

Ember Attack Pty Limited
ABN 36 693 019 760
("Company", "we", "us", "our")
STANDARD TERMS OF PURCHASE

1. 1. DefinitionsIn these Terms:

"Background IP" means all Intellectual Property Rights owned or used by a party prior to the date of this Contract or which are developed or acquired by a party independently of this Contract;
"Contract" means the contract for the purchase of Goods comprising these Terms, each Purchase Order, the Special Conditions and the Returns Policy (if any);
"Created IP" has the meaning given in clause 15.1;
"Goods" means all products and services you supply to us under this Contract, including any Hazardous Goods;
"GST" means any goods and services tax and any replacement or similar tax;
"Hazardous Goods" means any goods or substances that have explosive, flammable, toxic, infectious or corrosive properties, including goods that contain asbestos or asbestos related materials, hazardous or carcinogenic substances;
"Intellectual Property Rights" means any copyright (including future copyrights), 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 any rights in respect of an invention, discovery, novel design, trade secret, confidential information, know-how, concept, idea, information, data or formula;
"Purchase Order" means an order for Goods placed by us, in whatever form, and accepted by you;
"Returns Policy" has the meaning given in clause 5.1;
"Special Conditions" means the special conditions, if any, set out in the Purchase Order;
"Supplier" means any person or entity that supplies the Goods under this Contract as specified in the Purchase Orders;
"Terms" means these standard terms of purchase; and
"Territory" means Australia.

2. Contract

- 2.1. These Terms apply whenever the Supplier ("**you**", "**your**") supplies goods to us. This Contract applies to all Goods you supply to us, and overrides any quotes, invoices or other documentation exchanged between the parties whether or not such documents expressly provide that they override this Contract.
- 2.2. If there is any inconsistency between the documents forming this Contract, the inconsistency will be resolved by applying the following order of precedence: (a) the Special Conditions; (b) the Returns Policy (if any); (c) these Terms; and (d) the Purchase Orders.
- 2.3. We may alter these Terms from time to time by publishing an updated version of the Terms on our website. The updated Terms will apply to Purchase Orders placed after the date of publication. It is your responsibility to check the current Terms that apply on our website before accepting our order, which can be accessed using the following link: ember.attack.com/terms-of-purchase
- 2.4. We are not obliged to exclusively purchase Goods from you, to purchase any minimum volume of Goods from you, or to accept or pay for any Goods delivered in excess of the quantity set out in the Purchase Order.
- 2.5. We may cancel a Purchase Order at any time by giving you written notice, provided that we must reimburse you for any reasonable direct costs you incur arising from the cancellation.2.6 Goods may not be substituted unless approved by us in writing. If specified Goods are unavailable, or if quantity and pack sizes vary from that set out in the Purchase Order, you must immediately notify us upon receipt of the order. This does not affect your liability as otherwise contained in this Contract.

3. Your obligations

- 3.1. You must supply the Goods:
 - a. with due care and skill, using that standard of diligence that would reasonably be expected from an experienced supplier of goods which are the same or similar to the Goods;
 - b. in accordance with all requirements set out under this Contract;
 - c. using appropriately qualified and trained representatives; and
 - d. to our reasonable satisfaction.
- 3.2. In supplying the Goods, you must, and must ensure that your representatives:
 - a. comply with all applicable laws, regulations, codes, and standards;
 - b. provide us with all information and documentation required in relation to the Goods under such laws,
 - c. regulations, codes and standards; and
 - d. comply with all reasonable directions relating to you or your representative's access on our premises.

- 3.3. Where the Goods supplied to us are Hazardous Goods, you must maintain material safety data sheets ("**MSDS**"), and must make these available to us upon request. The MSDS must:
- specify the raw products comprising the Goods and their health effects;
 - provide first-aid instructions, precautions for use, safe handling and storage information for the Goods; and
 - be non-technical, expressed in clear English and refer to applicable Australian conditions, protective equipment, laws, regulations, codes and standards.
- 3.4. You must give us written notice if any Goods we order contain asbestos or asbestos-related materials or are
- otherwise hazardous or carcinogenic, and must affix written copies of the information required under clauses 3.2
 - and 3.3 to the Goods as part of delivery.

4. **Delivery**

- 4.1. You must deliver the Goods Free in Store ("**FIS**"), unless otherwise agreed by the parties in writing within the Purchase Order, by the delivery date, and to the delivery location, specified in the Purchase Order. You acknowledge that it is a material term of this contract to deliver Goods to us on time under this Contract.
- 4.2. You must notify us as soon as you become aware of any anticipated delay or failure to supply the Goods.
- 4.3. You must provide all necessary labour and equipment to safely unload the Goods into store or to a location as directed by our representative at the delivery location.
- 4.4. You must pack the Goods to ensure that they are not damaged during transit, and in a manner to allow for safe unloading of the Goods at the delivery location. You must collect, and retain or dispose of, all packaging that we do not require following unpacking of the Goods on delivery.
- 4.5. You must ensure that delivery is acknowledged by a written delivery docket quoting the details of the relevant Purchase Order and signed off by our representative at the delivery location.
- 4.6. Unless stated in the Purchase Order or otherwise agreed between the parties in writing, you may not deliver Goods under a Purchase Order in instalments.

5. **Returns**

- 5.1. Except to the extent our returns policy forms part of a Purchase Order ("**Returns Policy**"), the returns process set out in this clause 5 will apply to Goods supplied by you under the Contract. You must comply with the Returns Policy and/or this clause 5 (as the case may be), to the extent permitted by law and subject to any Non-Excludable Rights. For the avoidance of doubt, neither the Returns Policy nor this clause 5 apply to Defective Goods, which are to be dealt with under clause 7.
- 5.2. We may, within 6 months from the date that you deliver the Goods, return Goods that we no longer require, notwithstanding that the Goods may have been tested, invoiced or paid for, provided that we return the Goods in their original packaging and have not damaged or modified the Goods ("**Returned Goods**").
- 5.3. Where we return Goods to you under clause 5.2, you must either:
- provide us with a full credit for all amounts paid by us in respect of the Returned Goods (including freight
 - charges) without any deductions for any service, restocking or other charge or fee; or
 - where there is no outstanding amount owing by us to you, provide us with a full refund for all amounts paid by us in respect of the Returned Goods (including freight charges) without any deductions for any service, restocking or other charge or fee, within 30 days from the date of the Goods being returned.
- 5.4. You are responsible for the cost of freight and any other costs associated with the Returned Goods, except where the reason for the return is directly and wholly caused by our error (or an error of our customer), in which case we will bear the freight costs.
- 5.5. You may dispute any Returned Goods if they do not comply with the requirements of clause 5.2 by written notice to us, providing an explanation and any relevant documentation within 30 days of such return, failing which you are deemed to have accepted the Returned Goods. Risk in the Returned Goods passes to you on our return delivery (whether arranged by us or you).
- 5.6. Title in the Returned Goods passes to you when we receive a full credit or refund from you in relation to the Returned Goods in accordance with clause 5.3.

6. **Discontinued Goods**

- 6.1. You must notify us, as soon as reasonably practicable, if you decide to discontinue or cease supplying any Goods that you have supplied to us under this Contract in the preceding 12 months ("**Discontinued Goods**").
- 6.2. We may elect, after receiving notice from you under clause 6.1, to return some or all of the stock we hold of the Discontinued Goods to you. Where we return Discontinued Goods to you under this clause 6.2, you must either:

- a. (a) provide us with a full credit for all amounts paid by us in respect of the Discontinued Goods (including freight charges) without any deductions for any service, restocking or other charge or fee; or
 - b. (b) where there is no outstanding amount owing by us to you, provide us with a full refund for all amounts paid by us in respect of the Discontinued Goods (including freight charges) without any deductions for any service, restocking or other charge or fee, within 30 days from the date of the Discontinued Goods being returned.
- 6.3. You are responsible for the cost of freight and any other costs associated with the return of the Discontinued Goods.
- 6.4. Risk in the Discontinued Goods passes to you on our return delivery (whether arranged by us or you). Title in the Discontinued Goods passes to you when we receive a full credit or refund from you in relation to the Discontinued Goods in accordance with clause 6.2.

7. 7. Defective Goods

- 7.1. If we determine, acting reasonably, that any of the Goods supplied are non-compliant with this Contract, we may, at our option and in addition to any other rights we may have, reject the Goods by notifying you that we are rejecting them. Where Goods are rejected, you must promptly, at our option:
- a. replace, repair or re-supply the Goods at your expense; or
 - b. refund to us any amount we paid for the rejected Goods.
- 7.2. If we do not reject certain Goods under clause 7.1, that decision will not prevent us from rejecting any other Goods under clause 7.1.

8. 8. Warranties

- 8.1. You warrant that the Goods:
- a. comply with all applicable laws, regulations, codes, and standards;
 - b. comply with all requirements of this Contract, including any performance specifications set out in the Purchase Order;
 - c. are of acceptable quality, fit for the purpose for which they are acquired, and free from damage or defects in workmanship or materials.
 - d. have been supplied for a price that is no less favourable than the price paid by other purchasers of similar goods and services in similar circumstances; and
 - e. do not breach the Intellectual Property Rights of any third party.
- 8.2. You warrant that all information contained in catalogues, price lists, photographs, brochures and other illustrations or advertising material and drawings and information otherwise directly or indirectly produced by you is accurate and correct and is not misleading or deceptive in any way and that you have the necessary expertise and qualifications to provide that information.
- 8.3. You acknowledge that:
- a. before entering into this Contract, you have made your own enquiries to satisfy yourself as to the truth and accuracy of, and have therefore not relied upon, any written or oral information provided by us; and
 - b. you have fully informed yourself in relation to all matters relevant to the supply of the Goods under this Contract.

9. 9. Title and risk

- 9.1. Subject to clause 5 and 6 of these Terms and any Returns Policy, risk in and title to the Goods passes to us on delivery.
- 9.2. You warrant that:
- a. you have complete ownership of the Goods free of any encumbrances; and
 - b. we will receive clear and complete title to the Goods free from any encumbrances.

10. 10. Price and payment

- 10.1. We must pay the price for the Goods set out in the relevant Purchase Order. Unless the Purchase Order expressly states otherwise, the price is inclusive of all insurance, delivery charges (including loading and unloading), GST and any other sales, value added or similar tax, and all packaging (including drums, cases, pallets, general and special packaging) and special tooling requirements that are necessary to supply the Goods.
- 10.2. You must provide us with a tax invoice on or within 5 days after supply of the Goods under a Purchase Order in full. Your invoice must:
- a. be displayed in Australian dollars;
 - b. identify the relevant Purchase Order number;
 - c. be a valid tax invoice for GST purposes (if GST is applicable);
 - d. set out the GST at the end of the invoice and not on each product line (if GST is applicable); and
 - e. where we request it, be accompanied by documentation substantiating the amount claimed.

- 10.3. We will pay all correctly rendered invoices within 60 days after the end of the month in which the invoice was provided, except where we dispute an invoice, in which case:
- a. we will pay the undisputed amount of the invoice in accordance with this Contract;
 - b. we may withhold payment of the disputed amount of the invoice pending resolution of the dispute in accordance with clause 16; and
 - c. you must give us any information or document we reasonably request in relation to such dispute.
- 10.4. Without limiting any of our other rights or remedies, we may deduct from payment of your invoice any undisputed amounts that we reasonably determine you owe to us under this Contract (including any credits given under clauses 5 or 6, or rebates that we are entitled to under this Contract).
- 10.5. Our payment of your invoice does not constitute our acceptance that the Goods have been supplied in accordance with the terms of this Contract.

11. GST

- 11.1. Despite any other clause in this Contract, to the extent that any supply made under or in connection with this
- 11.2. Contract is a taxable supply (as defined by the *A New Tax System (Goods and Services Tax) Act 1999* (Cth)), we will pay to you, in addition to the consideration provided for under this Contract or 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.

12. Indemnity

- 12.1. Each party ("**Indemnifying Party**") indemnifies the other party ("**Indemnified Party**") from and against any loss, damage, liability, cost, or claim that the Indemnified Party suffers or incurs arising from or in connection with the Indemnifying Party's breach of this Contract, including in respect of any third party claim, except to the extent the relevant loss, damage, liability, cost or claim is caused by the Indemnified Party.

13. Spare parts

- 13.1. You must maintain spare parts (that are identical replacement parts) for all Goods supplied under this Contract for a period of 10 years from the date of delivery.
- 13.2. If you intend to cease supplying spare parts for the Goods, you must give us 12 months' written notice, or such lesser period that is reasonable in the circumstances, and must use reasonable endeavours to identify a replacement supplier of substantially similar replacement parts.

14. Insurance

- 14.1. You must, at your own cost, take out and maintain with a reputable insurer the insurance policies specified in the Purchase Order, for the minimum coverage and on the terms set out in such Purchase Order.
- 14.2. Upon request, you must promptly provide us with certificates of currency for any insurance policies held under clause 14.1, and any other documentation reasonably required by us to satisfy that you are complying with your obligations under this clause 14.

15. Intellectual Property Rights and Privacy

- 15.1. We own any Intellectual Property Rights you develop (either solely or with us) in relation to this Contract ("**Created IP**"). You assign to us all right, title and interest in such Created IP.
- 15.2. You remain the owner or licensee (as the case may be) of your Background IP. You grant us a non-exclusive, royalty-free licence to use your Background IP for the purposes of, or in connection with, our use and enjoyment of the Goods.
- 15.3. We remain the owner or licensee (as the case may be) of our Background IP. We grant you a non-exclusive, royalty-free, non-transferable licence to use our Background IP, and the Created IP, to the extent necessary to carry out your obligations under this Contract.
- 15.4. You must not reproduce, modify, amend or publish, nor allow to be reproduced, modified, amended or published, our registered or unregistered trade marks, names or logos without first obtaining our prior written consent.
- 15.5. Each party warrants that it will at all times comply with all applicable privacy laws within the Territory.

16. Disputes

- 16.1. Except for interim or urgent interlocutory relief which may be sought at any time, before court or arbitration proceedings are commenced, the parties must endeavour to settle any dispute that arises out of or in connection with this Contract (including as to its existence, validity, breach or termination) in accordance with this clause 16.

- 16.2. party claiming that a dispute has arisen must give notice in writing to the other party setting out the nature of the dispute. The parties must promptly meet and use their reasonable endeavours to resolve the dispute. If the dispute cannot be resolved within 30 days after notice of the dispute, the parties must refer the dispute to mediation. There will be a single mediator appointed by the parties or, failing agreement, by the President of the Law Society of NSW. The language of the mediation shall be English.
- 16.3. If the dispute cannot be resolved within 30 days after commencing mediation in accordance with clause 16.2, the parties must refer the dispute to arbitration. The seat of the arbitration is New South Wales, Australia. There will be a single arbitrator appointed by the parties or, failing agreement, by the President of the Law Society of NSW. The language of the arbitration shall be English. The dispute shall be determined in accordance with the laws of New South Wales, Australia.
- 16.4. The parties must continue performing their obligations under this Contract pending resolution of any dispute, except to the extent such obligations are the subject of the dispute.

17. Consignment

- 17.1. 17.1 If the Company holds Goods on consignment then:
 - a. the Supplier remains the owner of the Goods and the Company is only a bailee;
 - b. the Company is not obliged to store the Goods separately from any other goods; and
 - c. the Supplier must keep the Goods fully insured in accordance with clause 14.
- 17.2. In addition to the terms under clause 17.1, the parties may (but are not obliged to) enter into a fulsome consignment agreement to supplement or amend these terms.

18. General

- 18.1. If any provision of this Contract 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 this Contract shall not in any way be affected or impaired.
- 18.2. A reference to legislation includes any amendment to that legislation, any consolidation or replacement of it, and any subordinate legislation made under it.
- 18.3. In these Terms, the words 'include', 'including', 'for example', 'such as' or any form of those words or similar expressions do not limit what else is included and must be construed as if they are followed by the words 'without limitation' unless there is express wording to the contrary.
- 18.4. Neither party may advertise or publish that it has a contract with the other or refer to the other party in any advertising and/or merchandising material without first obtaining the prior written consent of that party.
- 18.5. A waiver of any right arising under this Contract must be in writing and signed by the party granting the waiver. Any variation of this Contract must be in writing and signed by the parties.
- 18.6. Neither party may assign its rights under this Contract without the other party's prior written consent.
- 18.7. This Contract is governed by the laws of New South Wales. The parties submit to the non-exclusive jurisdiction of the courts of New South Wales.