

Bituminous Products Pty Ltd
ACN 106 887 094
Conditions of Sale
Effective 1 December 2022

<p>1. DEFINITION</p> <p>In these terms and conditions:</p> <p>"Goods" means all equipment, products and services agreed to be supplied by the Seller to the Buyer under any contract, arrangement, understanding between the Seller and the Buyer (including pursuant to a quotation or letter of offer accepted by the Buyer);</p> <p>"Buyer" means the person to whom any quotation is made, any person offering to contract with the Seller on these Conditions of Sale and any person who purchases Goods from the Seller;</p> <p>"Consumer" means:</p> <p>(i) a Person acquiring Goods at a price not exceeding \$100,000; or</p> <p>(ii) a Person acquiring Goods of a kind ordinarily acquired for personal, domestic or household use or consumption.</p> <p>But excludes a Person acquiring the Goods, or holding himself or herself out as acquiring the Goods for commercial purpose including for the purpose of:</p> <p>(i) resupply; or</p> <p>(ii) using them up or transforming them, in trade or commerce in the course of a production or manufacture or in the course of repairing or treating other goods or fixtures on land;</p> <p>"Contract" means the Seller's pricing letter or letter of offer to which the supply of the Goods relates, as updated in writing by the mutual agreement of the parties, the attachments (if any) to that letter and these Conditions of Sale;</p> <p>"Individual" means a Buyer who is a natural person;</p> <p>"Person" means an Individual and a corporation; and</p> <p>"PPS Act" means the Personal Property Securities Act 2009 (Cth).</p> <p>"Seller" means Bituminous Products Pty Ltd (ACN 106 887 094).</p> <p>2. ENTIRE AGREEMENT</p> <p>(a) Clause 2(b) and (d) shall not apply to a Consumer.</p> <p>(b) Unless the Seller otherwise agrees in writing, the Contract contains the only terms and conditions of sale to which the Seller will be bound in connection with the supply of Goods to the Buyer.</p> <p>(c) The Buyer agrees that the Conditions of Sale contained in this Contract will in all circumstances prevail over the Buyer's terms and conditions of purchase or supply (if any).</p> <p>(d) These Conditions of Sale supersede and exclude all prior and other discussions, representations (contractual or otherwise) and arrangements relating to the supply of the Goods including, but not limited to, those relating to the performance of the Goods or the results that ought to be expected from using the Goods.</p> <p>(e) Without limiting any other mode of acceptance of this Contract exercised by the Buyer, the Buyer acknowledges that by accepting delivery of the Goods and/or the credit terms offered by the Seller, the Buyer by such conduct agrees to be bound by the Conditions of Sale of this Contract. Where the Buyer is not a Consumer, these Conditions of Sale will apply to the exclusion of all other terms and conditions of purchase or supply.</p> <p>(f) The Seller may change its Conditions of Sale from time to time. The Seller's current Conditions of Sale and any changes to the Conditions of Sale will be shown on the websites: www.bituminousproducts.com.au; www.ixom.com.au; together with the date on which any new Conditions of Sale become effective. It is the Buyer's obligation to check the Seller website or ask the Seller to provide a copy of the most up to date Conditions of Sale at the time the Buyer enters into a Contract. By entering into a Contract after the date upon which the new Conditions of Sale become effective the Buyer accepts and is bound by the changed Conditions of Sale for that Contract and future Contracts. If the Buyer does not accept the changes to the Conditions of Sale, it may notify the Seller to close its account. For the avoidance of doubt, any change to the Conditions of Sale will only apply to transactions entered into after the date in which the new Conditions of Sale become effective and does not result in amendments to any existing Conditions of Sale.</p> <p>(g) No amendment or variation of the Contract, other than as expressly provided for by these Conditions of Sale is valid or binding on a party unless made in writing and executed by both parties.</p> <p>3. WARRANTIES, GUARANTEES & LIABILITY</p> <p>(a) Clause 3 shall not apply to a Consumer with the exception that clause 3(d) shall apply where the Goods are acquired at a price not exceeding \$100,000 and the Goods are not of a kind ordinarily acquired for personal, domestic or household use or consumption.</p> <p>(b) The Seller warrants that the Goods supplied accord with any relevant specification contained or referenced in the Contract and are of acceptable quality.</p> <p>(c) Apart from the warranties contained in clause 3(b), to the maximum extent permitted by law, all warranties and guarantees expressed or implied by statute, the common law, equity, trade, custom or usage or otherwise, in relation to the supply of the Goods, are expressly excluded. Where the exclusion of any of the warranties and guarantees referred to in this clause 3(c) would be illegal, the Seller's liability for breach of such warranty or guarantee is limited in the manner set out below in clause 3(d).</p> <p>(d) The Seller's liability for breach of clause 3(b) or a non-excludable consumer guarantee or warranty implied into this Contract by law or other means is limited to performance of any one of the following as determined by the Seller:</p> <p>(i) the prompt retrieval of the non-compliant Goods at the Seller's cost and the replacement of the Goods or the supply of equivalent Goods;</p> <p>(ii) the repair at the Seller's cost of the Goods or payment of the cost of having the Goods repaired; or</p> <p>(iii) the payment by the Seller of the cost of replacing the Goods or of acquiring equivalent Goods.</p> <p>(e) To the extent permitted by law, subject to clause 3(d) and without limiting any other provision in these Conditions of Sale, the Seller's total liability to the Buyer for any claim howsoever arising in connection with the Contract or the supply of Goods, whether based on contract, tort, statute, equity or any other cause, is limited to the contract price payable by the Buyer to the Seller for the quantity of Goods to which the claim relates.</p> <p>(f) The Buyer will examine the Goods for non-conformances with clause 3(b) and shall notify the Seller of any non-conformances in writing within 30 days of delivery and the Buyer may reject the non-conforming Goods in that period. If the Buyer does not notify the Seller within 30 days of delivery the Buyer shall be deemed to have accepted the Goods and it shall no longer be entitled to exercise its rights in this clause 3(f) in respect of the relevant batch of Goods.</p> <p>(g) To the extent permitted by law and notwithstanding anything else in the Contract, where the Buyer is not a Consumer, the Seller excludes all liability whatsoever to the Buyer arising out of or in any way connected with a Contract for any loss of profits, loss of business revenue, failure to realise expected profits or savings, overhead costs, loss of goodwill, loss of reputation, loss of value in any intellectual property, damages or liquidated sums payable pursuant to other agreements, other economic losses, or any consequential or indirect losses of any kind howsoever arising and whether caused by breach of statute, breach of contract, negligence or other tort.</p> <p>(h) In relation to a Consumer, this Conditions of Sale is subject to all Commonwealth and State consumer laws, no clause in these conditions purports to or has the effect of excluding any of the consumer rights provided such laws.</p> <p>4. ADVICES</p> <p>(a) Clause 4 shall not apply to a Consumer.</p> <p>(b) The Buyer hereby acknowledges that:</p> <p>(i) it has not relied on any service involving skill or judgement, or on any advice, recommendation, information or assistance provided by the Seller in relation to the Goods or their use or application; and</p>	<p>(ii) it is responsible for ensuring that Goods that comply with the warranties in clause 3(b) are fit and suitable for its purposes, requirements, processes, plant and equipment.</p> <p>5. DELIVERY & RESPONSIBILITY TO PURCHASE</p> <p>Clause 5(c) shall not apply to a Consumer.</p> <p>(a) The Seller will make all reasonable efforts to have the Goods delivered to the Buyer on or about the date or within the timeframe forming part of the Contract.</p> <p>(b) The Seller shall not be liable for any failure to deliver or delay in delivery for any reason.</p> <p>(c) The Buyer will be contractually obligated to take delivery of and pay for all Goods ordered by it from the Seller, and which the Seller supplies or makes available to the Buyer in accordance with the Contract. Any order placed by the Buyer with the Seller is irrevocable.</p> <p>(d) Where the Buyer does not take delivery of or collect the Goods from the Seller upon such Goods becoming available to the Buyer at the agreed delivery point, the Buyer will pay the Seller for additional storage costs and reimburse the Seller for any demurrage, transport or futile delivery costs incurred by the Seller, subject to any contrary written agreement contained elsewhere in the Contract.</p> <p>6. RISK</p> <p>(a) Unless otherwise agreed in writing, all risk in and to the Goods purchased shall pass to the Buyer in accordance with the delivery term FCA (as defined in the <i>Incoterms 2020</i>), the place or point of delivery is the Seller's premises or such other delivery point agreed in writing by the parties.</p> <p>(b) Without in any way limiting the operation of the foregoing, upon delivery of the Goods to the Buyer or its agent or to a carrier commissioned by the Buyer, the Buyer covenants and warrants to the Seller that, in the storage and handling of the Goods, the Buyer and its agents and carriers shall comply with all relevant environmental laws and regulations, and comply with all necessary and/or relevant permits or licences pertaining to the storing and handling of the Goods, and the Buyer shall ensure that the Buyer and its agents and carriers are familiar with and adhere to all the necessary and appropriate precautions and safety measures relating to the storing and handling of the Goods. Without limiting the foregoing, the Buyer shall ensure that where the Goods are comprised of bulk chemicals, its storage tanks and vessels and the pipes, hoses, valves and other components used for the storage or transfer of those Goods are properly installed and maintained so as to prevent any death, injury or loss of containment during the processes of unloading the Goods into and storing those Goods in those tanks or vessels.</p> <p>(c) If the Seller does not receive forwarding instructions sufficient to enable it to despatch the Goods within 14 days of notification to the Buyer that they are ready, the Buyer shall be deemed to have taken delivery of the Goods from such date. The Buyer shall thereafter be liable for reasonable storage charges payable monthly on demand.</p> <p>(d) Where the Buyer re-sells or distributes the Goods to any third parties, it shall be responsible for ensuring that it provides detailed instructions to those third parties regarding the safe storage, handling and use of those Goods and any cylinders, drums or other packaging in which those Goods are stored.</p> <p>7. TITLE</p> <p>(a) Title in and to the Goods shall not pass to the Buyer until payment in full for all Goods supplied is received in full and in cleared funds.</p> <p>(b) The Buyer acknowledges that until title in and to the Goods passes to the Buyer in accordance with this clause, the Buyer holds the Goods as bailed of the Seller and that a fiduciary relationship exists between the Buyer and the Seller. Until the Buyer has paid the Seller in full for the Goods supplied, the Seller remains the owner of such Goods.</p> <p>(c) Until title in and to the Goods passes to the Buyer in accordance with this clause the Buyer shall store the Goods separately and in such a manner that they are clearly identified as the property of the Seller. In addition to any rights the Seller may have under Chapter 4 of the PPS Act, the Seller shall be entitled at any time until title in and to the Goods passes to the Buyer to demand the return of the Goods and, except where the Buyer is an Individual, shall be entitled without notice to the Buyer and without liability to the Buyer to enter (or have its representatives enter) any premises occupied by the Buyer in order to search for and remove the Goods. The Buyer and its representatives shall provide all reasonable assistance to the Seller and its representatives for this purpose. If there is any inconsistency between the Seller's rights under this clause 7(c) and its rights under Chapter 4 of the PPS Act, this clause 7(c) prevails.</p> <p>(d) The Buyer acknowledges that if it sells, leases or otherwise deals with the Goods or products incorporating the Goods before title in and to the Goods has passed to the Buyer in accordance with this clause, it shall hold the proceeds of sale, lease or such dealing on trust for the Seller in a separate account up to the amount owed by the Buyer to the Seller in relation to such Goods.</p> <p>(e) If title in and to the Goods has not passed to the Buyer in accordance with this clause, the Buyer's implied right to sell, use or consume the Goods in its operations shall immediately terminate upon the happening of any of the events stipulated in paragraph 10(b)(i)-(v) hereof.</p> <p>(f) The Buyer acknowledges that it hereby grants to the Seller a security interest (for the purposes of the PPS Act) in the Goods as supplied by the Seller hereunder and all proceeds described in sub-clause 7(d) until title passes to the Buyer in accordance with this clause 7, and in all returnable containers, cylinders, drums, packaging and storage vessels in which the Goods are made available such security interest to apply until such storage items are returned to the Seller in good condition and proper working order. This security interest secures all moneys owing by the Buyer to the Seller under any Contract or otherwise. The Buyer acknowledges that each security interest over Goods (or their proceeds) arising under this clause 7 is a "purchase money security interest" under the PPS Act to the extent that it secures payment of the amounts owing in relation to those particular Goods. The Buyer will do anything reasonably required by the Seller to enable the Seller to register these security interests, with the priority the Seller requires, and to maintain those registrations.</p> <p>(g) The security interests arising under this clause 7 attach to the Goods and storage items when the Buyer obtains possession of the Goods and the storage items and the parties confirm that they have not agreed that any security interest arising under this clause 7 attaches at any later time. Each security interest arising hereunder is a continuing security interest and is not extinguished or in any way diminished even if the Goods or any part of them are processed or commingled with or become part of another product. Such security interests secure the due and punctual payment of all moneys payable to the Seller by the Buyer under the Contract and, in respect of the storage items, the prompt return of those items in good condition and proper working order and in accordance with the Contract.</p> <p>8. PRICE</p> <p>Unless otherwise agreed in writing, the price charged for the Goods shall be determined and</p>
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adjusted in accordance with the Seller's final pricing letter or offer forming part of the Contract. Without limiting its rights in clause 10, the Seller may in its sole discretion charge interest on overdue invoiced amounts at the rate of 1% per calendar month (pro-rated to part of a month), compounding monthly and commencing from the date on which the invoiced amount becomes overdue.

9. FORCE MAJEURE

Deliveries may be totally or partially suspended by the Seller during any period in which the Seller may be prevented or hindered from manufacture, delivery or supply through any circumstances outside the Seller's reasonable control or where such manufacture, delivery or supply is rendered materially more expensive by such circumstances. Circumstances beyond the Seller's reasonable control shall include, without limitation, strikes, lockouts or other labour difficulty, inability to obtain any necessary materials, inputs, equipment, facilities or services on usual terms, power or water shortage, accidents or breakdowns of plant or machinery, delays, congestion or blockages at any sea ports or transport depots, software, hardware or communication network. The Seller shall not incur any liability to the Buyer in respect of such suspension.

10. PAYMENT AND DEFAULT

(a) Subject to sub-clause 10(c) hereof, and unless otherwise agreed in writing all accounts shall be payable within 30 days of delivery, or as otherwise identified on any statement of account issued by the Seller.

(b) If any of the events set out in (i) to (v) below occur, the Seller may at its option and absolute discretion withhold further deliveries or cancel the Contract without notice to the Buyer and without prejudice to any other action or remedy which the Seller has or might otherwise have had, and/or open a new trading account for the Buyer with cash on delivery payment terms.

(i) The Buyer makes default in any payments or is unable or states that it is unable to pay its debts as and when they fall due.

(ii) The Buyer being an individual commits an act of bankruptcy or has a controller or trustee appointed in respect of the Buyer's estate or any part of the Buyer's property or assets.

(iii) The Buyer being a company passes a resolution for its winding up or enters into liquidation or has an application for winding up filed against it.

(iv) A receiver, receiver and manager, controller or voluntary administrator is appointed over any part of the property or assets of the Buyer.

(v) The Buyer experiences any analogous event having substantially similar effect to any of the events specified above.

In such circumstances all moneys owing and outstanding to the Seller on any account whatsoever and irrespective of whether the due date on any statement of account has occurred or passed shall become immediately due and payable. The Buyer shall indemnify the Seller from and against all costs and disbursements incurred by the Seller in pursuing payment of any overdue debt owed by the Buyer to the Seller (including enforcing any security interest arising under this Contract), including without limitation legal costs on a solicitor and own client basis and the costs charged to the Seller by a debt collection agency and/or bailiff.

(c) Notwithstanding sub-clause 10(a) hereof the Seller may at all times in its sole and unfettered discretion and without being under any duty or obligation to assign reasons therefore review, alter or terminate the Buyer's credit limit or payment terms without notice. Without limiting the generality of the foregoing, the decision of the Seller shall be final and the Seller accepts no liability or responsibility for any loss, howsoever arising, incurred by the Buyer due to the operation of this condition.

11. CONTAINERS AND PALLETS

(a) Containers/IBCs and pallets in/on which Goods are delivered and for which a deposit or rental charge is payable or which are otherwise made available by the Seller on a returnable basis, remain the property of the Seller and must not be used for any other commodity than that contained therein at the time of delivery. On their return in good order and condition by the Buyer and at the Buyer's expense, to the factory or store of the Seller from which the Goods were delivered, the full amount of any deposit will be repaid or credited to the Buyer. Containers/IBCs and pallets will be deemed to be still in the Buyer's possession until received at such factory or store. In the case of containers/IBCs or pallets which are received at a factory or store of the Seller otherwise than in good order and condition, only such part of the deposit as in the opinion of the Seller is reasonable, having regard to their actual condition, will be allowed to the Buyer.

(b) The Buyer acknowledges that the Seller may have a security interest (for the purposes of the PPS Act) in any containers/IBC and pallets described in sub-clause 11(a) and the proceeds of these items. The Buyer will do anything required by the Seller to enable the Seller to register these security interests, with the priority the Seller requires, and to maintain those registrations.

12. GENERAL LIEN

In addition to any right of lien to which the Seller may be entitled under the common law, the Seller shall be entitled to exercise a general lien over all items in its possession belonging to the Buyer until the Buyer has paid in full for all Goods supplied by the Seller to the Buyer. The Seller may in its sole discretion sell any item that is subject to the said lien, provided that the Seller shall pay to the Buyer any surplus proceeds that are realised by it from a sale of any such items after discharging in full all monies outstanding to the Seller in respect of Goods that have been Delivered by it to the Buyer and all reasonable costs of sale incurred by the Seller.

The Buyer acknowledges that the Seller has a security interest (for the purposes of the PPS Act) in these items, and the proceeds of these items, until the Buyer has paid in full for all Goods supplied by the Seller in accordance with this clause 12. The Buyer will do anything required by the Seller to enable the Seller to register this security interest, with the priority the Seller requires, and to maintain that registration. Despite this requirement for registration of this security interest, and regardless of whether or not it is actually registered, the Seller may perfect this security interest by possession of the relevant items.

13. WAIVER

No failure to exercise nor any delay or omission in exercising any right, power or remedy by the Seller operates as or constitutes a waiver. A single or partial exercise by the Seller of any right, power or remedy does not preclude any other or further exercise by it of that or any other right, power or remedy. A waiver is not valid or binding on the Seller unless made in writing. No failure by the Seller to exercise, nor any delay or omission by the Seller in exercising, any right, power or remedy, nor any representation made or conduct carried out by the Seller under the Contract or in connection with the supply of the Goods or any of them shall constitute or provide grounds for a common law or equitable estoppels.

14. SEVERANCE

If any provision of these Conditions of Sale or its application to any person or circumstance is or becomes invalid, illegal or unenforceable the provision shall so far as possible be read down to such extent as may be necessary to ensure that it is not invalid, illegal or unenforceable. If any provision or part of it cannot be so read down the provision or part of it shall be deemed to be void and severable and the remaining provisions of these Conditions of Sale shall not in any way be affected or impaired.

15. GOVERNING LAW

The supply of Goods under these Conditions of Sale is governed by the law of the State of Victoria and the Seller and the Buyer submit to the non-exclusive jurisdiction of the courts of the State of Victoria.

16. TRANSACTION TAX

Where a transaction tax, including a goods and services tax ("GST") and any transaction taxes that come into existence after the date of these Conditions of Sale, applies to any supply made under these Conditions of Sale, the Seller may recover from the Buyer an additional amount on account of that transaction tax in accordance with clause 10.

17. CHANGE OF LAWS

Without limiting clause 17, if any of the Seller's costs of:

(a) manufacturing, importing, supplying or transporting the Goods; or
(b) procuring raw materials, services or inputs directly related to the activities in (a),

increase as a result of compliance by the Seller, the Seller's affiliates and related bodies corporate, or third parties, with:

(c) the introduction of or any change (including a change in interpretation) in any federal, state, local or other law or regulation or order, including any introduction of or a change in a tax; or

(d) any introduction of or change in of a scheme for management or reduction of greenhouse gas emissions or concentrations, or water use conservation or management,

Then the Seller may, by notice to the Buyer, increase the Price for the Goods to the extent required to pass through such increased costs (which may include, without limitation costs of acquiring permits or credits or costs of required plant modifications or additions). Such cost increase shall take effect immediately from the date such notice is provided.

18. MISCELLANEOUS

Additional terms relating to price, delivery date/time frame, place(s) of delivery, delivery quantities, purchasing deadlines Inco terms, documents and Goods specifications and other commercial matters are as indicated in the pricing letter or letter of offer to which the supply of the Goods relates, as updated in writing by the mutual agreement of the parties.

19. CONFIDENTIALITY

The Buyer and the Seller agree that neither of us will disclose to an "interested person" (as defined in section 275(9) of the PPS Act) or any other person, any information of the kind described in section 275(1) of the PPS Act.

20. ENFORCEMENT OF SECURITY INTERESTS

If Chapter 4 of the PPS Act would otherwise apply to the enforcement of the security interests created under this Contract, the Buyer agrees that the provisions referred to in section 115(1) of the PPS Act are hereby contracted out of by the parties and will not apply.

21. NOTICES UNDER PPS ACT

The Seller does not need to give the Buyer any notice under the PPS Act (including a notice of a verification statement) unless the notice is required by the PPS Act and that requirement cannot be excluded or contracted out of.

22. HARDSHIP

(i) For the purposes of this clause, "Hardship Event" means:

(A) any changes in raw material inputs outside of the manufacturer's control which leads to increased costs to Seller in sourcing the Goods from a manufacturer in a country outside Australia, including but not restricted to increases in fuel prices, energy costs, raw material cost or freight and transport costs; and/or

(B) any changes to or introduction of new national, central or regional laws, regulations or policies in a country outside Australia which lead to increased costs to Seller in sourcing the Goods from a manufacturer or supplier in that country, including but not restricted to increases in government charges, taxes, excises, or any other duties or charges, or any change or revaluation in the medium or long term exchange rate between the local currency in the relevant country and the Australian or US dollar.

(ii) If, at any time during the supply period to which the Contract relates, a Hardship Event occurs, Seller may notify the Buyer of such occurrence, and request a meeting to discuss appropriate changes to the terms of the Contract (including pricing terms or delivery dates) or adjustments to the supply price in light of such Hardship Event (such notice, a Hardship Notice).

(iii) The Buyer is not obliged to agree to any change to the terms of the Contract as a result of a Hardship Event, however, if the parties are unable to reach agreement on appropriate changes to the Contract price or other terms of the Contract within 14 days of the date of the Hardship Notice from Seller, and Seller is not prepared to continue supplying the Goods, then Seller may suspend supply of the Goods for the balance of the term of this Contract.