods** means the goods specified in the Order.
- 2.15 **Intellectual Property Rights** means any and all registered and unregistered intellectual property rights throughout the world including without limitation, all copyright, trade secrets, patents, patent applications, trademarks, domain names, business names, designs and circuit layout rights.
- 2.16 **Loading** means the loading of the Goods on a vehicle, ship, vessel or aircraft (as

- applicable) in connection with delivery to the Buyer.
- 2.17 **Loss** means any loss, damage, expense, payment or liability, whether direct or indirect, but excludes Consequential Loss.
- 2.18 **Order** means the relevant order for the Goods and any Services given by the Buyer to ENCOPARTS referred to in clause 1 above.
- 2.19 **Pandemic Event** means any biosecurity or human biosecurity emergency declared under the *Biosecurity Act 2015* (Cth), including in respect of COVID-19).
- 2.20 **Party** means a party to the Contract.
- 2.21 **Price** has the meaning given in clause 7.1.
- 2.22 **Sales Quotation** means the Sales Quotation form (or equivalent) given by ENCOPARTS and sent to the Buyer.
- 2.23 **Services** means the services (if any) specified in the Order.
- 2.24 **Terms** means these terms and conditions of sale and any additional terms and conditions stated in the Order, including any variations agreed by the Parties in writing or made by ENCOPARTS under clause 19.8.
- 2.25 **Unloading** means the unloading of the Goods from a vehicle, ship, vessel or aircraft (as applicable) in connection with delivery to the Buyer.
- 3. INTERPRETATION**
- 3.1 In the Contract, unless the context requires otherwise:
- (a) the singular includes the plural and vice versa;
 - (b) a reference to one gender includes any other gender;
 - (c) a reference to a person includes a company, body corporate and partnership as well as a natural person;
 - (d) obligations and warranties on the part of 2 or more persons bind them jointly and severally;
 - (e) a reference to a month is to a calendar month; and
 - (f) a reference to "\$" or "dollars" is to Australian dollars.
- 3.2 Headings have been inserted for ease of reference only and do not form part of the Contract.
- 3.3 The Price is payable in Australian dollars and is exclusive of GST unless specified otherwise in the Order.

4. CONTRACT

- 4.1 ENCOPARTS agrees to sell the Goods and any Services to the Buyer on the Terms.
- 4.2 Until ENCOPARTS has accepted an Order in accordance with clause 4.3, any Sales Quotation represented by ENCOPARTS is:
- (a) indicative only;
 - (b) not an offer to enter into a binding contract; and
 - (c) only valid for 30 days, subject to ENCOPARTS' right of revision or withdrawal within that timeframe,
- and no Order given the Buyer to ENCOPARTS following a Sales Quotation will by itself or in association with a Sales Quotation bind ENCOPARTS.
- 4.3 Subject to clause 5.1, if the Buyer makes an Order, ENCOPARTS accepts and is deemed to have accepted the Order under this clause 4.3:
- (a) when written notification of acceptance of the Order is provided by ENCOPARTS to the Buyer; or
 - (b) within 10 days of the date of the Order,
- whichever occurs first.
- 4.4 Upon ENCOPARTS' acceptance of the Order in accordance with clause 4.3, the parties will enter into the Contract which will incorporate the following documents:
- (a) the Commercial Credit Terms and Conditions (if applicable);
 - (b) these Terms; and
 - (c) the Order.
- 4.5 In the event of any inconsistency, ambiguity or discrepancy in or between any of the provisions of any of the documents comprising the Contract, the documents take precedence in the above order.
- 4.6 The use of the Buyer's own form or purchase order, irrespective of whether communicated to ENCOPARTS, will in no way derogate from any of the Terms.
- 4.7 The Contract solely governs and constitutes the entire agreement between the Parties and supersedes any prior promises, representations, undertakings or statements by or on behalf of ENCOPARTS.
- 5. ORDERS**
- 5.1 The quantity, quality, description or specification of the Goods and Services will only be those expressly set out in the Order

- and any variation raised by ENCOPARTS under clause 19.8.
- 5.2 Subject to clause 17.4 and 17.5, no order which has been accepted by ENCOPARTS may be cancelled by the Buyer.
- 6. CREDIT FACILITY**
- 6.1 Notwithstanding any other provision of the Contract, this Clause 6 applies only to the extent the Commercial Credit Terms and Conditions have been accepted by the Buyer and are applicable to the Contract.
- 6.2 The Buyer acknowledges and agrees that in the event the Buyer receives a credit facility from ENCOPARTS for the delivery of the Goods or the provision of the Services, the Commercial Credit Terms and Conditions will govern the delivery of the Goods or the provision of the Services in conjunction with the Terms.
- 7. PRICE**
- 7.1 The Price for the Goods and Services (including any deposits or advance payments) is the price stated in the Order, plus any variations raised by ENCOPARTS under clause 19.8 and any additional charges payable by the Buyer in accordance with the Terms.
- 7.2 ENCOPARTS is entitled to charge a currency conversion premium when converting receivables into Australian currency.
- 8. PAYMENT**
- 8.1 Subject to clause 8.2 but otherwise unless as agreed by the Parties in writing, the Buyer must pay the Price to ENCOPARTS at the time of commencement of delivery of the Goods or, if the Buyer chooses to collect the Goods from ENCOPARTS' premises, then at the time of collection. In the case of instalment deliveries, each delivery will be paid for as it is made.
- 8.2 Notwithstanding any other provision of the Contract, in the circumstances where ENCOPARTS requires an advance payment or payment by way of a deposit of the Price, the Buyer must ensure those payments are paid and received by ENCOPARTS in full, cleared and available funds as a condition precedent to any liability or obligation of ENCOPARTS arising under the Contract.
- 8.3 Where Goods are imported into Australia, any variation in the Price adverse to the Seller and greater than 5%, arising from fluctuation in currency exchange rates between the date of acceptance of the Order and delivery of the Goods, must be to the Buyer's account.
- 8.4 Any fee, charge, duty, levy, impost or tax which is not applicable at the date of the Order but which is subsequently levied upon ENCOPARTS in connection with the sale of the Goods as a result of any change in law or policy, will be to the Buyer's account.
- 8.5 The Price must be paid without counterclaim, deduction, withholding or set-off by the Buyer.
- 8.6 If any payment to be made by the Buyer to ENCOPARTS is overdue, then the Buyer must pay interest on that amount at a rate of 10% per annum, calculated and compounded daily, until the amount is paid in full. Interest is payable on demand. Any payments made by the Buyer must first be applied to any outstanding interest.
- 8.7 If any money owed by the Buyer to ENCOPARTS under the Contract is overdue, ENCOPARTS may withhold delivery or prevent collection of any of the Goods or withhold provision of any Services until arrangements as to payment or credit have been agreed by the Parties.
- 8.8 ENCOPARTS may set-off, or otherwise account for, amounts paid by the Buyer against any other amounts owed by the Buyer to ENCOPARTS or claimed to be so owed whether arising under or in connection with the Contract or otherwise.
- 9. DELIVERY**
- 9.1 ENCOPARTS will use its best endeavours to deliver the Goods to the Buyer at the Delivery Address by the Date for Delivery.
- 9.2 Delivery of the Goods is deemed to have occurred:
- (a) when Unloading of the Goods has been completed at the Delivery Address; and
 - (b) where no Delivery Address has been specified in the Order, upon commencement of the Loading of the Goods at ENCOPARTS' premises.
- 9.3 ENCOPARTS will notify the Buyer (in writing) upon the completion of the Services.
- 9.4 The Buyer must ensure that ENCOPARTS has access to the Delivery Address, including any relevant work area and equipment as is safe and reasonably necessary for ENCOPARTS to deliver the Goods or make provision of the Services.
- 9.5 The manner of delivery of the Goods and provision of the Services is at ENCOPARTS' absolute discretion.
- 9.6 Unless otherwise expressly agreed in writing by the Parties, any times for delivery of the

Goods or provision of the Services specified by ENCOPARTS, whether in the Order or otherwise, are estimates only and ENCOPARTS will not be liable to the Buyer for any Loss suffered by the Buyer as a result of ENCOPARTS' delay in meeting those delivery times for any reason whatsoever.

9.7 The Buyer is not entitled to terminate the Contract because of any delay in delivery of the Goods or provision of the Services.

10. INSPECTION, ACCEPTANCE AND COMPLETION

10.1 The Buyer must promptly inspect:

- (a) the Goods upon delivery in accordance with clause 9.2; and
- (b) the Services upon receipt of notification by ENCOPARTS in accordance with clause 9.3,

and notify ENCOPARTS of any non-compliance with the Contract in writing within 14 days of the Date of Delivery or from the notification of completion (as applicable), failing which, the Buyer will be deemed to have accepted that:

- (c) the Goods comply with, and have been delivered in accordance with, the Contract; and
- (d) the Services are complete, and have been performed in accordance with the Contract.

10.2 Subject to clauses 10.1, 10.3 and 15.10, as to delivered Goods which do not comply with the requirements of the Contract, the Buyer may:

- (a) reject and return them (at the Buyer's cost) to the Delivery Address or any other address nominated by ENCOPARTS; or
- (b) accept them and notify ENCOPARTS of a dispute under clause 22.

10.3 Subject to clause 15.10, the Buyer will only be entitled to return the Goods under clause 10.2(a) if the Goods are:

- (a) in a good saleable condition and in their original packaging, without an expired shelf life (if applicable) and with the original invoice; and
- (b) not custom-made Goods made to order solely for the Buyer,

and where the Goods are returned:

- (c) within 28 days of the Date of Delivery, the Buyer will be entitled to a refund of the Price of the Goods;

(d) after 28 days of the Date of Delivery but within 42 days of the Date of Delivery, the Buyer will be entitled to a refund of the Price of the Goods, less a restocking fee of \$100 or 10% of the Price (whichever is greater); and

(e) after 42 days of the Date of Delivery, the Buyer will be entitled to a refund of a portion of the Price of the Goods as determined by ENCOPARTS (acting reasonably), which amount shall be less than the amount stated in clause 10.3(d).

11. BUYER WARRANTIES

11.1 The Buyer warrants and agrees that:

(a) it is authorised to accept the Terms on behalf of its principal (if any);

(b) any vehicle used by the Buyer to collect, load, unload or transport the Goods is suitable for that purpose;

(c) the Buyer will comply with all requirements and directions of ENCOPARTS, and the requirements of any applicable law and Authority relating to the collection, Loading, Unloading or transportation of the Goods;

(d) the Buyer will, at its own expense, obtain all necessary approvals, permits and consents of all relevant Authorities for any collection, Loading, Unloading, transportation, use, operation, installation or storage of the Goods;

(e) the Buyer will, at its own expense, ensure that all safety and operating instructions and notices are observed and are not defaced or removed from any Goods;

(f) if the Delivery Address is not a premises controlled by ENCOPARTS, the Buyer must:

(i) ensure that the delivery site is ready to receive delivery of the Goods; and

(ii) give ENCOPARTS all necessary instructions, within 2 Business Days after being informed by ENCOPARTS that the Goods are ready for delivery, relating to the delivery; and

(g) if the Delivery Address is a premises controlled by ENCOPARTS, the Buyer must take delivery within 3 Business Days after being informed

by ENCOPARTS that the Goods are ready for delivery.

12. STORAGE AND REDELIVERY

12.1 If the Buyer fails to comply with its obligations under clauses 11.1(g) or 11.1(h), the Buyer must pay all reasonable Loss incurred by ENCOPARTS as a result of non-delivery of the Goods, including but not limited to costs of redelivery, transport and storage of the Goods.

12.2 ENCOPARTS may store the Goods at ENCOPARTS' own premises or such other premises as it deems fit, at ENCOPARTS' absolute discretion.

13. RISK AND PROPERTY

13.1 Risk of Damage to the Goods passes to the Buyer upon delivery.

13.2 If the Goods or Services are withheld by ENCOPARTS pursuant to clause 8.7, risk in the Goods passes to the Buyer when the Buyer would have been able to take delivery of the Goods had ENCOPARTS not withheld the Goods or Services.

13.3 Notwithstanding delivery and the passing of risk in the Goods or any other provision of the Terms, property in the Goods does not pass to the Buyer until ENCOPARTS has received, in cash or cleared funds, payment of the Price in full. Pending payment of the Price:

(a) ENCOPARTS' will have a lien over any of the Buyer's other goods under ENCOPARTS' control for all amounts claimed to be due and payable to ENCOPARTS; and

(b) the Buyer is a bailee of the Goods and owes ENCOPARTS the duties and liabilities of a bailee.

13.4 Until the property in the Goods passes to the Buyer, ENCOPARTS may at any time on giving notice to the Buyer, require the Buyer to deliver up possession or control of the Goods to ENCOPARTS.

13.5 The Buyer hereby irrevocably authorises ENCOPARTS to enter onto the Buyer's premises for the purpose of retaking possession or control of Goods pursuant to clause 13.4 or, where the Goods are located on the property of any third party, the Buyer must obtain pre-approval from the third party for ENCOPARTS to enter onto those premises for that purpose.

13.6 ENCOPARTS may keep, resell or otherwise deal with the Goods repossessed under clauses 13.4 or 13.5, in its absolute discretion.

13.7 The Buyer must not sell, pledge or in any way charge any Goods by way of security while the Goods remain the property of ENCOPARTS. If the Buyer does so, then:

(a) all money owing by the Buyer to ENCOPARTS (without prejudice to any other rights or remedies of the ENCOPARTS) becomes immediately due and payable; and

(b) all money received by the Buyer in respect of any sale of or security given over the Goods is held on trust for ENCOPARTS until ENCOPARTS has received full payment for the Goods.

13.8 Until property in the Goods passes to the Buyer, the Buyer must:

(a) keep the Goods in good and marketable condition, separate from all other goods, and except in cases of emergencies, must ensure that all repairs or replacements which may be required to the Goods are effected by ENCOPARTS or its duly appointed agent or representative at the cost of the Buyer; and

(b) insure the Goods for their full replacement value with an insurer carrying a minimum Standard & Poor's rating of 'A-' or an equivalent rating from another reputable agency.

13.9 The insurance required under clause 13.8(b) must cover the respective rights and interests of the Buyer and ENCOPARTS (as owner), note the interests of ENCOPARTS as owner if required by ENCOPARTS, and include:

(a) a cross-liability clause, to the intent that each insured party will be deemed to be separate insureds under the policy;

(b) an express provision requiring the insurer to notify ENCOPARTS if the policy of insurance is not renewed, lapses or is cancelled mid term; and

(c) an acknowledgement from the insurer that in the event of Loss or Damage to the Goods, all net insurance proceeds derived from any insurance settlement will be used to either repair or replace the Goods. Such determination will be at the absolute discretion of ENCOPARTS.

13.10 The Buyer must not do or permit or allow to be done anything which might or could prejudice any insurance of the Goods.

13.11 If the Buyer fails to insure the Goods or provide evidence of the insurances in

- accordance with this clause 13, ENCOPARTS may, but is not obliged to, procure and maintain such insurance and the cost of doing so will be a debt due and immediately payable from the Buyer to ENCOPARTS.
- 13.12 The Buyer must promptly inform ENCOPARTS in writing of any event or circumstance that may give rise to a claim under insurance required by clause 13.8(b) and keep ENCOPARTS informed of subsequent developments and take all reasonable steps to ensure a prompt and favourable settlement of the claim.
- 13.13 ENCOPARTS will effect and maintain, in relation to Services, for the duration of carrying out the Services, and for Goods, until property of the Goods passes to ENCOPARTS:
- (a) a public liability insurance policy for at least the amount of \$20,000,000 for any one occurrence;
 - (b) a products liability insurance policy for at least the amount of \$20,000,000 limited in the aggregate during any single term of insurance; and
 - (c) such insurances as are required by law including workers' compensation insurance.
- 13.14 The Parties will be responsible for and must pay any excess or deductible under insurance policies required by these Terms to the extent of their respective contributions to the Loss or Damage.
- 14. DRAWINGS**
- 14.1 All specifications, drawings, and particulars of weights and dimensions submitted by ENCOPARTS are approximate only and any deviation from any of these things does not vitiate the Contract or form grounds for any Action against ENCOPARTS.
- 14.2 The descriptions, illustrations and performances contained in catalogues, price lists and other advertising matter do not form part of the Contract or of the description applied to the Goods.
- 14.3 Where specifications, drawings or other particulars are supplied by the Buyer, the Price is calculated on estimates of quantities required. If there are any adjustments in quantities above or below the quantities estimated by ENCOPARTS and set out in an Order, then any such increase or decrease is to be adjusted on a unit rate basis according to unit prices set out in the Order.
- 15. LIABILITY, INDEMNITY AND RELEASE**
- 15.1 Except to the extent expressly stated in this Contract, the Buyer purchases the Goods and Services at its own risk.
- 15.2 The Buyer is liable for, indemnifies and will indemnify and keep ENCOPARTS indemnified against all Loss, and hereby releases and will release ENCOPARTS from any Action arising out of or in connection with:
- (a) the use of the Goods by the Buyer or by any third party;
 - (b) any defect in or Damage to the Goods which ought to have been apparent upon a reasonable visual examination of the Goods upon collection or delivery;
 - (c) any defect in or Damage to the Goods if such defect or Damage is caused or contributed to by the Buyer or by any third party, including but not limited to defects or Damage arising out of any alteration to the Goods by the Buyer or any third party;
 - (d) the re-taking of possession of any Goods pursuant to clause 13.4;
 - (e) the dealing with the Goods pursuant to clause 13.6; or
 - (f) any injury to any person, or Loss or Damage to property arising out of the collection, Loading, Unloading, transportation, use, operation, installation or storage of the Goods by the Buyer or by any third party.
- 15.3 Where ENCOPARTS is acting as agent for a manufacturer or supplier, ENCOPARTS will not be liable for any Loss arising out of or in connection with any alteration or variation of Goods made by the manufacturer.
- 15.4 To the maximum extent permitted by law:
- (a) all terms and warranties expressed or implied by any legislation, any written or unwritten law, trade, custom or usage or otherwise in relation to the supply of the Goods or the provision of the Services or the Terms are expressly excluded;
 - (b) subject to clauses 15.8(a) and (b), the Buyer bears the risk of, and ENCOPARTS is not liable in respect of, any Loss of the Buyer or any other person arising out of or in connection with the supply of the Goods or provision of the Services (whether caused by negligence or wilful default) including, without limitation:

- (i) the Loading or Unloading of the Goods on or from the relevant transportation vehicle;
 - (ii) the disassembly or reassembly of the Goods;
 - (iii) the transportation, delivery or availability of the Goods;
 - (iv) any delay in connection with the collection or delivery of any Goods or the provision of the Services;
 - (v) any delay in production, inconvenience or Loss arising out of or in connection with any accident involving, or breakdown or defect in, or Damage to the Goods or any part of them, or the Services, from any other cause whatsoever; or
 - (vi) any Loss suffered by third parties, including the Buyer's customers.
- (c) ENCOPARTS' liability arising out of or in connection with the Goods the subject of a manufacturer's warranty is limited to that warranty, irrespective of whether that warranty is applicable or has expired.
- 15.5 A statement signed by or on behalf of the Buyer that it has received the Goods and/or Services free from defects or Damage will be conclusive evidence of that fact and ENCOPARTS will not be liable for any Loss arising out of any defect or Damage subsequently alleged by the Buyer.
- 15.6 Subject to clauses 15.7, 15.9 and 15.10 where:
- (a) ENCOPARTS delivers Goods to which a manufacturer's warranty applies, it will provide the Buyer with all details of the manufacturers' warranties and do all things reasonably necessary to enable the Buyer to receive the benefit of any manufacturers' warranties but those warranties will be the sole and exclusive warranty in favour of the Buyer for those Goods; and
 - (b) ENCOPARTS delivers Goods to which a manufacturer's warranty does not apply, ENCOPARTS warrants that:
 - (i) to the extent designed by ENCOPARTS, those Goods will be fit for the purpose specified in or reasonably inferred from the Contract; and
 - (ii) those Goods will be free from defects in materials and workmanship, for a period of 12 months from the Date of Delivery or unless otherwise agreed in writing by ENCOPARTS.
- 15.7 Any warranty given by ENCOPARTS in accordance with clause 15.6(b) excludes liability for costs incurred in connection with:
- (a) labour (including overtime labour) other than is reasonable or customary to rectify the defect;
 - (b) the removal or reinstallation of any parts and components comprising the Goods or the Services unless ENCOPARTS performed the original reinstallation; and
 - (c) standby, freight, transportation, travel, packaging and handling, demobilisation and remobilisation, commissioning and testing in respect of those Goods.
- 15.8 To the extent that any legislation or law implies any term or warranty or prohibits provisions in the Contract excluding or modifying the application of, exercise of or liability under that term or warranty, the liability of ENCOPARTS for breach of that term or warranty is limited, at the discretion of ENCOPARTS, to:
- (a) in respect of Goods:
 - (i) the replacement of the defective part of the Goods or the supply of equivalent Goods;
 - (ii) the repair of the defective part of the Goods; or
 - (iii) the payment of the cost of having the defective part of the Goods repaired or replaced; or
 - (b) in respect of Services:
 - (i) the supply of the defective Services again; or
 - (ii) the payment of the cost of having the defective Services supplied again.
- 15.9 ENCOPARTS is not liable for any Loss incurred by the Buyer, and the Buyer releases ENCOPARTS from all Actions arising out of or in connection with the faulty or defective design of the Goods unless such design has been wholly developed by ENCOPARTS in which event ENCOPARTS' liability is strictly limited pursuant to clause 15.8.

15.10 ENCOPARTS will not be liable for Loss arising out of or in connection with the supply of the Goods or the provision of the Services unless:

- (a) to the extent that the Loss arises out of a defect in or Damage to the Goods which ought to have been apparent upon inspection of the Goods or the Services (as relevant) in accordance with clause 10.1(a); and
- (b) any Action arising out of or in relation to the Loss is filed and served on ENCOPARTS within 12 months after the delivery or collection of the relevant Goods or the completion of the provision of the relevant Services.

15.11 The Buyer's compliance with clause 15.10 is a condition precedent to the Buyer's entitlement to make any claim for, or bring any Action in respect of, any such Loss.

15.12 ENCOPARTS will not be liable for Loss arising out of or in connection with any quotation, representation or information, whether oral or in writing, made or given by or on behalf of ENCOPARTS. ENCOPARTS does not accept responsibility in relation to any decision made or action taken or liability incurred on the basis of any such quotation, statement, representation or information.

15.13 Notwithstanding any other provision of the Contract, to the extent that ENCOPARTS is held to be liable to the Buyer for a monetary amount in respect of any Action or Loss arising out of or in connection with the Contract, the supply of the Goods or the provision of the Services, ENCOPARTS' liability to the Buyer will in every case be limited to 50% of the Price.

16. WARRANTY CLAIM PROCEDURE

16.1 The Buyer must notify ENCOPARTS of any event or circumstance which may give rise to a warranty claim by the earlier of:

- (a) the time expressly required by the manufacturer's warranty for the notification of claims, if any such time applies; or
- (b) if no such time applies, within 90 days of the event or circumstance occurring that gave rise to the warranty claim,

and in any event, within the relevant warranty period stipulated in clause 15.6.

16.2 Without limiting clauses 15.9 and 15.10, if the Buyer fails to notify ENCOPARTS in accordance with clause 16.1, ENCOPARTS may, in its absolute discretion, rectify the defect but otherwise has no liability to do so.

16.3 The Buyer must send a warranty claim to:

ENCOPARTS PTY LTD
Level 2, 1109 Hay Street
WEST PERTH WA 6005
Fax: 08 9377 1791

Email: warranty@ENCOPARTS.com.au.

16.4 The Buyer warrants that any claim made by it on warranty is valid and one to which the warranty responds.

17. DEFAULT AND TERMINATION

17.1 To the extent permitted by law, in the event that the Buyer:

- (a) fails to make any payment which pursuant to the Contract it is required to make and fails to remedy that breach within 3 days after being requested by ENCOPARTS to do so;
- (b) commits or allows to be committed any breach or non-observance of any of the other obligations on its part to be performed and/or observed under the Terms, and fails to remedy or take effective action to remedy that breach or non-observance, so far as reasonably practicable, within 7 days after being requested by ENCOPARTS to do so; or
- (c) prior to the payment of (as relevant) all or the remainder of the Price:
 - (i) is unable to pay its debts when they fall due;
 - (ii) threatens or resolves to become or is in jeopardy of becoming subject to any form of insolvent administration;
 - (iii) enters into any negotiations for any arrangement or composition with its creditors;
 - (iv) being a company, goes into liquidation, whether voluntary or compulsory, or has a receiver or receiver and manager or administrator appointed, or an application is made for the Buyer to be wound up; or
 - (v) ceases or threatens to cease to carry on business,

then ENCOPARTS may:

- (d) terminate the Contract without providing prior notice to the Buyer; or
- (e) retake possession of the Goods to the value of the unpaid portion of the Price. The Buyer hereby irrevocably authorises ENCOPARTS to enter the

premises on which the Goods are located for the purpose of retaking possession of the Goods. Where the Goods are located on the property of any third party, the Buyer must obtain pre-approval from the third party or parties for irrevocable access for any reason.

17.2 The termination of the Contract does not affect or prejudice any rights of ENCOPARTS which have accrued prior to the termination, whether under the Contract or any written or unwritten law. ENCOPARTS' exercise of its rights under this clause does not affect or limit its ability to exercise any other rights under the Contract or any written or unwritten law.

17.3 If the Buyer defaults in any of its obligations under the Contract, including its obligation to pay for the Services, then all amounts unpaid as at the date of that default will immediately become due and payable.

17.4 Either Party may, in its absolute discretion and for any reason whatsoever, cancel or terminate the Contract, or any part of it (including any order), by giving the other Party 30 days' prior written notice.

17.5 If the Buyer cancels or terminates the Contract, or any part of it (including any order), under clause 17.4, the Buyer must pay to ENCOPARTS as compensation for termination:

- (a) the Price for any Goods already delivered and Services (or part thereof) already completed;
- (b) the cost of any, parts, components and materials ordered by ENCOPARTS which it is liable to accept and cannot reasonably avoid or cancel;
- (c) any Loss arising due to the cancellation or termination of third party contracts including contract break-costs, cancellation fees and necessary redundancies; and
- (d) reasonable demobilisation costs and any additional transport, freight, handling, packaging, consumables (fluids), insurance or maintenance costs.

17.6 In the event the Contract is terminated pursuant to clauses 17.1(d) or 17.4, the Buyer will forfeit any advance payment or payments by way of deposit paid in respect of the Price in accordance with clause 8.2.

18. FORCE MAJEURE

18.1 If either Party hereto is by reason of Force Majeure prevented from carrying out any of

its obligations under the Terms, that obligation will be suspended but only to the extent and so far as affected by, and during the continuance of such Force Majeure. Neither Party will be liable to the other for any Loss associated with the delay or disruption due to Force Majeure.

18.2 Clause 18.1 does not apply to any obligation of the Buyer to pay monies due.

19. GENERAL

19.1 **Waiver:** No waiver by either Party of any breach of a provision of the Contract is a waiver of any subsequent breach of that provision or any other provision. A waiver is not effective unless it is in writing.

19.2 **No Agency:** The Contract does not create a relationship of employment, partnership or agency between ENCOPARTS and the Buyer, or between the Buyer and the individual whose services are provided by ENCOPARTS.

19.3 **Subcontracting:** ENCOPARTS may subcontract its obligations under the Contract but, if it does so, it will remain liable to the Buyer in accordance with the Terms.

19.4 **Intellectual Property:** All illustrations, drawings, data and other documents supporting or forming part of the Order, including any privacy statement available from ENCOPARTS (including on its website <https://www.ENCOPARTS.com.au>) ("**Confidential Information**") and all Intellectual Property Rights in the Goods remain the property of ENCOPARTS at all times. The Buyer must not disclose the Confidential Information or make it available to any other person, corporation or entity without the prior written consent of ENCOPARTS, which consent may be withheld in ENCOPARTS' absolute discretion.

19.5 **Regulatory Requirements:** The Contract is at all times conditional upon and subject to the ENCOPARTS being able to obtain all export or import licences and permits, all financial authorisations, including all foreign exchange authorisations and upon all other Government requirements being satisfied.

19.6 **Governing Law:** The Contract is governed by, and is to be interpreted in accordance with the laws in force in the State of Western Australia and the Parties submit exclusively to the jurisdiction of the courts in that State, and any courts of appeal therefrom

19.7 **Severance:** If any provision of the Contract is determined to be void by any court then that determination does not affect any other provision of the Contract which otherwise remains in full force and effect.

19.8 Variations:

- (a) ENCOPARTS may add to, delete or otherwise change any of the Terms by giving the Buyer written notice. Such a change takes effect in respect of each subsequent Contract and the placement of an Order by the Buyer following the issue of such notice constitutes deemed acceptance by the Buyer of the changes.
- (b) Without limiting clause 19.8(a) and unless otherwise expressly stated in the Contract, ENCOPARTS is entitled to increase or decrease the rates or prices under the Contract as a variation in the following circumstances:
 - (i) for Services, by applying a rise and fall calculated on 1 January of each year; and
 - (ii) for Goods, in accordance with any other ENCOPARTS Comércio, Impotação e Exportação de Peças e Serviços Ltd (Brazil) price changes which may occur from time to time after the date of the Order but prior to the Date of Delivery.
- (c) An amendment or variation to the Contract required by the Buyer is not effective unless it is in writing and signed on behalf of ENCOPARTS by one of its directors. In the event ENCOPARTS is required to raise a variation due to exigencies resulting from acts, omissions or circumstances for which the Buyer is responsible or for the Buyer's convenience the Buyer agrees to pay ENCOPARTS the increase in Price specified by ENCOPARTS.

19.9 Notices: Notices under the Contract must be in writing and in English addressed to the addressee at the address of that Party stated in the Order or as subsequently notified by that Party. Notices may be delivered by hand, by mail or by facsimile transmission. Notices will be deemed given:

- (a) in the case of hand delivery, on the date of delivery as evidenced by a written acknowledgement of receipt by an authorised employee, agent or representative of the addressee;
- (b) in the case of posting, 2 Business Days after posting if posted within Australia or 5 Business Days after posting if posted from or to a place outside Australia; and

- (c) in the case of facsimile, at the time of transmission (as evidenced by a successful transmission report from the sender's machine in the case of a facsimile) if the transmission was made before 5.00pm (addressee's local time) on a Business Day or otherwise at the commencement of the first Business Day following transmission.

19.10 **No Set-off:** The Buyer may not withhold any payment due under the Contract (including without limitation payment of the Price) or set-off or deduct all or any part of a payment against any amount claimed by the Buyer from ENCOPARTS, for any reason (including by way of counterclaim).

19.11 **Time:** Time is of the essence in the Contract in respect of any obligation of the Buyer.

19.12 **Convention:** The operation of the Convention is excluded.

19.13 **Anti-Poaching:** The Buyer must not without the prior written consent of ENCOPARTS, directly or indirectly approach or communicate with any of ENCOPARTS' employees or officers having any connection or involvement with the Contract, with respect to:

- (a) an offer of employment; or
- (b) availability of employment,

with the Buyer or any of the Buyer's related entities.

20. GST

20.1 In this clause 20 the expressions "adjustment note", "consideration", "GST", "supply", "tax invoice", "recipient" and "taxable supply" have the meanings given to those expressions in the *A New Tax System (Goods and Services Tax) Act 1999*.

20.2 Unless otherwise stated, the Price and any other amount payable for any delivery of any goods and the provision of any services under the Contract are specified exclusive of GST.

20.3 If GST is imposed on any supply made under the Contract, the Buyer must pay to ENCOPARTS an amount equal to the GST payable on the taxable supply. Such amount must be paid in addition to and at the same time as payment for the taxable supply is required to be made under the Contract.

20.4 If a GST price is charged or varied under the Contract, ENCOPARTS will provide the Buyer with a valid tax invoice or adjustment note at or before the time of payment or variation.

20.5 If the amount of GST paid or payable by ENCOPARTS on any supply made under the Contract differs from the amount of GST paid by the Buyer, because the Commissioner of Taxation lawfully adjusts the value of the taxable supply for the purpose of calculating GST, then the amount of GST paid by the Buyer will be adjusted accordingly by a further payment by the Buyer to ENCOPARTS or ENCOPARTS to the Buyer, as the case requires.

21. DUTIES, TAXES AND DELIVERY COSTS

21.1 The Buyer must pay:

- (a) any import duties, taxes or charges associated with the importation of the Goods to the Buyer; and
- (b) all costs involved in delivering the Goods to the Buyer including freight and transportation costs, loading charges and insurance costs, including any increases in these costs which may be imposed after the date of the Contract.

22. DISPUTE RESOLUTION

22.1 If there is any dispute between the parties concerning or arising out of the Contract, the Parties must, as a condition precedent to the commencement of any proceedings, meet to attempt to resolve the dispute. If the Parties fail to resolve the dispute within 30 days after first meeting, the dispute shall be referred by either Party to arbitration.

22.2 If the Parties have not agreed upon an arbitrator within 5 Business Days of the referral of the dispute to arbitration, the arbitrator will be the person appointed by the then current Chair of Resolution Institute. The arbitrator must be listed in the Resolution Institute register of practising arbitrators and graded as Grade 1.

22.3 The arbitration will be conducted:

- (a) by a single arbitrator;
- (b) in Perth, Western Australia; and
- (c) in accordance with the then current Resolution Institute Arbitration Rules.

22.4 Except in respect of any jurisdictional error, the arbitrator must deliver detailed, written reasons for decision. The arbitrator's decision will be final, non-appealable and binding upon the Parties and may be enforced in any court of competent jurisdiction.

22.5 Nothing herein will prejudice the right of a Party to institute proceedings to enforce payment due under the Contract or to seek injunctive or urgent declaratory relief in

respect of a dispute under clause 22 or any matter under the Contract.

22.6 Nothing in this clause 22:

- (a) prejudices the right of a Party to seek urgent injunctive or urgent declaratory relief from a court of competent jurisdiction; or
- (b) precludes a Party from joining the other Party in any legal or other proceedings commenced by a third party.

23. APPLICATION OF THE PPSA

23.1 In this clause 23, **PPSA** means the *Personal Property Securities Act 2009* (Cth). If a term used in this clause has a particular meaning in the PPSA, it has the same meaning in this clause.

23.2 This clause applies to the extent that the ENCOPARTS' interest in any Goods is a security interest.

23.3 The Buyer acknowledges and agrees that ENCOPARTS may apply to register a security interest in the Goods at any time before or after delivery of the Goods. The Buyer waives its right under s 157 of the PPSA to receive notice of any verification of the registration.

23.4 The Buyer must not:

- (a) create any form of security interest over the Goods in favour of any third party, register, or permit to be registered, a financing statement or financing change statement in respect of a security interest contemplated or constituted by the Contract without ENCOPARTS' prior written consent; or
- (b) register, or permit to be registered, a financing statement or financing change statement in relation to the Goods in favour of any third party without ENCOPARTS' prior written consent.

23.5 ENCOPARTS can apply amounts it receives from the Buyer towards amounts owing to it in such order as ENCOPARTS chooses.

23.6 If the Buyer defaults in the performance of any obligation owed to ENCOPARTS under the Contract or any other agreement for ENCOPARTS to supply Goods to the Buyer, ENCOPARTS may enforce its security interest in any Goods by exercising all or any of its rights under the Contract or the PPSA. To the maximum extent permitted by law, the Buyer and ENCOPARTS agree that the following provisions of the PPSA do not apply to the enforcement by ENCOPARTS of

its security interest in the Goods: sections 95, 118, 121(4), 125, 130, 132(3)(d), 132(4), 135, 142 and 143.

- 23.7 The Buyer and ENCOPARTS agree not to disclose information of the kind mentioned in s 275(1) of the PPSA, except in circumstances required by sections 275(7)(b)-(e) of the PPSA. The Buyer waives any right it may have, or but for this clause may have had, under section 275(7)(c) of the PPSA to authorise the disclosure of such information.
- 23.8 The Buyer must promptly do anything required by ENCOPARTS to ensure that ENCOPARTS' security interest is a perfected security interest and has priority over all other security interests in the Goods.
- 23.9 Nothing in this clause is limited by any other provision of the Contract or any other agreement between the Parties.