

1. Exclusive Application

- 1.1 These General Terms of Sale (**Terms**):
- (a) apply where KCES supplies Goods to Customers named in Orders; and
- (b) override any quotes, invoices, accepted or modified Orders and the Customer's terms and conditions of purchase (if any), exchanged between the parties whether or not such documents expressly provide that they override these Terms or any part of it.
- 1.2 These Terms together with any accepted Order and Credit Application (if any) constitute a Contract between KCES and the Customer for the supply of the Goods.

2. Orders

- (a) All Orders placed by Customers must clearly state:
- (i) the quantity of Goods ordered; and
- (ii) the model number or such other identification number or detail of the Goods ordered.
- (b) KCES has sole discretion to:
- (i) accept or reject any Order, any part of an Order, or any variation or modification of an Order, requested by the Customer; or
- (ii) accept or reject any Order cancellation requested by the Customer. If a cancellation request is accepted by KCES, the Customer will be liable for any Loss incurred by KCES in respect of that Order (including, without limitation, payment for any Goods ordered by KCES from its suppliers relating to that Order).
- (c) No Order is binding until it is accepted in writing by KCES.

3. Quotations

- (a) All quotations are indicative only, are not binding on KCES and are not to be regarded as an offer by KCES.
- (b) Any delivery times, periods or dates specified in a quotation are approximate and non-binding and based on stock levels and conditions of trade prevailing at the time the quotation is prepared.

4. Prices

- (a) Subject to clause 4(b), the Price of the Goods will be KCES's current price (based on KCES's current price list) for the relevant Good(s) on the Order date.
- (b) KCES reserves the right to vary the Price in respect of Goods ordered more than 2 months in advance of the anticipated delivery date to reflect any actual increase to KCES in respect of the ordered Goods between the date of the Order and the anticipated delivery date.
- (c) Time for payment for the Goods is of the essence. Unless otherwise agreed by KCES in writing, the Customer must make payment in full for Goods in cash or by credit card or direct bank deposit at the time of placing the Order or, if the Customer has an Account with KCES, within **30 days** (or as otherwise agreed in writing by KCES) after the date of KCES's invoice.
- (d) The Customer must pay or reimburse KCES for any overseas bank transfer charges and fees charged by the Customer's own, or any other, banking institution from or through which any funds are transferred.
- (e) KCES may refuse to supply the Goods to any Customer who has not paid for them in full in accordance with these Terms until payment in full is received, including by refusing the Customer access to its premises to collect the Goods, and, where Goods are collected directly from the manufacturer's premises, procuring that the manufacturer denies the Customer access to its premises to collect the Goods.
- (f) Unless prices quoted by KCES are stated to include any sales, value added, GST or similar tax which may apply, these taxes are payable by the Customer in addition to the price set out in the Order.
- (g) Without prejudice to any other rights or remedies of KCES, if the Customer fails to make (whether in full or in part) any payment required under these Terms on or before the due date for payment, then:
- (i) KCES may charge the Customer interest on the unpaid amount at the Interest Rate; and
- (ii) such interest will accrue from the date payment was due to the date payment is made, will be calculated daily and capitalised monthly and must be paid by the Customer upon demand by KCES.

5. GST and other taxes and duties

Despite any other clause in the Contract, to the extent that any supply made under or in connection with the Contract is a taxable supply (as defined by the GST Law), the Customer must pay to KCES, in addition to the consideration provided for under these Terms for that supply (unless it expressly includes GST) an amount (additional amount) equal to the amount of that consideration (or its GST exclusive market value) multiplied by the rate at which GST is imposed in respect of the supply. The Customer must pay to KCES the additional amount at the same time as the consideration to which it is referable. The Customer is responsible for paying any other duties, taxes or charges, including any stamp duty (if applicable), in relation to the Goods.

6. Delivery

- (a) Delivery occurs when the Goods are notified as ready for dispatch at KCES's premises or, if supplied direct from the manufacturer, at the manufacturer's premises (ex works). Risk in the Goods passes to the Customer at this time.
- (b) Subject to clause 6(c), the Customer is responsible for arranging and paying for collection and carriage of the Goods to their final destination within 7 days of delivery (**Dispatch Period**).
- (c) KCES may at the time the Order is placed agree to arrange freight on behalf of the Customer. If KCES agrees to arrange freight on behalf of the Customer:
- (i) KCES will notify the Customer of the additional freight costs that it will charge the Customer in respect of such freight (**Freight Costs**); and
- (ii) if the Customer agrees to the Freight Costs, KCES will arrange for the carriage of the Goods to the Customer during the Dispatch Period and the Customer must pay to KCES (in any manner directed by KCES) the Freight Costs; or
- (iii) if the Customer does not agree to the Freight Costs, the Customer must organise its own freight in accordance with clause 6(b).
- (d) KCES will take reasonable care, in respect of any Goods which are on KCES's premises to store such Goods in a safe and secure location during the Dispatch Period.
- (e) KCES may deliver the Goods in instalments. If the Goods are delivered to the Customer in instalments, KCES may invoice each delivery instalment separately.
- (f) For the avoidance of doubt, collection and carriage by either party are at the Customer's cost and risk.
- (g) Any delivery dates indicated by KCES are non-binding and based on the conditions prevailing at the time the order is accepted and on the assumption of normal supply and manufacturing conditions.
- (h) The failure of KCES to deliver the Goods promptly or at all does not entitle either party to treat a Contract as repudiated.
- (i) If for any reason the Customer does not accept delivery of the Goods or does not arrange for collection and carriage of the Goods within the Dispatch Period, KCES will be entitled to:
- (i) charge the Customer a fee equivalent to the Interest Rate on the Price for each day that delivery is delayed for storage costs, plus reimbursement for additional transport costs and subsequent delivery fees; and/or
- (ii) treat the Order as cancelled, in which case the Customer must pay to KCES a re-stocking / administration fee of 20% in respect of the cancelled Order.

7. Shortfalls

- (a) The Customer must, within 7 days of delivery of the Goods, check the quantity of the Goods delivered against the quantity due to be delivered.
- (b) Except only for those rights and remedies that the Customer has in respect of the Goods under the Australian Consumer Law and similar state and territory laws applicable to Consumers and which cannot be lawfully excluded, restricted or modified:
- (i) KCES is not responsible for making good any shortage unless the Customer gives KCES notice of the shortage within 7 days of delivery of the Goods; and
- (ii) if KCES does not receive a notice under clause 7(b)(i), the Goods delivered will be considered to accord with the relevant Order and to be accepted by the Customer.

8. Defective Goods

- (a) The Customer must, as soon as possible after delivery, check whether the Goods are Defective Goods.
- (b) Except only for those rights and remedies that the Customer has in respect of the Goods under the Australian Consumer Law and similar state and territory laws applicable to Consumers and which cannot be lawfully excluded, restricted or modified, the Goods will be considered to have been delivered in good condition unless the Customer gives KCES notice of the Defective Goods within 14 days after delivery.
- (c) If the Customer gives KCES notice under clause 8(b), it must:
 - (i) preserve the Defective Goods in the state in which they were delivered for such period advised by KCES; and
 - (ii) allow KCES access to the Customer's premises to inspect the Defective Goods during that period; or
 - (iii) at KCES's request return the Defective Goods as soon as possible in the condition in which they were delivered and with all packaging material in as new condition as is reasonably possible in the circumstances.
- (d) KCES's liability in respect of Defective Goods or for breach of a Consumer Guarantee is limited to any one of the following options as determined by KCES:
 - (i) replacement of the Goods or the supply of equivalent Goods;
 - (ii) repair of the Goods;
 - (iii) payment of the cost of replacing the Goods or of acquiring equivalent Goods;
 - (iv) payment of the cost of repairing the Goods; or
 - (v) for Business Customers, provision of a credit.
- (e) KCES will reimburse the Customer for the reasonable costs incurred by the Customer to return any Goods if, on inspection by KCES, KCES determines that the relevant Goods are Defective Goods.

9. Claims and limitation of liability

- (a) The Customer must:
 - (i) promptly inform KCES of all complaints or claims relating to any of the Goods;
 - (ii) not admit liability on behalf of KCES in respect of any complaint or claim relating to any of the Goods;
 - (iii) not resolve or settle any complaint or claim relating to any of the Goods which may result in KCES incurring any liability (whether to the Customer, another customer or any other person); and
 - (iv) deal promptly with all complaints or claims relating to any of the Goods which will not result in KCES incurring any liability.
- (b) Except only for those rights and remedies that the Customer has in respect of the Goods under the Australian Consumer Law and similar state and territory laws applicable to Consumers and which cannot be lawfully excluded, restricted or modified:
 - (i) all conditions, warranties and consumer guarantees, whether statutory or otherwise, are excluded in relation to the Goods; and
 - (ii) KCES is not liable to the Customer for any Loss which the Customer suffers, incurs or is liable for in connection with supply of the Goods under a Contract, except in accordance with clause 8(d).

10. Returns

- (a) A Customer may return Goods (not being defective or delivered in error) with KCES' prior written consent (which consent may be withheld by KCES in its absolute and unfettered discretion).
- (b) Where KCES gives such consent, the Goods must be returned (at the Customer's cost) undamaged, unused and in resalable condition, in their original packaging and together with a copy of the original invoice.
- (c) Subject to approval by KCES, the Customer will be given a credit to the value of the duly returned Goods less an administration fee of 20% of the invoiced price of the Goods to cover KCES administration costs.
- (d) A Customer is not entitled to return Goods pursuant to clause 10(a) where the Goods have been specially manufactured or modified pursuant to the Customer's order.

11. Fitting Instructions

The Customer agrees to comply fully, carefully and completely in every respect with the relevant fitting instructions for the Goods supplied. If the Customer is not the end-user of the Goods, the Customer undertakes to ensure that its customer or any other end-user or installer complies with this requirement. Goods may not be used or fitted inconsistently with the appropriate fitting instructions, the technical manual, or any

other technical information or advice provided. No liability will be accepted by KCES for any type of loss or damage caused by failure by the end-user to comply with this clause 11.

12. Title

- (a) Title to the Goods passes to the Customer on payment in full of the Price for the Goods.
- (b) KCES's rights under this clause 12 secure:
 - (i) KCES's right to receive the Price of the Goods; and
 - (ii) all other amounts owing to KCES under any other contract.
- (c) All payments received from the Customer must be applied in accordance with section 14(6)(c) of the PPSA.
- (d) Until full payment in cleared funds is received by KCES for all Goods supplied by it to the Customer, as well as all other amounts owing to KCES by the Customer under a Contract:
 - (i) the Customer must store the Goods separately and in such a manner and maintain any labelling and packaging of KCES, so that the Goods are clearly and readily identifiable as the property of KCES;
 - (ii) the Customer must not sell the Goods except in the ordinary course of the Customer's business;
 - (iii) the Customer holds and agrees to hold the proceeds of any sale, lease or other dealing with the Goods for KCES in a separate bank account with a bank which does not (and will not in the future) provide finance to the Buyer;
 - (iv) in addition to any rights KCES may have under Chapter 4 of the PPSA, KCES may, at any time, demand the return of the Goods and shall be entitled without notice to the Customer and without liability to the Customer, to enter any premises where it suspects the Goods may be located in order to search for and remove the Goods without committing a trespass, even though they may be attached or annexed to other goods or land not the property of KCES, and for this purpose the Customer irrevocably licenses KCES to enter such premises, undertakes that it will procure any necessary authority to enter from any relevant person and also indemnifies KCES from and against all loss suffered or incurred by KCES as a result of exercising its rights under this clause 12(d)(iv). If there is any inconsistency between KCES's rights under this clause 12(d)(iv) and its rights under Chapter 4 of the PPSA, this clause 12(d)(iv) prevails;
 - (v) the Customer acknowledges and warrants that KCES has a security interest (for the purposes of the PPSA) in the Goods and any proceeds described in clause 12(d)(iii) and the Customer must do anything reasonably required by KCES to ensure that such security interest is enforceable, perfected and otherwise effective and has the priority required by KCES which, unless KCES agrees in writing otherwise, is first priority; and
 - (vi) the security interest arising under clause 12(d)(v) attaches to the Goods when the Customer obtains possession of the Goods and the parties confirm that they have not agreed that such security interest attaches at any later time.
- (e) The Customer must, at its own cost, insure and keep insured the Goods against such risks as a prudent owner of the Goods would insure at their full cost price, with a reputable insurance company.

13. Force Majeure

- (a) In this clause 13, **Force Majeure** means an act of God; war, revolution or any other unlawful act against public order or authority; an industrial dispute including strike or other labour disturbances; a governmental restraint; a shortage or unavailability of raw materials, production capacity or transportation; and any other event which is not within the reasonable control of KCES.
- (b) Where Force Majeure prevents or delays KCES from performing any obligation under a Contract, that obligation is suspended as long as the Force Majeure continues.

14. Reliance on advice provided by KCES

- (a) The Customer acknowledges and accepts that:
 - (i) the Customer must satisfy itself that the Goods are suitable for the Customer's intended purpose;
 - (ii) neither KCES nor any of its officers or agents is, nor do any of them hold themselves out to be, a consulting engineer or other expert in any other field and therefore are not qualified to give advice on matters that require the expertise of persons who are so qualified; and
 - (iii) the Customer does not rely on any advice provided by KCES in relation to the Goods.

- 15. Brochures and discontinued Goods**
KCES reserves the right to supply equivalent Goods to those specified in a confirmed order where the specified Goods have been discontinued or are not otherwise available from the manufacturer.
- 16. Intellectual Property**
(a) All materials and drawings, documents or other information which KCES or the manufacturer generates and delivers to the Customer in the course of its dealings with the Customer remain the property of, and all intellectual property rights in them belong to, KCES or the manufacturer respectively.
(b) Where any designs or specifications have been supplied by the Customer for manufacture by or to the order of KCES then the Customer warrants that the use of those designs or specifications for the manufacture, processing, assembly or supply of the Goods does not infringe the rights of any third party.
- 17. Indemnity**
The Customer indemnifies KCES against any Loss which KCES suffers, incurs or is liable for in connection with a Contract including, but not limited to:
(a) any act or omission of the Customer;
(b) any breach of a Contract by the Customer; and
(c) enforcing any security interest arising under a Contract.
- 18. Confidential Information**
(a) In this clause 18, **Confidential Information** means confidential information, trade secrets, know-how, scientific, technical, product, market or pricing information relating to the Goods or KCES's business.
(b) The Customer is authorised to use the Confidential Information for the sole purpose of using or selling the Goods supplied under a Contract and must not otherwise use or disclose any Confidential Information. The Customer agrees to keep the Confidential Information confidential and not to disclose any of it to any third party without the written consent of KCES and on such terms as KCES shall think fit, unless such disclosure is required by law.
- 19. Enforcement of Security Interests**
If Chapter 4 of the PPSA would otherwise apply to the enforcement of the security interest created under this Contract, the Customer agrees that the following provisions of the PPS Act will not apply:
(a) section 95 (notice of removal of accession), to the extent that it requires KCES to give a notice to the Customer;
(b) section 121(4) (enforcement of liquid assets – notice to grantor);
(c) section 130 (notice of disposal), to the extent that it requires KCES to give a notice to the Customer;
(d) paragraph 132(3)(d) (contents of statement of account after disposal);
(e) subsection 132(4) (statement of account if no disposal);
(f) section 135 (notice of retention);
(g) section 142 (redemption of collateral); and
(h) section 143 (reinstatement of security agreement).
- 20. Notices and confidentiality under the PPSA**
(a) KCES does not need to give the Customer any notice under the PPSA (including a notice of a verification statement) unless the notice is required by the PPSA and that requirement cannot be excluded.
(b) Subject to section 275(7) of the PPSA, neither party will disclose information of the kind mentioned in section 275(1) of the PPSA.
- 21. Privacy**
(a) The Customer consents to KCES obtaining from a credit-reporting agency a credit report containing personal credit information about the Customer in relation to credit provided by KCES.
(b) The Customer agrees that KCES may exchange information about the Customer with those credit providers, trade referees and other third parties named in the Credit Application for credit account or named in a consumer credit report issued by a reporting agency for the following purposes:
(i) to assess an application by the Customer;
(ii) to notify other credit providers of a default by the Customer;
(iii) to exchange information with other credit providers as to the status of this credit account, where the Customer is in default with other credit providers; and
(iv) to assess the credit worthiness of the Customer.
(c) The Customer consents to KCES being given a consumer credit report to collect overdue payment on commercial credit
- and agrees to obtain written consent for KCES to do so from nominated individuals associated with the Customer.
KCES may give information about the Customer to a credit reporting agency for the following purposes:
(i) to obtain a consumer credit report about the Customer; and
(ii) to allow the credit reporting agency to create or maintain a credit information file containing information about the Customer.
(e) The Customer agrees that personal data provided by the Customer may be used and retained by KCES for the following purposes and for other purposes as may be agreed between the Customer and KCES or required by law from time to time:
(i) the provision of the Goods;
(ii) the marketing of goods or services by KCES, its agents or distributors, in relation to KCES's goods and services;
(iii) analysing, verifying or checking the Customer's credit, payment and status in relation to provision of Goods;
(iv) obtaining a trade reference in respect of the Customer;
(v) processing of any payment instructions, direct debit facilities and credit facilities requested by the Customer; and
(vi) enabling the daily operation of the Customer's Account and the collection of amounts outstanding in the Customer's Account in relation to the Goods.
(f) KCES will use any personal information in accordance with the KCES Privacy Policy which can be found at www.kces.com.au.
- 22. General**
(a) These Terms are governed by the laws of Victoria. The parties submit to the non-exclusive jurisdiction of the courts of that State and courts entitled to hear appeals from those courts.
(b) The Customer must not assign or otherwise deal with their rights under a Contract without the prior written agreement of KCES.
(c) For Business Customers, each Contract supersedes all previous agreements in respect of its subject matter and embodies the entire agreement between the parties in respect of its subject matter.
(d) If the Customer comprises more than one person: the Contract binds each Customer jointly and severally; and
(ii) KCES is only required to give notices, quotes and other information, to one of the Customers (who undertakes to provide the notices, quotes and information to the other Customer or Customers).
(e) A waiver of any right arising under a Contract must be in writing and signed by the party granting the waiver. Any variation of a Contract must be in writing and signed by the parties.
(f) KCES and the Customer are independent contracting parties and nothing in these Terms makes either party the agent or legal representative of the other or grants either party any authority to assume or create an obligation on behalf of the other.
(g) The United Nations Convention on the International Sale of Goods will not apply to these Terms.
(h) If any of these Terms is invalid or unenforceable:
(i) it is to be read down or severed to the extent of the invalidity or unenforceability; and
(ii) it does not affect the validity or enforceability of the remaining provisions of these Terms.
- 23. Definitions**
In these Terms:
(a) **Australian Consumer Law** or **ACL** means schedule 2 of the Competition and Consumer Act 2010;
(b) **Account** means a credit account with KCES which account will be subject to the terms and conditions (if any) set out in the Credit Application;
(c) **Business Customer** means a Customer who is not a Consumer;
(d) **Business Day** means any day which is not a Saturday, Sunday or public holiday in Melbourne, Victoria;
(e) **Consumer** has the meaning given to it in section 3 of the Competition and Consumer Act 2010 (Cth);
(f) **Consumer Guarantee** means the consumer guarantees identified in Division 1 of Part 3-2 of the Australian Consumer Law;
(g) **Contract** has the meaning given to it in clause 1.2;
(h) **Credit Application** means any application for credit to be provided by KCES to the Customer;
(i) **Customer** means the person or entity who is buying the Goods from KCES, the details of which are set out in the Order;

- (j) **Defective Goods** means Goods that are defective in design, performance or workmanship;
- (k) **Goods** means goods supplied by KCES to the Customer;
- (l) **GST Act** means A new Tax System (Goods and Services Tax) Act 1999;
- (m) **Intellectual Property Rights** includes:
 - (i) any copyright (including future copyright), patent, trade mark (whether registered or not), registered design or other design right and any right to apply for the grant or registration of the same; and
 - (ii) any rights in respect of an invention, discovery, novel design, trade secret, confidential information, know-how, concept, idea, information, data or formula;
- (n) **Interest Rate** means interest at the rate of 2% above the Business Lending Base Rate of the National Australia Bank as published on its website from time to time;
- (o) **KCES** means Kessler Couplings and Engineering Supplies Pty Ltd as trustee for the Kessler Family Trust ABN 86 916 141 288;
- (p) **Loss** means all actions, claims, costs (including legal costs on an indemnity basis), damages, expenses, interest, liabilities and losses (whether direct, indirect, special, consequential or otherwise);
- (q) **Order** means a Order issued by the Customer setting out details of the Goods that the Customer requires KCES to supply;
- (r) **PPSA** means the Personal Property Securities Act 2009 (Cth); and
- (s) **Price** means the price for the supply of the Goods as provided for in clause 4.

