

Middleby Australia PTY LTD

Terms and Conditions

This Agreement sets out the Terms and Conditions that apply to all transactions between us, the "Supplier" and you, the "Customer". These Terms and Conditions are subject to variation and may not include any specific contractual agreements that may be agreed with you the "Customer" and us the Supplier as set out from time to time in ad-hoc quotations.

The full Terms and Conditions create a security interest in favour of the Supplier for the purposes of the Personal Property Securities Act 2009 (PPSA) and a charge over all property, both equitable and legal, present or future in respect of any monies that may be owing to the Supplier by the Customer.

All credit applications submitted by the Customer and approved by the Supplier will include and require to be executed (unless otherwise agreed to by the Supplier) documents entitled "Declaration" and "Personal Guarantee and Indemnity".

1. DEFINITIONS

In this document and any Agreement entered into between the Customer and the Supplier:

- (a) **"Agreement"** means all parts of the credit application including the full Terms and Conditions and the Declaration and Personal Guarantee and Indemnity.
- (b) **"Consumer"** means a consumer as that term is defined in the Competition and Consumer Act 2010.
- (c) **"Customer"** means a person, trust, partnership, firm, company or other entity whose order for the purchase of goods is accepted by the Supplier.
- (d) **"Group Company"** means any company within the Middleby Group of companies and includes all associated entities of Middleby and any Related Bodies Corporate (as those terms are defined in the Corporations Act 2001).
- (e) **"Law"** means any Commonwealth or Australian state legislation or regulations and the general law and includes the Commonwealth Competition and Consumer Act 2010 and regulations as amended from time to time and the Personal Property Securities Act 2009 and regulations as amended from time to time.
- (f) **"Middleby Group"** means any company Related or Associated with the Supplier (as those terms are defined in the Corporations Act 2001).
- (g) **"Related Bodies Corporate"** means a body corporate that is related to the Supplier by virtue of section 50 of the Corporations Act 2001.
- (h) **"Supplier"** means Middleby Australia Pty Ltd ABN 29 603 410 573 or any of its Related Bodies Corporate or their respective assigns trading under various firm names or styles;

2. INTERPRETATION

- (a) The headings used do not form part of these Terms and Conditions and are for convenience only.
- (b) Where the context admits or requires words importing, the singular number shall include the plural number, those denoting a given gender shall include all other genders and those denoting natural persons shall include corporations.
- (c) "Including" is not a term of limitation.

3. GENERAL

- (a) The Supplier may vary the Terms and Conditions by providing written notice to the Customer (notice may also be given via the Suppliers Website). If the Customer is a Consumer, then the Customer may consider the variation and, if the variation is not considered acceptable to the Customer, the Customer may elect not to proceed with the purchase of the goods ordered before the date of the variation but which are intended to be subject to the variation. If the Customer is not a Consumer, the Customer agrees that goods delivered and/or ordered after the date of the notice of the variation will be subject to the variation and acceptance of the goods or the placing of the order shall be deemed to be an acceptance of such varied Terms and Conditions.
- (b) Should there be any variation or proposed change to any of the information supplied by the Customer to the Supplier in any credit application, or if the Supplier sells or transfers any assets, including any real or personal property or proposes to sell or transfer any assets whether listed in the credit application or not, or there has been a change of control of the Customer or in the structure or nature of the Customer's business (such as a conversion to or from a Company or Trust) the Customer must notify the Supplier in writing at least 7 days prior to any such change to the information or sale or disposal of property.
- (c) The Supplier reserves the right to accept or refuse any order for goods placed by the Customer and may make its acceptance of an order conditional upon it receiving a satisfactory credit assessment of the Customer.
- (d) The Terms and Conditions shall be binding on the Customer's personal representatives, successors and permitted assigns and shall be for the benefit of the Supplier's successors and assigns.
- (e) The Supplier does not waive any of its rights under the Agreement if it accepts a payment from the Customer, or refuses, neglects or fails to exercise any of its rights under the Agreement, or fails or neglects to insist on the Customer's full compliance with the Agreement. In addition, if the Supplier fails to exercise any power or right conferred on it by the Agreement, it will not be prevented from exercising that power or right in the future.

4. QUOTATIONS AND PAYMENT

- (a) A quotation shall not constitute an offer to sell goods to the Customer. No contract for the supply of goods shall exist between the Supplier and the Customer until a Customer's order for goods has been accepted by the Supplier (such acceptance of Customer's orders may be made and communicated by the Supplier in writing or by overt act of acceptance).
- (b) Prices quoted are subject to the Customer taking delivery of the whole amount stated in the quotation.
- (c) A quotation provided by the Supplier to the Customer shall be open for acceptance by the Customer for a period of 30 days from the date of quotation unless the quotation is previously withdrawn or extended by notice to the Customer from the Supplier.
- (d) The prices specified for goods may, at the Supplier's option, be subject to alteration to reflect the Supplier's prices and charges in effect at the time of delivery.
- (e) Any variations in the invoice or contract price as a consequence of currency fluctuations, taxes, customs duty or other imposts shall be to the Customer's account.
- (f) If the Customer is a Consumer, then the Customer may consider the variation referred to in clause 4(e) and, if not acceptable, may elect not to proceed with the purchase of the goods ordered before the date of the variation but which are intended to be subject to the variation.
- (g) Payments received by the Supplier shall be applied first in payment of interest and then to any costs of and incidental to debt recovery and then to any amounts that are payable by the Customer under the Agreement and then in reduction of principal.
- (h) Payments received without remittance advice may be applied first to the oldest balance owing by the Customer or in the alternative at the Supplier's absolute discretion.
- (i) Unless otherwise agreed to by the Supplier, the only accepted means of paying accounts will be by cash, bank cheque, COD or electronic funds transfer, all without any deduction. Where payments are not made in accordance with this clause, or the Customer makes payment by way of credit card, the Customer will also pay the Supplier an administration fee of 2% (calculated on the amount so paid) on any payment, being the agreed liquidated cost of processing that abnormal payment. That fee is payable at the same time as the account to which it relates is due.
- (j) The Supplier shall be entitled to set off against any money owing to the Customer amounts owed to the Supplier by the Customer on any account whatsoever. However the Customer shall not set off any amounts allegedly owing by the Supplier to it against any amount due by it to the Supplier.

5. CANCELLATION AND RETURN OF GOODS

- (a) No orders for goods can be cancelled without the Supplier's specific written consent.
- (b) Any goods supplied in accordance with the Customer order but which are subsequently returned to the Supplier, will only be credited by the Supplier if the Supplier has given prior written consent

- (c) to the return of the goods and the goods are returned to the Supplier in the same condition that they were in when supplied to the Customer.
- (c) If the Customer wishes to return the goods to the Supplier, the Customer must request permission from the Supplier, and that request must be delivered to the Supplier within seven (7) days from the date of delivery of the goods.
- (d) Any goods (except for goods ordered by way of Special Order) that are returned to the Supplier in accordance with clause 5(b) will incur a restocking fee of 20% of the total sale value. The restocking fee is payable to the Supplier at the same time that the goods are returned by the Customer to the Supplier.
- (e) Any goods ordered by way of Special Order that are returned to the Supplier in accordance with clause 5(b) will incur a restocking fee of 85% of the total sale value. The restocking fee is payable to the Supplier at the same time that the goods are returned by the Customer to the Supplier.

6. CREDIT TERMS

- (a) The Customer is liable for all purchases made under its account number and/or account name. It is not the responsibility of the Supplier to confirm authority for the purposes of supplying or delivering goods to the Customer, its agent(s) or those who the Supplier deems to be the Customer's agents. It is the sole responsibility of the Customer to ensure there is no unauthorised use of their account number or name.
- (b) The Supplier shall issue a tax invoice for the goods and the Customer shall pay for the goods within the time specified on the tax invoice ("due date") or in accordance with any written credit agreement between the parties; whichever is later.
- (c) Goods will generally be invoiced on dispatch.
- (d) The Supplier shall at its election issue all invoices and statements to the Customer by email to the Customer's last known email address or by ordinary post to the Customer's last known address.
- (e) Unless otherwise agreed in writing by the Supplier, a Customer who has not been granted an approved credit limit must pay a deposit equal to 100% of the net order value upon acceptance of the order by the Supplier and the Supplier can withhold delivery until payment of the deposit is received.
- (f) Credit extended to the Customer for all goods sold will be made in accordance with the terms of credit as agreed by the Supplier at the time the Customer's account was established or as subsequently altered by the Supplier. In all other respects the Terms and Conditions will apply.
- (g) The Customer will pay any legal costs (on an indemnity basis), stamp duties, any bank charges, merchant fees or like charges levied on the Supplier by any banker or other credit provider whose banking or credit card facilities are utilised by the Customer for paying the Supplier any amounts on any account and any other expenses payable of and incidental to the performance or enforcement of or any litigation on the Terms and Conditions or any credit application or any security documents signed by the Customer or any guarantor together with any other collection costs and dishonoured cheque fees.
- (h) The Supplier may withdraw the Customer's credit facilities or at its discretion vary the Customer's credit limit at any time without notice and for any reason whatsoever. The Supplier may notify the Customer of any alteration in the credit limit by notice to that effect in the following statement of account sent to the Customer. Any credit approval limit noted in this form, any statement of account or otherwise is for the Supplier's convenience only and does not reflect what may actually be the credit limit of the account at any one time.
- (i) If in the opinion of the Supplier, the credit worthiness or credit standing of the Customer alters from that indicated by the Customer in its credit application, the Supplier has the express right to immediately stop supply to the Customer without being obliged to give the Customer any reason whatsoever and the Supplier has the express right to demand payment in full for any outstanding account within fourteen (14) days.
- (j) Should the Supplier choose to exercise the right conferred on it in clause 6(i), the Supplier may refuse to deliver further goods to the Customer unless such goods are paid for in full by the Customer before delivery.
- (k) If the Customer does not pay the Supplier by the due date, the Customer shall pay compounding interest on monies due, charged on a daily basis at 10% pa from the due date for payment until the actual date of payment. If the Customer has an account with the Supplier, the Supplier may debit the Customer's account monthly or at such other times as it chooses for such interest.
- (l) The acceptance by the Supplier of any payment under the specified due date thereof shall not constitute a waiver of the Customer's obligations to make any further payments to the Supplier.
- (m) If the Customer has any queries regarding items shown on invoices, the Customer must, within fourteen (14) days of the issue date of the relevant invoice, lodge with the Supplier, in writing, details of the Customer's queries, failing which the Customer will be deemed to have accepted the Supplier's invoice without dispute.

7. DEFAULT

- (a) All monies payable by the Customer to the Supplier shall at the Supplier's election become immediately due and payable notwithstanding that the due date for payment shall not have expired, and the Supplier may without prejudice to any of the rights it may have, do any or all of the things listed in clause 7(b) hereof, if:
 - (i) the Supplier has reasonable grounds to believe that the Customer may not be able to make punctual payment to the Supplier; or
 - (ii) there is any default or failure by the Customer in making punctual payment to the Supplier of any invoice or any moneys owing by the Customer; or
 - (iii) a receiver, receiver and manager, administrator or controller is appointed in respect of any assets or group of assets of the Customer; or
 - (iv) the Customer goes into bankruptcy or is wound up; or
 - (v) an administrator, liquidator or provisional liquidator is appointed to the Customer or over any of its assets; or
 - (vi) the Customer becomes, admits in writing that it is, or declared by a court to be unable to pay its debts as and when they fall due; or
 - (vii) there is a breach by the Customer of any of the Terms and Conditions,
- (b) The Supplier may without prejudice to any other rights it may have, do any or all of the following upon the occurrence of any of the circumstances listed in clause 7(a):
 - (i) suspend any credit facilities which may have been extended to the Customer;
 - (ii) withdraw any credit facilities which may have been extended to the Customer;
 - (iii) suspend any further delivery of goods to the Customer;
 - (iv) in respect of goods already delivered, enter onto the Customer's premises to recover and resell the goods;
 - (v) recover from the Customer the cost of materials or goods acquired for the purpose of future deliveries; or
 - (vi) exercise such rights as are afforded to the Supplier under the PPSA.

- (c) All costs (including without limitation, legal or other debt collection costs) actually incurred by the Supplier of and incidental to the performing or enforcing of or any litigation on the terms of the Agreement, including any action taken by the Supplier to recover monies due from the Customer, will be payable by the Customer to the Supplier on a full indemnity basis.

8. DELIVERY

- (a) Delivery dates or times quoted are estimates only and the Supplier shall not be liable to the Customer for any failure to deliver or for delay in delivery of goods occasioned by any cause whatsoever whether or not beyond the control of the Supplier. Time is not of the essence for the delivery of goods.
- (b) The Customer shall not be relieved of any obligation to accept or pay for goods by reason of any delay in delivery.
- (c) Goods will be delivered or deemed to be delivered, when they are delivered to the delivery place nominated by the Customer. If no such address is nominated, then delivery will be deemed to occur at the time when the goods are ready for collection at the Supplier's premises.
- (d) If the Customer has any queries, or disputes that goods were delivered, the Customer must, within seven (7) days of the issue date on the relevant invoice, lodge with the Supplier, in writing, details of the Customer's queries or dispute, failing which the goods will be deemed to have been delivered to the Customer without dispute. Invoices will be deemed to have been sent to the Customer in accordance with clause 19.
- (e) The Customer shall pay to the Supplier packing, crating and delivery charges in accordance with the Supplier's current rates as at the date of dispatch. If there is no current rate, then a reasonable delivery charge shall be paid by the Customer.
- (f) The Supplier reserves the right to make a reasonable charge for storage if delivery instructions are not provided by the Customer within seven (7) days of a request by the Supplier for such information.
- (g) The Customer authorises the Supplier to deliver goods to the place nominated by the Customer and to leave the goods at such place whether or not any person is present to accept delivery. The Supplier shall not be liable on any basis whatsoever for loss suffered by the Customer after delivery to the nominated delivery place.
- (h) The Supplier is not obliged to obtain a signed receipt or other acknowledgment from any person at the nominated place for delivery but if a signed receipt or other acknowledgment is obtained from someone believed by the Supplier to be authorised by the Customer to sign or otherwise take delivery, then such signed receipt or other acknowledgment shall be conclusive evidence of the Customer's acceptance of the goods delivered.
- (i) The Supplier reserves the right to deliver goods by installments and each installment shall be deemed to be sold under a separate contract. Failure to deliver any installment or deliver any installment on time shall not entitle the Customer to repudiate the contract in whole or in part

9. PROPERTY AND RISK

- (a) The goods shall be at the sole risk of the Customer as soon as they are dispatched from the Supplier's premises.
- (b) The Supplier will remain the legal and equitable owner of the goods until the fully contractually agreed payment has been received by the Supplier in respect of all goods supplied and all other amounts owed by the Customer to the Supplier have been paid for in full and until then:
- (i) the Customer will hold the goods as fiduciary and bailee for the Supplier;
 - (ii) the Customer must retain the goods in good and merchantable condition;
 - (iii) the Customer will store the goods separately and in a manner enabling them to be identified as goods of the Supplier and cross-referenced to particular invoices and the Customer acknowledges that if it should process or mix the goods with other products or items such that the goods are no longer separately identifiable then the Customer and the Supplier will be owners in common of the new product;
 - (iv) the Customer may sell the goods in the ordinary course of its business as bailee for the Supplier and will hold the proceeds of sale in a separate account on trust for the Supplier and account to the Supplier for those proceeds; and
 - (v) the Supplier may require the Customer to return the goods to it on demand and may enter upon the premises of the Customer to inspect or repossess the goods.
- (c) The Customer expressly and irrevocably agrees that the Supplier is entitled to enter any premises where they are located to take possession, repossess, remove and sell such goods. The Customer, its successors and assigns (including any external manager or administrator) shall not object to the Supplier, or its agents, entering any premises for the purpose of this clause and agrees to indemnify and keep the Supplier indemnified in respect of any claims, actions and costs that may arise against the Supplier in relation to the removal, repossession and sale of the goods pursuant to the Terms and Conditions including any claims brought by third parties
- (d) The Customer shall insure the goods against theft or any damage until such goods have been paid for or until they are sold by the Customer whichever occurs first and the Supplier will be entitled to call for details of the insurance policy.
- (e) If the Customer does not insure the goods or fails to supply details of its insurance policy, the Customer will reimburse the Supplier for the cost of any insurance which the Supplier may reasonably arrange in respect of the goods supplied to the Customer.

10. SPECIAL ORDERS AND SPECIFICATIONS IN GENERAL

- (a) An order for goods is a Special Order for goods where the goods are not regularly stocked by the Supplier. This includes, but is not limited to, goods made in accordance with a custom design at the request of the Customer.
- (b) The Customer warrants to the Supplier that all drawings and specifications and other design information provided to the Supplier for the manufacture of Special or Custom orders or tooling are accurate and correct in all respects, comply with any relevant standards or legal or regulatory requirements and do not infringe upon the intellectual property rights of any third party including any copyright, patents, designs or trademarks of a third party.
- (c) Any Special or Custom Order will require a minimum 50% non-refundable deposit on order.
- (d) The deposit specified in clause 10(c) for special or custom orders may, at the Supplier's option, be subject to alteration to reflect the special or custom order or the Supplier's prices and charges in effect at the time.

11. RETURN OF GOODS - CONSUMERS

If the Customer is a Consumer then:

- (a) The goods come with guarantees that cannot be excluded under the Australian Consumer Law. The Customer is entitled to a replacement or refund for a major failure and to compensation for any other reasonably foreseeable loss or damage. The Customer is entitled to have the goods repaired or replaced if the goods fail to be of acceptable quality and the failure does not amount to a major failure.
- (b) The guarantees under the Australian Consumer Law are given by the Supplier.
- (c) If the Customer believes the goods do not comply with the statutory guarantees, they must contact the Supplier (whose details are listed in the Credit Application and whose address is listed at clause 18) and the parties may make arrangements for the return of the goods. Any returned goods must be accompanied by proof of purchase. If the Supplier agrees that the goods do not comply with the statutory guarantee, the Supplier will refund the costs of returning the goods to the Supplier and, in all other respects, act in accordance with its obligations under the Australian Consumer Law (as the case may be).
- (d) No other guarantees or warranties apply to the goods unless a further and additional warranty is provided, in writing, to the Customer by the Supplier.

12. RETURN OF GOODS - NON CONSUMERS

If the Customer is not a Consumer:

- (a) In accordance with Clause 5, unless agreed in writing by the Supplier, the Supplier will not accept the return of goods. Goods accepted for return by the Supplier shall attract a charge to recover

restocking and repackaging charges. The amount of this charge is set out in Clause 5 and is payable to the Supplier at the same time that the goods are returned by the Customer to the Supplier.

- (b) The proof of purchase from the Customer must accompany all goods returned to the Supplier.
- (c) All claims for the Supplier's failure to comply with the Customer's order whether due to shortfall, defect, incorrect delivery or otherwise must be made by giving written notice to the Supplier within fourteen (14) days from the date of delivery. If the Customer fails to provide such notice then the Customer shall be deemed to have accepted the goods.
- (d) The conditions shall not exclude, or limit the application of any provision of any statute including any implied condition or warranty the exclusion of which would contravene any statute or cause any part of this clause to be void. To the extent permitted by law all conditions, warranties and undertakings are expressly excluded.
- (e) The Supplier's liability for breach of a non-excludable condition or warranty is limited at the Supplier's option, to any one of the following:
- (i) the replacement of the goods or the supply of equivalent goods;
 - (ii) the repair of the goods;
 - (iii) the payment of the cost of providing replacement goods or of acquiring equivalent goods; or
 - (iv) the payment of the cost of having the goods repaired.
- (f) The Supplier shall not be liable for any indirect loss or damages whatsoever, including consequential loss, loss of profits, loss of opportunity or loss of use.

13. PRIVACY

- (a) The Supplier's Privacy Policy, available upon request to the Supplier, forms part of the Terms and Conditions.
- (b) Our web site may be hosted, or some data may be stored overseas for reasons of uniformity and convenience for the Middleby Group. All personal information derived from Australia will still be treated in accordance with this Privacy Policy while being stored overseas.
- (c) In accordance with the Privacy Policy, the Customer agrees that the Supplier may use or disclose information to the Middleby Group and to third parties for the purpose of providing the goods, providing information about goods, sending information on the Middleby Group and our services; performing our administrative and marketing operations; complying with legislative and regulatory requirements or as otherwise permitted or authorised by law, considering any other application you may make to the Supplier or any member of the Middleby Group; managing our rights and obligations in relation to external payment systems, e.g. credit card schemes and debit payment schemes; conducting market research or customer satisfaction research; developing, establishing and administering arrangements (including rewards programs) with other organisations in relation to the promotion, administration and use of the Middleby Group's goods; and developing and identifying products and services that may interest you.

14. FITNESS FOR PURPOSE

To the maximum extent permitted by law, the Customer agrees that it does not rely on the skill or judgment of the Supplier in relation to the suitability of any goods for a particular purpose. Any advice, recommendation, information or assistance provided to the Customer by the Supplier is provided without any liability by the Supplier whatsoever.

15. GST

- (a) Any expression used in this clause and which is defined in the "A New Tax System (Goods and Services Tax) Act 1999" has the same meaning in this clause 15.
- (b) With the exception of any amount payable under this clause, unless otherwise expressly stated all amounts stated to be payable by the Customer under the Terms and Conditions are exclusive of GST.
- (c) If GST is imposed on any supply made under or in accordance with the Terms and Conditions, the recipient of the taxable supply must pay to the supplier an additional amount equal to the GST payable on or for the taxable supply. Payment of the additional amount will be made at the same time as payment for the taxable supply is required to be made in accordance with this document, subject to the provision of a tax invoice by the supplier to the recipient.

16. TRUST AND TRUSTEES

Where the Customer is a trustee then:

- (a) The Customer agrees to provide to the Supplier a stamped copy of the trust deed (with all amendments) immediately upon demand by the Supplier.
- (b) The Customer warrants to the Supplier that it has full power and authority to enter into the Agreement on behalf of the trust and that it will be bound by the Terms and Conditions both personally and as trustee, irrespective of whether or not it discloses to the Supplier that it is a trustee at the time of entering into the Agreement with the Supplier.

17. LAWS TO GOVERN PROVISIONS OF AGREEMENT

- (a) Unless varied by notice in writing by the Supplier the Terms and Conditions shall be governed by and construed in accordance with the laws of the state or territory of the place of delivery of the goods. The parties submit to the exclusive jurisdiction of the courts in the capital city in that State or Territory (and, if there is more than one such court in the capital city, at such court as the Supplier in its absolute discretion selects).
- (b) The parties agree that proceedings may be commenced in any such Court of such State or Territory and consent to that Court having jurisdiction by virtue of clause 17(a) notwithstanding that that Court would not have such jurisdiction without this consent.

18. NOTICE TO THE SUPPLIER

Notices to be given by the Customer to the Supplier may be delivered personally or sent to the Supplier at the Supplier's address at **Middleby Australia Pty Ltd, 211-217 Woodpark Rd, Smithfield, NSW 2164** or to the last address notified by the Supplier to the Customer and, unless the contrary is proved, notice shall be taken as delivered when received by the Supplier at that address.

19. NOTICE TO THE CUSTOMER

- (a) Notices to be given to the Customer by the Supplier may be delivered personally or sent by email to the Customer's last known email address or sent by ordinary prepaid post to the Customer's last known address. If Notices are posted, unless the contrary is proved, Notices shall be taken as delivered on the second business day following posting.
- (b) Invoices and statements that have been sent by ordinary prepaid post are deemed received by the Customer on the second business day after posting by ordinary prepaid post.

20. SEVERANCE

In the event that the whole or any part or parts of any provisions in the Agreement should be held to be void or unenforceable in whole or in part such provision or part thereof shall to that extent be severed from the Terms and Conditions but the validity and enforceability of the remainder of these Terms and Conditions shall not be affected.