



ABN 44 109 765 504

25 Mary St, Pakenham 3810 VICTORIA AUSTRALIA

Telephone: +61.3 9504 5008

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

TERMS AND CONDITIONS OF SALE

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 provision of goods or services by EMB to the Customer;

consumer is as defined in the ACL and in determining if the Customer is a consumer, the determination is made if the Customer is a consumer under the Agreement;

Customer means the person, firm, corporation, governmental or semi-governmental authority purchasing goods and/or services from EMB.

goods means goods supplied by EMB to the Customer;

GST means the Goods and Services tax as defined in *A New Tax System (Goods and Services Tax) Act 1999* (Cth) and its associated Regulations as amended;

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

PPSA means the *Personal Property Securities Act 2009* (Cth) and its associated Regulations as amended;

services means services supplied by EMB to the Customer; and

Terms means these Terms and Conditions of Trade, as amended or updated from time to time by EMB.

2. Basis of Agreement

2.1. Unless otherwise clearly stated in writing by EMB, the following Terms for EMB sales will apply.

2.2. These Terms shall apply to the supply of goods and/or services by EMB to the Customer.



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- 2.3. The matters referred to in these Terms constitute a contract between EMB and the Customer. These Terms shall prevail over any other terms and conditions that may contain terms and conditions that may be inconsistent or contrary to those contained herein. These Terms shall apply to the exclusion of all other agreements and prior representations, unless subsequently evidenced in writing by EMB and the Customer, and shall be the whole of the Agreement between EMB and the Customer.
- 2.4. An Agreement is accepted by EMB when EMB accepts, in writing or electronic means, an offer from the Customer or provides the Customer with the goods or services.
- 2.5. EMB may refuse to accept any offer.
- 2.6. The Customer must provide EMB with its specific requirements, if any, in relation to the goods and services.
- 2.7. EMB may vary or amend these Terms by written notice to the Customer at any time. Any variations or amendments will apply to quotes or orders placed after the notice date.

3. Orders

- 3.1. The description of goods and/or services as stipulated on invoices or order forms is provided by way of identification only and the use of that description shall not constitute a description under any Contract of Sale by description. Any description of any goods in any brochure, document or other sales literature used by EMB shall not form part of any Agreement between EMB and the Customer.
- 3.2. EMB shall have no obligations to make alterations in the design and construction of goods previously accepted and delivered even though design changes are incorporated in the goods subsequently being delivered.
- 3.3. Goods and invoices only accepted after supply of relevant QA documentation. In the case of Steel, a Material Certificate is a minimum requirement.

4. Price



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4.1. Unless otherwise agreed by EMB and the Customer in writing the price of the goods sold and services supplied shall be that specified by EMB on Invoice, Order Forms or Price List. Except as otherwise stated in writing by EMB, prices shall be exclusive of:

(a) GST;

(b) Delivery charges; and

(c) Freight.

Delivery charges become payable by the Customer where the Customer requires special transport or if goods have been quoted accordingly.

4.2. Subject to paragraph 4.3, the price shall be as quoted in writing by EMB. If a price is not quoted then it shall be in accordance with EMB 's current price list. Verbal quotations are subject to written confirmation.

4.3. EMB reserves the right to alter the price of goods and services whether or not a deposit or part payment has been received by EMB for such goods or service and to invoice the Customer for any such extra amount where the costs of the goods to EMB has altered due to circumstances beyond its control including but without limiting the generality of the foregoing any variation in EMB 's exchange rates, taxes, levies, imposts, duties, premiums, fees or charges and to correct errors and omissions.

4.4. Where EMB seeks to vary its price to take account of any such change referred to in paragraph 4.3, EMB will notify the Customer and the Customer may:

(a) accept the new price and continue with the Agreement; or

(b) refuse the new price and cancel the Agreement insofar as it relates to the subject of the requested variation.

5. Payment

5.1. Unless otherwise agreed in writing:

(a) Subject to 5.1(b), full payment for the goods or services must be made within 30 days of the date of EMB 's invoice.



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(b) EMB reserves the right to require payment in full on delivery of the goods or completion of the services.

- 5.2. Payment by cheque is not deemed made until the proceeds of the cheque have cleared.
- 5.3. The Customer must not set-off or attempt to set-off against any amount owed to EMB or any amount the Customer alleges is owed to it by EMB.
- 5.4. Payment terms may be revoked or amended at EMB's sole discretion immediately upon giving the Customer written notice, and such revocation or amendment will apply to any orders placed by the Customer after such notice.
- 5.5. The time for payment is of the essence.

6. Payment Default

- 6.1. If the Customer fails to comply with the terms of payment in paragraph 5 then:
 - (a) all money which would become payable by the Customer to EMB at a later date on any account, becomes immediately due and payable without the requirement of any notice to the Customer, and EMB may, without prejudice to any of its other accrued or contingent rights:
 - (i) charge the Customer interest on any sum due at the prevailing rate pursuant to the *Penalty Interest Rates Act 1983 (Vic)* plus 4% for the period from the due date until the date of payment in full;
 - (ii) charge the Customer for, and the Customer must indemnify EMB from, all costs and expenses (including without limitation all legal costs and expenses) incurred by it resulting from the default or in taking action to enforce compliance with the Agreement or to recover any goods;
 - (iii) cease or suspend supply of any further goods or services to the Customer;
 - (iv) by written notice to the Customer, terminate any uncompleted contract with the Customer.



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(b) Subject to any applicable statutory stay of proceedings, and without prejudice to EMB's other remedies at law, clauses 6.1(a)(iii) and 6.1(a)(iv) may also be relied upon, at EMB's option:

- (i) where the Customer is a natural person and becomes bankrupt or enters into any scheme of arrangement or any assignment or composition with or for the benefit of his or her creditors or any class of his or her creditors generally; or
- (ii) where the Customer is a corporation and, it enters into any scheme of arrangement or any assignment or composition with or for the benefit of its creditors or any class of its creditors generally, or has a liquidator, administrator, receiver or manager or similar functionary appointed in respect of its assets, or any action is taken for, or with the view to, the liquidation (including provisional liquidation), winding up or dissolution without winding up of the Customer.

7. Credit Accounts

7.1. Where a Customer opens an account with EMB, the Customer may be required to nominate referees or guarantors (that shall be acceptable to EMB) before credit trading is approved by EMB.

7.2. The Customer authorises EMB (and its servants and agents) to make all reasonable inquiries to verify that the information given to EMB by the Customer and that the Customer can satisfy its commitments pursuant to these Terms with EMB.

8. Delivery

8.1. Invoices issued by EMB will be payable by the Customer in respect of every delivery notwithstanding that the balance of the order has not been nor will not be delivered for any reason.

8.2. Unless EMB otherwise agrees in writing Stamp duty, delivery, carriage insurance, handling, storage and packaging and any other expenses relating to the goods shall be charged to and paid by the Customer.



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- 8.3. In the absence of specific instruction from the Customer, EMB will select the carrier and make such agreement with the carrier on behalf of the Customer as EMB in its absolute discretion deems appropriate. The cost of the carrier will be charged to the Customer and added to the invoice.
- 8.4. EMB will endeavour to deliver the goods (or provide the services) within the Customer's required delivery period, however any period or date for delivery of goods or provision of services stated by EMB is an estimate only and not a contractual commitment.
- 8.5. EMB will not, subject to Clause 20, be liable for any loss or damage directly or indirectly sustained from any failure to deliver within such period.
- 8.6. Time shall not be of the essence of this Agreement and any delay shall not be the basis of the Customer's cancellation of any Agreement.
- 8.7. EMB shall not be liable for any loss or damage including consequential loss or damage resulting from any failure to give notice of any delay in delivery or due to any late delivery for any reason whatsoever.
- 8.8. EMB reserves the right to deliver the goods by instalments at its absolute discretion and in such circumstances the Customer shall accept delivery of such goods by instalments.
- 8.9. The Customer must provide full and safe access to EMB or its carrier and the Customer will be liable for and indemnify EMB and its carrier against the cost of all loss, damage to property and injury to persons; occurring directly or indirectly as a result of the failure by the Customer to ensure full and safe access.
- 8.10. The Customer is responsible for providing adequate labour and/or material handling equipment for the loading and unloading of goods at its premises.
- 8.11. The Customer indemnifies EMB against any loss or damage suffered by EMB, its sub-contractors or employees as a result of delivery, except where the Customer is a consumer and EMB has not used due care and skill.



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- 8.12. If delivery is attempted and is unable to be completed the Customer is deemed to have taken delivery of the goods. Where it is necessary for EMB to store the goods the subject of delivery, the Customer is liable to EMB for storage charges payable monthly on demand..
- 8.13. If agreed that the Customer will collect the goods:
- (a) the Customer must collect the goods within 7 days of being advised they are ready;
 - (b) if the Customer does not collect the goods within this time, the Customer is deemed to have taken delivery of the goods and is liable for storage charges payable monthly on demand.
- 8.14. Where EMB agrees to collect goods from the Customer's premises, the Customer must ensure that the goods are all available for collection at an easily accessible central point and that they are ready for loading at the time EMB arrives to collect them.

9. Shortages, Specifications and Exchanges

- 9.1. Subject to this clause 9, the Customer may, in EMB 's sole discretion, return goods for credit.
- 9.2. The Customer's return of any goods to EMB for credit requires the prior written approval of EMB.
- 9.3. Where any goods are being returned to EMB, the Customer must ensure that they are returned complete together with all operations manuals and accessories in a safe condition, having regard to the risk to:
- (a) Persons handling them and in their vicinity; and
 - (b) Damage to the goods themselves.
- 9.4. The Customer must inspect the goods supplied by EMB immediately upon delivery.
- 9.5. All claims by the Customer regarding quality, fitness for purpose, suitability and conformity or short supply must be made within 7 days in writing to EMB. Without



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limiting the Customer's rights under the ACL, EMB will not accept any liability if the Customer fails to notify EMB in writing within 7 days of delivery.

- 9.6. Where goods are incorrectly ordered by the Customer, supplied and subsequently returned, a restocking fee of 10 percent of the purchase price of the goods must be paid by the Customer together with any package and handling fee incurred by EMB as a result, within 30 days of the date of invoice.
- 9.7. No return of goods will be accepted and no credit note will be issued by EMB for any goods and/or services specifically acquired or manufactured for the Customer.
- 9.8. If EMB is of the opinion that goods when returned not in the same condition as when delivered to the carrier or directly to the Customer, the Customer must pay to EMB a charge equal to the cost necessary to restore the goods to their original condition upon demand by EMB.
- 9.9. If goods are returned to EMB which EMB is unable to resell to a third party or resell for the same amount as was sold to the Customer, EMB reserves the right to charge the Customer an amount equal to the loss incurred as a result of the Customer returning the goods.
- 9.10. Changes to the specifications at the Customers request, either at the time of placing the order or thereafter, will only be accepted at EMB 's discretion. Such changes will only take effect when agreed in writing by EMB and which may result in a price increase.
- 9.11. Goods will be deemed to comply with the specifications of this Agreement if they are manufactured, made, cut, finished and/or supplied to dimensions and measurements that are within acceptable industry tolerances.
- 9.12. The goods may vary from product to product, including without limitation as to their colour, finish and design. Any sample provided is intended as a general guide only. To the extent permitted by law, the provision of a sample does not constitute a supply of goods by sample and EMB is not liable to the Customer for any variation in colour, finish and/or design of the goods.



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9.13. Unless required under the ACL, EMB does not accept any liability or responsibility should the colour, design, measurement and/or dimensions of the goods vary from those contained in any catalogue, brochure or other promotional or information document, which is intended as a guide only.

10. Passing of Property

10.1. Until EMB receives full payment in cleared funds for all goods and services supplied by it to the Customer, as well as all other amounts owing to EMB by the Customer:

- (a) title and property in all goods remain vested in EMB and do not pass to the Customer;
- (b) the Customer must hold the goods as fiduciary bailee and agent for EMB;
- (c) the Customer must keep the goods separate from its goods and maintain EMB's labelling and packaging;
- (d) the Customer must hold the proceeds of sale of the goods on trust for EMB in a separate account with a bank to whom the Customer has not given security however failure to do so will not affect the Customer's obligation as trustee;
- (e) in addition to its rights under the PPSA, EMB may without notice, enter any premises where it suspects the goods are and remove them, notwithstanding that they may have been attached to other goods not the property of EMB, and for this purpose the Customer irrevocably licences EMB to enter such premises and also indemnifies EMB from and against all costs, claims, demands or actions by any party arising from such action.

10.2. EMB will exercise its right of entry (including the use and extent of force) in accordance with applicable laws;

10.3. If EMB is unable to resell the goods at the same price or more as was invoiced to the Customer by EMB, then EMB shall be entitled to make claim, demand or institute, if necessary, an action to recover any loss or damage sustained by EMB due to EMB not being able to obtain the invoiced price plus the added expenses incurred by EMB as a result of non-payment by the Customer.



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11. Risk and Insurance

- 11.1. Should the goods supplied by EMB to the Customer be lost or damaged after delivery, the Customer will be liable to EMB for payment.
- 11.2. The risk in the goods and all insurance responsibility for theft, damage or otherwise will pass to the Customer immediately on the goods being delivered to the Customer or taken from EMB's premises.
- 11.3. The goods are sold to the Customer on the basis that the Customer has obtained all necessary licenses or permits under all relevant laws and regulations in relation to the goods.
- 11.4. The Customer assumes all risk and liability for loss, damage or injury to persons or to property of the Customer, or third parties arising out of the use, installation or possession of any of the goods sold by EMB, unless recoverable from EMB on the failure of any statutory guarantee under the ACL.

12. Personal Property Securities Act

- 12.1. Notwithstanding anything to the contrary contained in these Terms, the PPSA applies to these Terms.
- 12.2. For the purposes of the PPSA:
 - (a) terms used in clause 12 that are defined in the PPSA have the same meaning as in the PPSA;
 - (b) these Terms are a security agreement and EMB has a Purchase Money Security Interest in all present and future goods supplied by EMB to the Customer and the proceeds of the goods;
 - (c) the security interest is a continuing interest irrespective of whether there are monies or obligations owing by the Customer at any particular time; and
 - (d) the Customer must do whatever is necessary in order to give a valid security interest over the goods which is able to be registered by EMB on the Personal Property Securities Register.



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- 12.3. The security interest arising under this clause 12 attaches to the goods when the goods are collected or dispatched from EMB 's premises and not at any later time.
- 12.4. Where permitted by the PPSA, the Customer waives any rights to receive the notifications, verifications, disclosures or other documentation specified under sections 95 (removal of accession), 118 (enforcement of security interests in accordance with land law decisions), 121(4) (enforcement of security interests in liquid assets), 130 (disposal of collateral), 132(3)(d) (amounts paid to other secured parties), 132(4) (statement of account in respect of seized collateral), 135 (retention of collateral) and 157 (notice to grantors) of the PPSA.
- 12.5. EMB and the Customer contract out of and nothing in the provisions of sections 96 (retention of accession), 125 (disposal or retention of collateral), 129 (disposal by purchase), 142 (redemption of collateral) and 143 (reinstatement of security agreement) of the PPSA will apply to these Terms.
- 12.6. To the extent permitted by the PPSA, the Customer agrees that:
- (a) the provisions of Chapter 4 of the PPSA which are for the benefit of the Customer or which place obligations on EMB will apply only to the extent that they are mandatory or EMB agrees to their application in writing; and
 - (b) where EMB has rights in addition to those in Chapter 4 of the PPSA, those rights will continue to apply.
- 12.7. The Customer must immediately upon EMB 's request:
- (a) do all things and execute all documents necessary to give effect to the security interest created under this Agreement; and
 - (b) procure from any person considered by EMB to be relevant to its security position such agreements and waivers (including as equivalent to those above) as EMB may at any time require.
- 12.8. EMB may allocate amounts received from the Customer in any manner EMB determines, including in any manner required to preserve any Purchase Money Security Interest it has in goods supplied by EMB.



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12.9. For the purposes of section 275(6) (response to request for information) of the PPSA, the parties agree and undertake that these Terms and any information pertaining to the sale of goods and details of the goods shall be kept confidential at all times. Neither party may disclose any information pertaining to these Terms or the sale of the goods, except as otherwise required by law or that is already in the public domain.

13. Cancellation

- 13.1. If EMB is unable to deliver the goods or provide the services, then it may cancel the Customer's order (even if it has been accepted) by written notice to the Customer, and refund to the Customer any payment the Customer has made to EMB for the relevant goods or services which will not be supplied.
- 13.2. No purported cancellation or suspension of an order or any part of it by the Customer is binding on EMB once the order has been accepted.
- 13.3. To the full extent permitted by law, orders for goods specifically acquired or manufactured by EMB for the Customer shall not be cancelled by the Customer without EMB 's written consent. Such cancellation shall be on terms, which indemnify EMB against all loss.

14. Liability

- 14.1. Except as the Terms specifically state, or as contained in any express warranty provided in relation to the goods or services, the Agreement does not include by implication any other term, condition or warranty in respect of the quality, merchantability, acceptability, fitness for purpose, condition, description, assembly, manufacture, design or performance of the goods or services or any contractual remedy for their failure.
- 14.2. If the Customer is a consumer nothing in these Terms restricts, limits or modifies the Customer's rights or remedies against EMB for failure of a statutory guarantee under the ACL.
- 14.3. If the Customer on-supplies the goods to a consumer and:



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(a) the goods or services are not of a kind ordinarily acquired for personal, domestic or household use or consumption, then the amount specified in section 276A(1) (limitation of liability of manufacturer to seller in certain circumstances) of the ACL is the absolute limit of EMB's liability to the Customer;

(b) the goods or services are of a kind ordinarily acquired for personal, domestic or household use or consumption, payment of any amount required under section 274 (indemnification of suppliers by manufacturers) of the ACL is the absolute limit of EMB's liability to the Customer;

howsoever arising under or in connection with the sale, installation, use of, storage or any other dealings with the goods or services by the Customer or any third party.

14.4. If clause 14.2 or 14.3 do not apply, then other than as stated in the Terms or any written warranty statement EMB is not liable to the Customer in any way arising under or in connection with the sale, installation, use of, storage or any other dealings with the goods or services by the Customer or any third party.

14.5. EMB is not liable for any indirect or consequential losses or expenses suffered by the Customer or any third party, howsoever caused, including but not limited to loss of turnover, profits, business or goodwill or any liability to any other party, except to the extent of any liability imposed by the ACL.

14.6. The Customer acknowledges that:

(a) it has not relied on any service involving skill and judgement, or on any advice, recommendation, information or assistance provided by EMB in relation to the goods or services or their use or application.

(b) it has not made known, either expressly or by implication, to EMB any purpose for which it requires the goods or services and it has the sole responsibility of satisfying itself that the goods or services are suitable for the use of the Customer.

14.7. Nothing in the Terms is to be interpreted as excluding, restricting or modifying or having the effect of excluding, restricting or modifying the application of any State or



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Federal legislation applicable to the sale of goods or supply of services which cannot be excluded, restricted or modified.

14.8. In cases where the design is supplied EMB to fabricate or machine any product, EMB cannot accept any liability whatsoever for any design or non-compliance to standards apart from workmanship under direct EMB control.

14.9. In cases where the customer or certification body are appointed by the customer to approve and have influence on the design, welding, processes or quality requirements EMB does not accept any liability for the products whatsoever apart from workman ship under direct EMB control.

15. Force Majeure

15.1. Neither EMB or the Customer are liable in any way howsoever arising under the Agreement to the extent that it is prevented from acting by events beyond its reasonable control including, without limitation, acts of God, civil or military authority, acts of public enemy, wars, accidents, fires, explosions, earthquakes, floods, the elements, strikes, labour disputes, shortages of suitable parts, components, materials, labour or transportation.

15.2. If an event of force majeure occurs, EMB may suspend or terminate the Agreement by written notice to the Customer.

15.3. Clause 11.1 does not operate to excuse the Customer from any obligation to pay money to EMB.

16. Warranty

16.1. If the Customer seeks to claim against EMB's warranty (if any), it must do so in accordance with EMB's warranty statement.

16.2. If goods are repaired under warranty they will be returned to the Customer or ultimate user, carriage paid.

16.3. EMB does not warrant or promise the ready availability of parts for such goods as may be required to be repaired or replaced from time to time.

17. Customer's Information



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17.1. Any designs, tools, patterns, material, drawings, confidential information or equipment furnished by the Customer or any other item which became the Customer's property may be considered obsolete and may be destroyed by EMB after two consecutive years from order if not collected by the Customer from EMB.

17.2. EMB will not be responsible for any loss or damage arising from any steps undertaken in clause 17.1.

18. Indemnity

18.1. To the full extent permitted by law, the Customer agrees:

(a) To indemnify and at all times keep indemnified and hold EMB, its servants and agents and each of them harmless against all claims for loss or damage (whether as a result of negligence or otherwise) arising directly or indirectly out of the Customer's use, possession, ownership or resale to a third party or out of the use, possession or ownership by such third party of the goods or any part or parts, whether separately or in combination with any other equipment or material.

(b) That the indemnity in Clause 18 shall survive the termination of this Agreement and shall extend to cover all alleged defaults or defects in the goods or part(s) or instructions supplied for use in connection with the goods or out of any failure of the goods to perform a particular task or to achieve a particular result or to comply with any particular specification.

19. Entire Agreement

19.1. These Terms comprise the entire Agreement between the Customer and EMB.

19.2. All prior statements and representatives or collateral warranties that may have been given whether oral or in writing by EMB or its servants or agents prior to the delivery of the goods and/or services are expressly excluded to the full extent permitted by law and accordingly EMB is released by the Customer from any liability as a result of such statement or representation.

20. Miscellaneous



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- 20.1. Failure by EMB to insist upon strict performance by the Customer of the Terms must not be construed as a waiver of any of EMB's rights and will not discharge the Customer from any of its obligations pursuant to these Terms.
- 20.2. In addition to any lien to which EMB may be entitled by statute or common law, and to the extent permitted by law, EMB shall in the event of the Customer's insolvency, bankruptcy or winding up, be thereupon entitled to a general lien on all property whatsoever owned by the Customer and in EMB's possession at the time. Such lien will cover the unpaid price of any goods and/or services supplied by EMB to the Customer.
- 20.3. All Notices on Accounts shall be in writing and may be hand delivered or mailed postage pre-paid addressed to the postal address of either EMB or the Customer as notified to the other from time to time in writing, or sent to the last known fax number or email address. Any such Notice or Demand or Account shall be deemed to have been received immediately (if delivered by hand), two business days after dispatch (if sent by mail), or upon confirmation of successful transmission (if sent by fax or email communication).
- 20.4. If a clause is unenforceable it must be read down to be enforceable or, if it cannot be read down, the term must be severed from the Terms, without affecting the enforceability of the remaining terms.
- 20.5. The terms of this Agreement may be varied by further agreement in writing between the parties.
- 20.6. The law of Victoria from time to time governs the Terms. The parties agree to the non-exclusive jurisdiction of the courts of Victoria, the Federal Court of Australia, and of courts entitled to hear appeals from those Courts.