



ABN 44 109 765 504  
25 Mary St, Pakenham, 3810 VICTORIA AUSTRALIA  
Telephone : +61 (0) 3 9504 5008

Manufacturer & Distributor of *LaBounty* Equipment and *Embrey* Equipment.

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## TERMS AND CONDITIONS OF PURCHASE

### 1. DEFINITIONS

In these Terms:

**ACL** means the Australian Consumer Law Schedule of the *Competition and Consumer Act 2010* (Cth) and its associated Regulations, as amended;

**Agreement** means any agreement for the purchase of Goods or Services by EMB from the Supplier;

**Delivery Date** means the date the Supplier is required by EMB to deliver the Goods or provide the Services to EMB, whether it is a single date or a delivery schedule as provided or amended by EMB;

**Force Majeure** means the occurrence of an event or circumstances beyond the reasonable control of the parties;

**Goods** means all goods ordered by EMB from the Supplier;

**Insurance** means all insurance relevant to the Supplier's design, manufacture, storage, supply, delivery and installation of the Goods and/or Services, including but not limited to public and product liability insurance;

EMB means Embrey Attachments Ltd (A.C.N. 109 705 504) of 25 Mary St, Pakenham, Victoria or any related corporation or legal entity;

**Offer** means all offers, quotations and tenders to sell Goods or supply Services received by EMB from the Supplier;

**Order** means an official written purchase order for Goods or Services sent by EMB to the Supplier;

**Requirements** means any requirements specified by EMB in an Order;

**Services** means any services ordered by EMB from the Supplier;

**Specifications** means all, in respect of the Goods, any specification provided by EMB to the Supplier or represented to EMB by the Supplier;

**Standards** means all laws, regulations, standards and guidelines relating to the manufacture, supply and use of the Goods and the supply of the Services;

**Supplier** means the Supplier of the Goods or Services or any person acting on behalf of or with the Supplier's authority; and

**Terms** means these terms and conditions of purchase.

### 2. BASIS OF CONTRACT

(a) Unless otherwise agreed in writing, and subject to Clause 2(e), these Terms apply exclusively to every Agreement and cannot be varied or replaced by any other terms or conditions (including any terms and conditions of sale proposed by the Supplier).

(b) All quotations received by EMB from the Supplier will be deemed to be Offers.

(c) EMB's Orders must specify the Goods and Services, the quantity of the Goods, the scope of Services, the Delivery Date, and EMB's nominated delivery address and method.

(d) The receipt of an Order from EMB by the Supplier will constitute the Supplier's acceptance to supply the Goods or Services to EMB on these Terms.

(e) EMB's Order may impose additional terms to those set out in these Terms, which will prevail to the extent of any inconsistency with these Terms.

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- (f) If an Order imposes additional terms on the Supplier, then, unless the Supplier rejects EMB's Order within 3 days of receipt, the Supplier is deemed to have accepted the Order and these Terms in full.
- (g) The Supplier must not sub-contract or assign the Agreement to any other party without EMB's prior written consent.
- (h) In addition to these Terms, all implied conditions and warranties contained in the *Sale of Goods Acts* and *Australian Consumer Law and Fair Trading Acts* of the various States and Territories and the ACL will apply.
- (i) The application of the *United Nations Convention on Agreements for the International Sale of Goods (Vienna Convention)* is expressly excluded from these Terms.

### 3. THE GOODS AND SERVICES

- (a) Where the Goods or Services to be supplied under this Agreement are supplied pursuant to provision of descriptions or samples made available to and examined by EMB, then this Agreement shall be a contract for sale by sample as well as being a contract for sale by description.
- (b) The Supplier guarantees that the Goods supplied are of acceptable quality and, where the purpose for which the Goods or Services are required has been made known to the Supplier (either expressly or impliedly), to be fit for that purpose.
- (c) Any representation as to the quality or characteristics of the Goods or Services referred to in these Terms or in previous communications in writing shall be deemed to be part of the Agreement.

### 4. PRICING

- (a) Prices quoted in an Offer are fixed, and cannot be increased unless EMB has requested a change to the Order.
- (b) Offers are valid from the date of the Offer until such time as EMB may place an Order, unless written notice of cancellation or withdrawal is provided by the Supplier.
- (c) Prices quoted in Offers include all taxes, duties, freight costs, delivery and insurance to the destination specified by EMB, unless separately specified.
- (d) The price will not be varied by fluctuations in the rate or rates of exchange.

### 5. TIME

- (a) Time is of the essence for delivery under this Agreement. The Supplier must provide the Goods or Services by the Delivery Date(s).
- (b) The Supplier must co-operate with EMB and all other parties to ensure that the delivery of the Goods or Services is completed by the Delivery Date(s).
- (c) EMB may request an adjustment to the Delivery Date(s), and the Supplier must use best endeavours to comply with such request.
- (d) Any adjustment to the Delivery Date(s) requested by EMB will be at no cost to EMB.
- (e) If delivery is likely to be delayed by any cause beyond the control of the Supplier, the Supplier must notify EMB in writing immediately upon becoming aware of the likely delay, explaining the reasons for that likely delay.
- (f) The Supplier will be liable for any loss or damage (including consequential loss) suffered or incurred by EMB, either

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directly or indirectly, caused by the Supplier's delay or failure to deliver the Goods or Services by the Delivery Date(s).

### 6. PAYMENT

- (a) Unless otherwise specified in the Order, EMB will make payment for the Goods or Services within 60 days from the end of the month during which EMB receives a tax invoice from the Seller for the delivery of the Goods or Services.
- (b) Payment will be withheld by EMB subject to Order compliance, and receipt of all required material certificates and quality assurance certificates, and the Goods or Services being delivered or completed by the Delivery Date(s).
- (c) If the Supplier makes partial delivery of the Goods or Services, EMB is not required to pay for any of the Goods or Services until all Goods and Services in that Order are received.
- (d) EMB may offset any amount due to the Supplier against any sums due to EMB by the Supplier.
- (e) Under delayed payment to EMB by a customer of EMB with a Head Contract in place and the Goods are used within the scope of the Head Contract and/or part of the Goods produced in the Head Contract, EMB reserve the right to hold payment to the Supplier until such time as the payment is made by the EMB customer.
- (f) EMB accepts no responsibility for payment for Goods and Services other than against its Order and in accordance with these Terms.
- (g) EMB has no liability for payment for any Goods or Services if the Supplier cannot produce to EMB a delivery receipt signed

by an authorised EMB representative. The signing of any delivery receipt on behalf of EMB will not amount to an acceptance of the quality or quantity of the Goods or Services supplied.

- (h) Any NCR "Non-Conforming Good" generated at any time between goods acceptance and payment will result in the Supplier's invoice being placed on hold by EMB.
- (i) The Supplier is not entitled to interest on unpaid monies, or for any other costs associated with recovery from EMB for unpaid monies.

### 7. PACKAGING AND DELIVERY

- (a) Unless otherwise agreed, delivery will be made by the Supplier FIS.
- (b) Unless otherwise agreed, all Goods ordered must be suitably packed and otherwise prepared for delivery, without additional charge to EMB.
- (c) If EMB has agreed in writing to pay the cost of freight and insurance:
  - (i) the Goods must be packed and prepared in accordance with the carrier's requirements so as to secure the lowest transport and insurance rates; and
  - (ii) copies of carrier's invoices and insurance details must be supplied with the Goods.
- (d) Goods and Services supplied under this Agreement, unless otherwise so directed, must be delivered to EMB's nominated address.
- (e) EMB may direct that the Goods or Services be delivered to some place other than its nominated address. If delivery to such other place is likely to result in an increase in the costs likely to be incurred by the Supplier:

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- (i) the Supplier must give notice of such likely increase to EMB; and
- (ii) EMB may either agree to the increase in cost, or reject the additional cost and direct the Supplier to make delivery to the original delivery address.

### 8. PROPERTY AND RISK

Unless otherwise agreed in writing:

- (a) property in and ownership of the Goods will pass to EMB upon delivery of the Goods; and
- (b) risk in the Goods and Services and all insurance responsibility for theft, damage or otherwise remains with the Supplier until the Goods and Services are accepted by EMB in accordance with Clause 14.

### 9. INSURANCES

- (a) The Supplier must hold the Insurance.
- (b) The Supplier must maintain the Insurance for a period of no less than 7 years following supply of the Goods or provision of the Services.
- (c) The Insurance must be for an amount sufficient to cover the Supplier's potential liability under these Terms.
- (d) For the avoidance of doubt, any absence or shortfall of Insurance does not affect or limit the Supplier's liability to EMB under these Terms.

### 10. WARRANTY AND INDEMNITY

- (a) The Supplier warrants:
  - (i) that it has the necessary skills, ability and capacity to provide the Goods and supply the Services;
  - (ii) that EMB will have and enjoy quiet possession of the Goods;

- (iii) that the Goods and Services are supplied free from any encumbrance in favour of any third party;
- (iv) the quality of the materials and workmanship of the Goods and Services, and that the Goods and Services are fit for purpose, and free from defects;
- (v) the Goods and Services comply with all Standards and Specifications, and any material certificates or quality assurance certificates supplied with the Goods and Services;
- (vi) the Goods and Services supplied pursuant to an Order will conform with that Order; and
- (vii) that EMB will be assigned and have the full benefit of any manufacturer's warranties.

- (b) The Supplier indemnifies and will keep EMB indemnified from and against any and all costs, actions, claims, damages, expenses, losses and demands of any kind whatsoever suffered by EMB as a result of:
  - (i) any breach of these Terms by the Supplier;
  - (ii) any claim for injury or death of any person, loss or damage caused in whole or in part by any act or omission of the Supplier, its servants and agents whilst executing an Order or making a delivery, and the Goods or Services the Supplier provides;
  - (iii) any claim with respect to the Goods or Services arising out of any latent or inherent defects;
  - (iv) any claim in respect to the Supplier's failure to comply with the Standards; or



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(v) any litigation or arbitration from any claim referred to above.

(c) The Supplier recognises that EMB may be liable to its customers in respect of the Goods under the provisions of the ACL or otherwise, and as manufacturer of the Goods agrees to indemnify EMB in respect of any such liability.

### 11. LIABILITY

To the maximum extent permitted at law, the Supplier is liable for:

- (a) any and all direct, indirect and consequential losses or expenses suffered by EMB or any third party arising out of the Agreement or the use of the Goods or Services howsoever caused, including but not limited to loss of turnover, profits, business or goodwill, or any liability to any other party; and
- (b) any loss or damage suffered by EMB or any third party where the Supplier has failed to meet any Delivery Date(s), or cancels or suspends the supply of the Goods or Services, or supplies Goods or Services that are not in conformance with the Order. This includes but is not limited to:
  - (i) the costs of freighting the Goods by air or other means to avoid a breach by EMB of its obligations under a contract with its customer;
  - (ii) liquidated damages claims;
  - (iii) loss of turnover, profits, business or goodwill; and
  - (iv) any liability to any other party.

### 12. INTELLECTUAL PROPERTY

(a) The Supplier warrants that it owns or is licensed to sell any Goods or provide any Services that are the subject of any patent, trade mark, design, copyright or

any other form of intellectual property rights.

(b) The Supplier warrants that the supply of the Goods and Services does not and will not infringe any intellectual property rights of any third party. The Supplier indemnifies EMB against any and all liability, loss, damages and expenses arising out of any claim in respect of infringement or alleged infringement, of any intellectual property rights whether in Australia or overseas, relating to the Goods or Services.

(c) The Supplier acknowledges and agrees that the Goods and Services purchased are for EMB's use and may be resold by EMB and/or may be incorporated in other products or subject to further processes of manufacture. Under no circumstances will the Supplier make any claim for royalty or other additional compensation by reason of such use or manufacture.

(d) The ownership of the intellectual property in all materials provided by EMB to the Supplier remains with EMB, and the Supplier must promptly return all such material to EMB and immediately cease use of it, if requested by EMB.

(e) The Supplier assigns to EMB all right, title and interest to all trade marks, copyright, designs and patents in any material or works created by the Supplier specifically in relation to any Order.

(f) Where Goods are ordered to be manufactured by the Supplier to EMB's Specifications and EMB does not specify any tolerance or materials, the Supplier must manufacture the Goods to the highest quality using only first grade materials and workmanship and in



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accordance with best industry practice in Australia.

### 13. ASSIGNMENT

The Supplier must not assign any part of the supply of the Goods or Services without EMB's prior written consent.

### 14. ACCEPTANCE AND CONFORMITY

(a) The Supplier must deliver Goods and Services that are of the quantity, quality and description detailed in an Order or as advised to the Supplier at the time of the Order, and must comply with all Standards and Specifications.

(b) EMB is entitled to inspect all Goods and Services upon delivery. EMB may, within 21 days of delivery, reject any defective Goods or Services. EMB will not be deemed to have accepted the Goods or Services until they have been so inspected.

(c) EMB will promptly notify the Supplier of any defect (inherent, latent or otherwise) found in the Goods or Services during EMB's subsequent course of manufacture of the Goods.

(d) EMB will not be required to hold any rejected Goods beyond a period of 60 days from the date of notification in accordance with Clauses 14(b) and (c). All Goods held beyond that period will be at the Supplier's risk and cost.

(e) Unless otherwise agreed by the parties, the quantity of the Goods delivered must not exceed or fall short of the amount specified in the Order.

(f) If the quantity of the Goods delivered exceeds or falls short of the amount specified in the Order to an extent greater than 5%, EMB may, in its absolute discretion:

(i) return the excess quantities to the Supplier at the Supplier's own risk and expense;

(ii) require the Supplier to hold the excess quantities until directed otherwise by EMB;

(iii) offset the value of the shortfall in accordance with Clause 6(b);

(iv) obtain a refund from the Supplier to the value of the shortfall;

(v) require the Supplier to deliver the shortfall amount at the same cost as the Goods delivered;

(vi) cancel the Order; and/or

(vii) obtain damages from the Supplier for any loss incurred directly or indirectly as a result of the Seller's failure to deliver the Goods in the quantity or amount specified in the Order.

(g) Goods and Services will not conform with an Order unless they:

(i) are fit for the purposes for which Goods or Services of the same description would ordinarily be used;

(ii) are fit for any particular purpose expressly or impliedly made known by EMB to the Supplier at the time of the Order;

(iii) possess the qualities of Goods or Services which the Supplier has held out to EMB by way of a sample or model, including as to conformance and/or tolerances;

(iv) are supplied in accordance with and comply with the relevant Standards and Specifications, including as to material quality, conformance and tolerance;

(v) are supplied with all required material certificates and quality assurance certificates; and

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(vi) are supplied to the quality specified in an Order or otherwise agreed in writing.

(h) All Goods and Services provided by the Supplier must comply with all:

(i) mandatory and voluntary safety standards, information standards or regulations which apply to the Goods or Services;

(ii) safety or other requirements specified in an Order; and

(iii) any other applicable Standards that may apply to the Goods or Services.

(i) Rejected non-conforming Goods may either, at EMB's discretion:

(i) be returned by EMB to the Supplier, at the Supplier's cost, for full refund for EMB; or

(ii) be replaced by the Supplier, at the Supplier's cost; or

(iii) otherwise dealt with as agreed between EMB and the Supplier.

(j) On return of any non-conforming Goods or rejection of any non-conforming Services, and without prejudice to any of EMB's other rights or entitlements under these Terms, the Supplier must, at EMB's option either:

(i) allow EMB to offset payment in accordance with Clause 6(b);

(ii) refund the price paid for the Goods or Services; or

(iii) re-provide compliant Goods or Services.

### 15. NOTICES

Where any Notice is required to be given in writing by either party to this Agreement, it may be given by hand, by facsimile transmission, by email, or sent by post to the addresses set out in the Schedule, or to a substitute address that has been notified

to the other party. Notices delivered by facsimile or email are deemed received upon receipt of confirmation of successful transmission. Notices delivered by post are deemed to be received 2 days after posting.

### 16. CANCELLATION

(a) EMB may, where reasonably necessary, cancel an Order, or part of it, at any time before delivery of the Goods or Services. Upon such termination, EMB's total liability is, to the extent permitted by law, limited to payment to the Supplier for:

(i) any Goods and Services already delivered; and

(ii) work in progress, subject to the work in progress being related to Goods and Services already ordered by EMB.

(b) Subject to any statutory stay of proceedings, EMB may cancel an Order at any time without any liability or penalty by written notice to the Supplier if the Supplier:

(i) fails or is unable to comply with the terms of the Agreement;

(ii) in EMB's reasonable view, fails to make progress so as to endanger timely and proper supply of the Goods or Services;

(iii) becomes insolvent or enters into a scheme of arrangement with its creditors or has a liquidator or similar functionary appointed in respect of its assets;

(iv) enters into a composition or arrangement with its creditors or calls a meeting of creditors with a view to entering into a composition or arrangement; or

(v) has an execution levied against it by creditors for an amount in excess of two thousand dollars (\$2,000.00).



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(c) Cancellation of an Order will not prejudice any claim that EMB may have resulting from the Supplier's failure.

(d) All Orders are subject to suspension or cancellation by either party without liability in the event of force majeure.

#### **17. SEVERABILITY**

If any provision of these Terms is unenforceable, it shall be read down so as to be enforceable, or if it cannot be read down, the Term or part will be severed from the Agreement without affecting the enforceability of the remaining Terms.

#### **18. WAIVER**

A party's failure to enforce any of these Terms will not be construed as a waiver of that party's rights.

#### **19. APPLICABLE LAW**

This Agreement is governed by the laws of the State of Victoria, Australia. EMB and the Supplier submit to the exclusive jurisdiction of the courts of Victoria, the Federal Court of Australia, and courts entitled to hear appeals from those courts.





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By signing below, you agree that:

- you have read and understood these Terms and Conditions of Purchase of Goods and provision of Services; and
- you agree that the Terms apply to the purchase of the Goods by, and the supply of the Services to, EMB.

Signed by: \_\_\_\_\_

Signed by: \_\_\_\_\_

Print Name: \_\_\_\_\_

Print Name: \_\_\_\_\_

For and on behalf of EMB

For and on behalf of the Supplier