

# STANDARD TERMS AND CONDITIONS OF CONTRACT

Vomax Instrumentation Pty. Ltd (ABN 30 123 874 831)

V2.00

## 1. INTERPRETATION

- 1.1 "Articles" means all instruments, articles, materials or services supplied, or quoted to be supplied, by Vomax to a Customer.
- 1.2 "Australian Consumer Law" means Schedule 2 to the *Competition and Consumer Act 2010* (Cth).
- 1.3 "Contract" means any contract entered into between Vomax and a Customer for the supply of Articles.
- 1.4 "Customer" means the person, firm, company, authority or entity to whom Vomax provides a quotation or from whom Vomax accepts an order.
- 1.5 "PPSA" means the *Personal Property Securities Act 2009* (Cth).
- 1.6 "Vomax" means Vomax Instrumentation Pty. Ltd.

## 2. TERMS

- 2.1 Unless varied in writing, these terms apply to every contract for the supply of Articles by Vomax to the Customer and prevail over any other terms proposed by the Customer at any time (including without limitation any purchase order issued by the Customer).
- 2.2 No agent or contractor of Vomax may vary or add to these terms other than with the written consent and acknowledgement of Vomax or make any representation about the performance, specifications or fitness for purpose of any Article other than as specified in authorised Vomax manuals for the relevant Article.

## 3. PRICES AND VALIDITY

- 3.1 Prices quoted are valid for sixty (60) days from date of quotation but, prior to acceptance, are subject to change or withdrawal at any time by written notice.
- 3.2 All prices are firm and in Australian Dollars (AUD) unless stated otherwise.
- 3.3 In the event that commissioning and calibration of Articles does not commence within six (6) months of delivery, price escalation may apply for engineering services required for those purposes.
- 3.4 If GST is payable on any supply made by Vomax to the Customer then to the extent not otherwise specifically provided for in any quoted or agreed price the amount otherwise payable by the Customer will be increased by the amount of the GST.

## 4. TERMS OF PAYMENT

- 4.1 Terms of payment if not specified are fourteen (14) calendar days from date of invoice for Articles.
- 4.2 If payment is not made in full by the due date Vomax will be entitled to charge interest on any amount outstanding at a rate 3% higher than the maximum rate charged by Vomax's bank in respect of an unsecured overdraft of such amount.
- 4.3 The Customer will not be entitled to deduct from any amount due any set off, counterclaim or other sum unless agreed in writing by Vomax.
- 4.4 Vomax may charge a 20% restocking fee plus costs incurred in making good any damage or wear for any Articles returned to Vomax or repossessed by Vomax due to non payment of the full price.

## 5. DELIVERY

- 5.1 Delivery is "Ex Works" as defined by current INCOTERMS. Vomax will arrange for loading of articles onto the Purchaser's nominated carrier at Vomax's works Adelaide, South Australia. Unless specifically specified in the order, sale of the Article(s) does not include installation, commissioning or site visits.

## 6. RISK

- 6.1 All risk in the Articles transfers to the Customer at the earlier of the time of delivery to the Customer (or a person or place nominated by the Customer) or the time of collection by the Customer (or a person or carrier nominated by the Customer).
- 6.2 The Customer must effect and maintain insurance with a recognised and reputable public insurance company for all Articles for their full insurable or replacement value (whichever is the higher) from the time risk in the Articles passes to the Customer pursuant to clause 6.1 until the time title in the Articles passes to the Customer pursuant to clause 7.1.

## 7. TITLE

- 7.1 Property in and legal and beneficial ownership of the Articles shall remain with Vomax until the Customer has made payment in full in cleared funds of the contract price of those Articles and any other money owing by the Customer to Vomax, and pending such payment:

- (a) the Customer shall hold the Articles as fiduciary bailee and agent for Vomax;
  - (b) unless otherwise notified in writing, the Customer is authorised to sell the Articles in the ordinary course of business;
  - (c) after giving 48 hours notice to the Customer, Vomax shall be entitled to enter the premises of the Customer between 9am and 5pm to inspect the Articles;
  - (d) the Articles shall be stored separately and in a manner to enable them to be identified and cross-referenced to particular invoices; and
  - (e) the proceeds of any Articles sold will be held by the Customer on trust for Vomax, and must be in a separate account and must not be mixed with any other moneys.
- 7.3 If payment for the Articles or any other money owing by the Customer to Vomax is not made by the due date Vomax shall be entitled to enter the Customer's premises at any time to do all things necessary in order to take possession of the Articles, without being liable for trespass, conversion or any resulting damage. The Customer shall be liable for all costs of whatsoever nature of and associated with the exercise of rights by Vomax under this clause, which shall be payable on demand, and will have no claim whatsoever against Vomax.
- 7.4 The Customer acknowledges that if the Articles are mixed with or incorporated into, other products or items such that the Articles are no longer separately identifiable, then Vomax will be owner in common of the new product with the Customer.
- 7.5 The Customer acknowledges and agrees that by assenting to these terms, which constitute a security agreement for the purposes of the PPSA:
- (a) the Customer grants a security interest to Vomax in all Articles now or in the future supplied by Vomax to the Customer (or to its account) during the continuance of the relationship between Vomax and the Customer, and the proceeds of those Articles;
  - (b) any purchase it makes on credit terms or on a retention of title basis pursuant to these terms, will constitute a purchase money security interest (**PMSI**) for the purposes of the PPSA, and the PMSI will continue to apply to any goods coming into existence, and the proceeds of the sale of goods coming into existence, on or after the date of these terms;
  - (c) Vomax will continue to hold a security interest in the Articles in accordance with, and subject to, the PPSA, notwithstanding that the Articles may be processed, commingled or become an accession with other goods;
  - (d) any security interest held by Vomax will be a continuing and subsisting interest in the Articles, which will have priority to the fullest extent permitted by law over all other registered or unregistered security interests;
  - (e) until title in the Articles passes to the Customer, it will keep all Articles supplied by Vomax free, and will ensure all such Articles are kept free, of any charge, lien or security interest and not otherwise deal with the Articles in a way that will or may prejudice any rights of Vomax under these terms or the PPSA; and
  - (f) in addition to any other rights under these terms or otherwise arising, Vomax may exercise any and all remedies afforded to it as a secured party under the PPSA, including, without limitation, entry into any building or premises owned, occupied or used by the Customer, to search for, seize, dispose of or retain those Articles in respect to which the Customer has granted a security interest to Vomax.
- 7.6 The Customer will, whether before or after Articles are supplied under these terms, do such acts and provide such information (which information the Customer warrants to be complete, accurate and up to date in all respects) as in the opinion of Vomax (acting in its absolute discretion) may be required or desirable to enable Vomax to perfect under the PPSA the security interest created by these terms.
- 7.7 To the extent permitted by law the Customer waives any right to receive a copy of a verification statement under section 157 (or otherwise) of the PPSA and agrees as to any contract between Vomax and the Customer for the supply of Articles governed by these terms, to the extent permitted by law, to contract out of each and every provision permitted by section 115(1) of the PPSA, except section 115(1)(g), to the intent that Vomax will preserve its right to seize collateral, and the Customer agrees to waive its rights referred to in section 115(1).
- 7.8 The Customer undertakes to:
- (a) not register or permit to be registered a Financing Change Statement (as defined under the PPSA) in any of the Articles in which Vomax has a security interest pursuant to these terms; and
  - (b) provide Vomax not less than 7 days prior written notice of any proposed change in the Customer's name, address, contact numbers, business practice or such other change in the Customer's details

which are registered on the Personal Property Securities Register, to enable Vomax to register a Financing Change Statement (as defined by the PPSA), if Vomax deems it necessary (in its sole discretion).

7.9 The Customer agrees to pay the costs, charges and expenses of and incidental to the need for, or desirability of registration of, a financing statement or financing change statement or any action taken by Vomax to comply with the PPSA or to protect its position under the PPSA. The Customer agrees to pay any costs incurred by Vomax, including, but not limited to, legal costs on a solicitor-own client basis, arising from any disputes or negotiations with third parties claiming an interest in any Articles supplied by Vomax.

## 8. DELIVERY DATE

8.1 The delivery date defined in a quotation or order acceptance from Vomax is based on Vomax factory demands at the time of the quotation or order acceptance.

8.2 The delivery date may be varied at the time of order based on Vomax factory demands at time of order.

8.3 Where a time for delivery is agreed, Vomax will take all reasonable action to deliver the Articles on time, but time shall in no circumstances be deemed of the essence, and Vomax shall not be liable for any loss or damages suffered by the Customer arising out of, or in relation to, a delay in delivery by Vomax.

## 9. EXCUSABLE DELAY

9.1 In the event of any stoppage, delay or interruption of work or business related to the manufacture of Articles as a result of strikes, lockouts, trade disputes, breakdown, accident or delay in obtaining material inputs for equipment manufacture or any other cause beyond the control of Vomax, the delivery date shall be extended (without claim by the Customer) by the duration of the delay.

9.2 The Customer is allowed a reasonable time to provide Customer supplied information. Excessive delays in providing information will result in the delivery date being extended by the duration of the delay and may result in re-negotiation of the delivery date in accordance with prevailing factory demands at that time.

9.3 Any delays beyond the control of Vomax which impede the provision of engineering services during commissioning and calibration of Articles shall entitle Vomax to extend the delivery date and all costs incurred by Vomax as a result of such delays will be the responsibility of the Customer.

## 10. CONFIDENTIALITY

10.1 Any drawings, software or other information supplied by Vomax is not to be passed to, or made accessible by third parties without prior written consent of Vomax, and then only to use such information for the specific purpose for which consent is granted.

10.2 Copyright in all documentation in relation to Articles will remain vested in Vomax and may not be used without the express written consent of Vomax for any purpose other than by the Customer for the purposes for which it is furnished.

10.3 Unless specifically agreed otherwise in writing with the Customer, Vomax reserves the right to use images and data from the installation and use of the Articles for promotional purposes.

## 11. CERTIFICATION AND PERFORMANCE

11.1 Unless specifically notified by Vomax in writing, the Customer acknowledges that:

- (a) no Article is certified for assessment of commodities in relation to transfer of ownership or otherwise for measurement in the context of commercial transactions; and
- (b) Instruments supplied by Vomax are an extra tool to be used in assessing plant performance trends and general operational status, and not for definitive or contractual determination of performance; and
- (c) all performance indicators are at one standard deviation and exclude sampling and laboratory errors as generally determined by the use of the 'Grubbs Estimator' technique (see ASTM 6543).

## 12. RETURN OF ARTICLES

12.1 To the extent permitted by law:

- (a) Vomax will only accept the return of Articles and bear the cost of return freight if Vomax is legally obliged to repair or replace those Articles or the Articles were delivered to the Customer as a result of Vomax's error, but not otherwise. If so required by Vomax, the Customer will return Articles to Vomax's nominated representative;
- (b) the Customer will not return Articles for repair or replacement until, following receipt of the Customer's written notice that Articles require repair or replacement, Vomax's agent has inspected the Articles and advised the Customer of an authorisation number which the Customer must quote to Vomax in all subsequent dealings relating to the relevant Articles; and

- (c) subject to the foregoing, receipt by Vomax or by any of its agents or representatives of Articles returned, will not constitute or be deemed to constitute Vomax's acceptance of the return of those Articles for any purpose, and those Articles will be returned to the Customer at the Customer's expense.

### 13. LIABILITY

13.1 The Customer acknowledges, agrees, represents and warrants that:

- (a) the use and (where applicable) installation of the Articles is outside the control of Vomax, and the Customer is satisfied that the Articles have the condition, characteristics, quality and attributes that will make them suitable or fit for any ordinary or special purpose required for those Articles, even if that purpose was made known to Vomax;
- (b) the Customer has or will in a timely manner conduct all mandatory or prudent tests and apply all mandatory or prudent quality control checks and procedures to ensure the Articles and any product that is produced from them will be without defect and suitable or fit for any purpose required for them;
- (c) it has not relied upon any statement, representation, warranty, guarantee, condition, advice, recommendation, information, assistance or service provided or given by Vomax or anyone on its behalf, or apparently on its behalf, in respect of the Articles, other than those that are expressly contained in these terms;
- (d) it understands that the reliability and performance of the Articles is subject to and dependent on various factors outside the control of Vomax (including without limitation, the place at which any Article is used or installed and weather conditions), and accepts any limitation in the reliability or performance of the Articles arising out of or in relation to factors outside of Vomax's control; and
- (e) it will install, use and maintain all Articles in accordance with any manual or guidelines provided from time to time either by Vomax or any other manufacturer or supplier of the Articles (including on any website of Vomax or the manufacturer of any Article).

13.2 Unless specifically stated otherwise by Vomax in writing, all Articles should be utilised as an operational tool and should be used to determine contractual or custody transfer issues for any product assessed using the Articles.

13.3 Subject to the remainder of this clause 13, Vomax offers no guarantee or warranty in respect of the Articles it supplies to the Customer, and all representations, conditions and warranties of any nature made in relation to the Articles are expressly excluded from these terms and shall not bind Vomax.

13.3 To the extent permitted by law, where Vomax becomes liable to the Customer in any manner for any breach of any condition or warranty expressed or implied in relation to the supply of goods or services to the Customer, Vomax's liability will be limited, at Vomax's sole discretion to either:

- (a) in relation to the supply of goods:
  - (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 replacing the goods or of acquiring equivalent goods; or
  - (iv) the payment of the cost of having the goods repaired; and
- (b) in relation to the supply of services:
  - (i) the supplying of the services again; or
  - (ii) the payment of the cost of having the services supplied again.

13.4 If any action is brought by the Customer against Vomax, pursuant to Part 5.4 Division 1 of the Australian Consumer Law, Vomax's liability will be as prescribed in Part 5.4 Division 1 of the Australian Consumer Law.

13.5 To the extent permitted by law, the Customer releases and indemnifies Vomax and its officers, employees, consultants and agents from and against all actions, claims, proceedings and demands (including those brought by third parties) which may be brought against it or them, whether on their own or jointly with the Customer and whether at common law, under tort (including negligence), in equity, pursuant to statute or otherwise, in respect of any loss, death, injury, illness, cost or damage arising out of or in relation to any breach by the Customer of any warranty provided by it under clause 13.1.

13.6 To the extent permitted by law, Vomax will have no liability to the Customer however arising, including, without limitation, under any cause of action or theory of liability (including negligence), in respect of special, indirect or consequential damages, loss of profit (whether direct or indirect) or loss of business opportunity, arising out of or in connection with these terms.

13.7 To the extent permitted by law, the total liability of Vomax to the Customer in respect of all claims whatsoever is limited in aggregate to the payment by way of damages of a sum or sums not exceeding the total amount of the price paid for Articles under these terms.

13.3 The provisions of this Clause 13 continue to apply notwithstanding fundamental breach, breach of fundamental term, revision, repudiation or termination for any reason or frustration, whether deliberate, unintentional or by operation of law.

#### **14. ACCEPTANCE OF ORDER**

14.1 All orders received by Vomax are subject to acceptance by Vomax.

#### **15. TERMINATION**

15.1 Following written notification of acceptance of an order by Vomax the Customer may not suspend or terminate the order.

15.2 Vomax may at any time by written notice to the Customer terminate its obligation to supply Articles to the Customer upon the happening of any of the following:

- (a) any action is taken for, or with a view to, the liquidation (including provisional liquidation), winding up, official management, bankruptcy or insolvency (or equivalent) of the Customer and such action remains pending for a period of 21 days thereafter, unless the Customer satisfies Vomax (in its absolute discretion) of the Customer's solvency;
- (b) the Customer becomes insolvent or is unable or deemed to be unable to pay its debts or ceases or threatens to cease to carry on its business or a major part of its business or the Customer enters into dealings with any of its creditors with a view to avoiding, or in expectation of, insolvency or stops or threatens to stop payments generally or a receiver or receiver and manager is appointed to, or an encumbrancee takes or proposes to take possession of, any material part of the assets of the Customer;
- (c) the Customer enters into any arrangement, assignment or composition with or for the benefit of its creditors or any class of them;
- (d) any distress, attachment or execution is issued, levied or enforced against the Customer which is not satisfied or challenged in good faith by appropriate means within 14 days;
- (e) a person is appointed under any applicable law to investigate any part of the Customer's business or affairs or an application is made for the appointment of such an inspector, or an administrator (or equivalent) is appointed to the Customer or any steps are taken for such an appointment; or
- (f) any other event occurs or circumstance arises, financial or otherwise, which, in the reasonable opinion of Vomax, is likely materially and adversely to affect the ability of the Customer to observe any of its payment obligations to Vomax,

and in any such event the Customer shall be deemed to be in breach of its obligation to purchase those Articles.

#### **16. WAIVER OF REMEDIES**

16.1 No forbearance, delay or indulgence by either party in enforcing the provisions of any Contract will prejudice or restrict the rights of that party nor will any waiver or its rights operate as a waiver of any subsequent breach and no right, power or remedy by the Contract conferred upon or reserved for either party is exclusive of any other right, power or remedy available to that party and each such right, power or remedy will be cumulative.

#### **17. CONSEQUENTIAL DAMAGE**

17.1 Vomax shall not be held responsible for any consequential damage that may result from the use of Articles.

#### **18. APPLICABLE LAW**

18.1 These terms and any Contract between Vomax and the Customer are governed by and will be construed in accordance with the laws of South Australia.

#### **19. DISPUTES**

19.1 Vomax and the Customer must negotiate in good faith for a period of 21 days following receipt of a written notice of dispute (issued by either Vomax or the Customer) to resolve the dispute detailed in such notice.

19.2 If the dispute is not resolved within that time, then at any time thereafter either Vomax or the Customer may require the dispute to be referred for arbitration. If agreement cannot be reached on an arbitrator the arbitrator will be appointed by the President for the time being of the Institute of Arbitrators (South Australia Division). The arbitrator will act as an expert and will determine the procedures for the arbitration.

19.3 The decision of the arbitrator will be final and binding.

19.4 The costs of the arbitrator will be borne equally unless otherwise directed by the arbitrator.

## 20 **REMEDIES**

20.1 If the Customer breaches a Contract, or if an individual commits an act of bankruptcy under the Bankruptcy Act, or if a company becomes an externally administered body corporate under the Corporations Act, Vomax may (in addition to any other rights to which it may be entitled) suspend or terminate any Contract by giving written notice to the Customer, provided that the Customer will remain obliged to pay for Articles already delivered under the Contract.

## 21 **VARIATION**

21.1 Vomax may at any time vary these terms and conditions applicable to future supplies and may notify the Customer of these changes or provide any other notice under or in connection with the terms and conditions by email, facsimile, post or, in the case of a variation of these terms and conditions, by publishing the revised terms and conditions or notice on its website. If Vomax publishes the revised terms and conditions on its website, it may (but is not obliged to) notify the Customer that it has done so on any invoice or order acknowledgement.