DEFINITIONS

In these terms and conditions:

“Goods” means all equipment, products and services agreed to be supplied by Orica to the Buyer under any contract, as per the Contract.

“Buyer” means the person to whom any quotation is made, any person offering to contract with Orica on these Conditions of Sale and any person who purchases Goods from Orica.

“Consumer” means:
(i) an individual acquiring Goods for personal, domestic or household use or consumption;
(ii) a person acquiring Goods at a price not exceeding $40,000; or
(iii) a Person acquiring Goods of a kind ordinarily acquired for personal, domestic or household use or consumption.

But excludes a Person acquiring the Goods, or holding himself or herself out as acquiring the Goods,

“Contract” means Orica’s pricing letter or letter of offer to which the Supply of the Goods relates, as per the Contract.

“PPS Act” means the Personal Property Securities Act 2009 (Cth).

2. ENTIRE AGREEMENT

(a) Clause 2(b) and (d) shall not apply to a Consumer.

(b) Unless Orica otherwise agrees in writing, the Contract contains the only terms and conditions of sale to which Orica will be bound in connection with the supply of Goods to the Buyer.

(c) The Buyer agrees that the Conditions of Sale contained in this Contract will in all circumstances prevail over the Buyer’s terms and conditions of purchase or supply (if any).

(d) These Conditions of Sale supersede and exclude all prior and other discussions, representations (contractual or otherwise) and arrangements relating to the supply of the Goods, including, but not limited to, those relating to the performance of the Goods or the results that may be expected from using the Goods.

(e) Without limiting any other mode of acceptance of this Contract exercised by the Buyer, the Buyer acknowledges that by accepting delivery of the Goods and/or the credit terms offered by Orica, the Buyer by such conduct agrees to be bound by the Conditions of Sale contained in the Contract.

(f) Unless otherwise agreed in writing, all risk in and to the Goods purchased shall pass to the Buyer at the time of delivery to the delivery point agreed in writing by the parties.

(g) It is the responsibility of the Buyer to ensure that the Buyer and his agents and carriers are familiar with and comply with all necessary and/or relevant environmental laws and regulations, and comply with all necessary and/or relevant permits or licences pertaining to the storage and handling of the Goods, and the Buyer shall ensure that the Buyer’s agents, carriers and suppliers comply with all relevant environmental laws and regulations, and comply with all necessary and/or relevant permits or licences pertaining to the storage and handling of the Goods, and the Buyer’s agents, carriers and suppliers comply with all relevant environmental laws and regulations, and comply with all necessary and/or relevant permits or licences pertaining to the storage and handling of the Goods, and the Buyer’s agents, carriers and suppliers comply with all relevant environmental laws and regulations, and comply with all necessary and/or relevant permits or licences pertaining to the storage and handling of the Goods.

3. WARRANTIES, GUARANTEES & LIABILITY

(a) Clause 3 shall not apply to a Consumer with the exception that clause 3(d) shall apply where the Goods are acquired at a price not exceeding $40,000.

(b) Orica warrants that the Goods supplied accord with any relevant specification contained in the Contract.

(c) Apart from the warranties contained in clause 3(b), to the maximum extent permitted by law, all warranties and guarantees expressed or implied by statute, the common law, equity, trade, custom or usage or otherwise, in relation to the supply of the Goods, are expressly excluded. Where the exclusion of any of the warranties and guarantees referred to in this clause 3(c) would be illegal, Orica’s liability for breach of such warranty or guarantee is limited in the manner set out below in clause 3(d).

(d) Orica’s liability for its breach of sub-clause 3(b) or a non-excludable consumer guarantee implied into this Contract by law is limited to any one of the following as determined by Orica:
(i) the repair of the non-compliant Goods at Orica’s cost and the replacement of the Goods or the supply of equivalent Goods;
(ii) the replacement of the Goods or the payment of the cost of having the Goods repaired;
(iii) the payment by Orica of the cost of replacing the Goods or of acquiring equivalent Goods.

(e) The Buyer will examine the Goods for defects and shall notify Orica of any defects in writing within 30 days of delivery. If the Buyer does not notify Orica within 30 days of delivery, the Buyer shall be deemed to have accepted the Goods and shall no longer be entitled to exercise its rights in clause 3(d)(i) in respect of those particular Goods.

(f) To the extent permitted by law and notwithstanding anything else in the Contract, where the Goods are not a Consumer, Orica excludes all liability whatsoever to the Buyer arising out of or in any way connected with the Goods for any loss of profit, loss of business revenue, failure to achieve anticipated profits or sale profit or other overhead costs, loss of goodwill, loss of reputation, loss of value in any intellectual property, damages or liquidated sums payable pursuant to other agreements, other economic losses, or any consequential or indirect losses of any kind arising out of or in any way connected with the Goods. However, Orica shall not be liable for any failure or delay in delivery for any reason.

4. ADVICES

(a) Clause 4 shall not apply to a Consumer.

(b) The Buyer hereby acknowledges that:
(i) if it has not relied on any service involving skill or judgement, or on any advice, recommendation, information or assistance provided by Orica in relation to the Goods or their use or application; and
(ii) it is responsible for ensuring that Goods that comply with the warranties in clause 3(b) are fit and suitable for its purposes, requirements, processes, plant and equipment.

5. DELIVERY & RESPONSIBILITY TO PURCHASE

(a) Clause 5(c) shall not apply to a Consumer.

(b) Orica will make all reasonable efforts to have the Goods delivered to the Buyer in a timely manner over the timeframe agreed in the Contract.

(c) The Buyer will be contractually obligated to take delivery of and pay for all Goods ordered by it from Orica, and Orica supplies or makes available to the Buyer in accordance with the Contract.

6. RISK

(a) Unless otherwise agreed in writing, all risk in and to the Goods purchased shall pass to the Buyer upon the loading of the Goods at the Buyer’s premises or such other delivery point agreed in writing by the parties.

(b) Without any way limiting the operation of the foregoing, upon delivery of the Goods to the Buyer or his agent or to a carrier commissioned by the Buyer, the Buyer covenants and warrants to Orica that, in the storage and handling of the Goods, the Buyer and his agents and carriers shall comply with all relevant environmental laws and regulations, and comply with all necessary and/or relevant permits or licences pertaining to the storage and handling of the Goods, and the Buyer shall ensure that the Buyer’s agents, carriers and suppliers comply with all relevant environmental laws and regulations, and comply with all necessary and/or relevant permits or licences pertaining to the storage and handling of the Goods, and the Buyer’s agents, carriers and suppliers comply with all relevant environmental laws and regulations, and comply with all necessary and/or relevant permits or licences pertaining to the storage and handling of the Goods.

7. TITLE

(a) Title in and to the Goods shall not pass to the Buyer until payment in full for all Goods is made.

(b) Until title in to and to the Goods passes to the Buyer in accordance with this clause, the Buyer holds the Goods as bailee of Orica and that a fiduciary relationship exists between the Buyer and Orica.

(c) Until title in to and to the Goods passes to the Buyer in accordance with this clause, the Buyer shall store the Goods separately and in such a manner that they are clearly identifiable as the property of Orica. In addition to any rights Orica may have under Chapter 4 of the PPS Act, in the event of insolvency of the Buyer, Orica shall be entitled to any and all proceeds of sale, within 7 days of any notice pursuant to the Act, delivered to Orica or to the PPS Act representative for this purpose.

(d) The Buyer acknowledges that it has sold, leased or otherwise dealt with the Goods or products incorporating the Goods before title in and to the Goods has passed to the Buyer in accordance with this clause, it shall hold the proceeds of sale, lease or such dealing on trust for Orica in a separate account.

(e) If title in to and to the Goods passes to the Buyer in accordance with this clause, the Buyer’s implied right to sell, use or consume the Goods in its operations shall immediately terminate upon the happening of any of the events stipulated in paragraph 10(b)(i)-(iv) hereof.

(f) The Buyer acknowledges that Orica has a security interest (for the purposes of the PPS Act) in the Goods and any proceeds described in sub-clause 7(d) until title passes to the Buyer in accordance with the Act. This security interest secures all moneys owing to the Buyer by Orica under any Contract or otherwise. The Buyer acknowledges that such security interest goes to Goods (or their proceeds) arising under this clause 7 is a “purchase money security interest” under the PPS Act to the extent that it secures payment of the amounts owing in relation to those particular Goods. The Buyer will do anything reasonably required by Orica to enable Orica to register these security interests, with the priority Orica requires, and to maintain those registrations.

(g) The Buyer warrants that in the event that it grants a ‘purchase money security interest’ in the account, within the meaning of the Act, to a Third Party as original collateral for new value, the buyer will:
(i) on the direction of Orica, purchase new inventory from Orica within 7 days of any notice pursuant to the Act, delivered to the Buyer by the Third Party;
(ii) on the direction of Orica, pay Orica all the outstanding amounts in the account to satisfy the Buyer’s primary obligations to Orica, within 7 days of any notice pursuant to the Act, delivered to Orica by the Third Party; whichever of (7)(i) or (7)(ii) Orica so directs.

(h) The Buyer acknowledges that it has sold, leased or otherwise dealt with the Goods or products incorporating the Goods before title in and to the Goods has passed to the Buyer in accordance with this clause, it shall hold the proceeds of sale, lease or such dealing on trust for Orica in a separate account.

(i) On the direction of Orica, Orica shall take the necessary steps to have the Goods removed from the Buyer’s premises.

(j) The Buyer covenants and warrants to Orica that, in the storage and handling of the Goods, the Buyer and his agents and carriers shall comply with all relevant environmental laws and regulations, and comply with all necessary and/or relevant permits or licences pertaining to the storage and handling of the Goods, and the Buyer’s agents, carriers and suppliers comply with all relevant environmental laws and regulations, and comply with all necessary and/or relevant permits or licences pertaining to the storage and handling of the Goods, and the Buyer’s agents, carriers and suppliers comply with all relevant environmental laws and regulations, and comply with all necessary and/or relevant permits or licences pertaining to the storage and handling of the Goods.

The security interests arising under this clause 7 attach to the Goods when the Buyer obtains possession of the Goods and the parties confirm that they have not agreed that any security interest arising under this clause 7 attaches at any later time.

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8. PRICE

Unless otherwise agreed in writing, the price charged for the Goods shall be determined and adjusted in accordance with Orica’s final pricing letter or offer forming part of the Contract. Without limiting its rights in clause 10, Orica may in its sole discretion charge interest on overdue invoices at the rate of 1% per calendar month (pro-rated to part of a month), compounding monthly and commencing from the date on which the invoiced amount becomes overdue.

9. FORCE MAJURE

Deliveries may totally or partially be suspended by Orica during any period in which Orica may be prevented or hindered from manufacturing, delivery or supplying through any circumstances outside Orica’s reasonable control or where such manufacture, delivery or supply is rendered commercially infeasible by such circumstances. Orica’s reasonable control shall include, without limitation, strikes, lockouts or other labour difficulty, inability to obtain any necessary materials, inputs, equipment, facilities or services on usual terms, power or water shortage, accidents or breakdowns of plant, machinery, software, hardware or communication network. Orica shall not incur any liability to the Buyer in respect of such suspension.

10. PAYMENT AND DEFAULT

(a) Subject to sub-clause 10(e) hereof, and unless otherwise agreed in writing all accounts shall be payable within 30 days of delivery, or as otherwise identified on any statement of account issued by Orica.

(b) If any of the events set out in (i) to (v) below occur, Orica may at its own absolute discretion withhold further deliveries or cancel the Contract without notice to the Buyer and without prejudice to any other action or remedy which Orica has or might otherwise have had, and/or open a new trading account for the Buyer with cash on delivery payment terms.

(i) The Buyer makes default in any payments or is unable or states that it is unable to pay its debts as and when they fall due.

(ii) The Buyer being an individual commits an act of bankruptcy or has a controller or trustee appointed in respect of the Buyer’s estate or any part of the Buyer’s property.

(iii) The Buyer being a company passes a resolution for its winding up or enters into an application for winding up, or a winding up order is made against it.

(iv) A receiver, receiver and manager, controller or voluntary administrator is appointed over any part of the property or assets of the Buyer.

(v) The Buyer experiences any analogous event having substantially similar effect to any of the events specified above.

In such an event, Orica may, at its absolute discretion and outstanding to Orica on any account whatsoever and irrespective of whether the due date on any statement of account has occurred or passed shall become immediately due and payable. The Buyer shall indemnify Orica against and hold Orica harmless from and against and costs in connection with the enforcement of this Contract, including without limitation legal costs on a solicitor and own client basis and the costs charged to Orica by a debt collection agency and/or bailiff.

(c) Notwithstanding sub-clause 10(a) hereof Orica may at all times in its sole and unfettered discretion and without being under any duty or obligation to assign reasons therefore review, alter or terminate the Buyer’s credit limit or payment terms without notice. Without limiting the generality of the foregoing, the decision of Orica shall be final and Orica accepts no liability or responsibility for any loss, howsoever incurred, by the Buyer due to the operation of this condition.

11. CONTAINERS & CYLINDERS

(a) Containers, drums, cylinders and other storage vessels in which Goods are delivered and for which a deposit or rental charge is payable or which are otherwise made available by Orica on a returnable basis, remain the property of Orica and must not be used for any other commodity than that contained therein at the time of delivery. On their return in good order and condition by the Buyer and at the Buyer’s expense, to the factory or store of Orica from which the Goods were delivered, the full amount of any deposit will be repaid to the Buyer. Containers will be deemed to be still in the Buyer’s hands until received at such factory or store. In the case of containers which are subject to Orica’s security interest under clause 12, the Buyer shall purchase or arrange for the purchase of other goods in good order and condition and having only such part of the deposit as in the opinion of Orica is reasonable, having regard to their actual condition, will be allowed to the Buyer.

(b) Cylinders and drums are delivered and are subject to a separate charge other than a deposit or rental charge is shown in the face of the invoice are, unless otherwise specified therein or agreed by the parties, sold with the Goods and their price as shown on the invoice must be added to the price of the Goods.

(c) No deposit charges are made for cylinders or drums containing compressed gases but such cylinders and drums remain the property of Orica. Cylinders and drums must be returned at the Buyer’s expense in good order and condition to the factory or store of Orica from which they were delivered.

(d) The Buyer agrees to indemnify Orica in respect of any cylinder or drum that is not returned in good order or condition to Orica within one month of any demand being made by Orica for the return of the cylinder or drum.

(e) Orica may at any time require the Buyer to return any cylinder or drum in which the Goods were supplied and the Buyer shall have no right to retain such cylinder or drum. Orica may at any time require the Buyer to return any cylinder or drum in which the Goods were supplied and the Buyer shall have no right to retain such cylinder or drum.

(f) The Buyer acknowledges that Orica may have a security interest (for the purposes of the PPS Act) in all containers, drums and cylinders delivered to the Buyer and agrees to indemnify Orica in respect of any portable magazine or pallet that is returned in good order and condition to Orica within one month of delivery of the Goods. Orica may at any time require the Buyer to return any cylinder or drum in which the Goods were supplied and the Buyer shall have no right to retain such cylinder or drum. The Buyer shall have no right to retain such cylinder or drum.

12. PORTABLE MAGAZINES AND PALLETS

Unless otherwise agreed to in writing all portable magazines and pallets on which Goods are delivered remain the property of Orica and must be returned to Orica at the Buyer’s expense in good order and condition to the factory or store of Orica from which they were delivered. Portable magazines and pallets will be deemed to be still in the Buyer’s hands until received at such factory or store. Except where the Buyer is a Consumer and to the extent the law permits, the Buyer shall have no right to retain any portable magazine or pallet. Orica may at any time require the Buyer to return any cylinder or drum in which the Goods were supplied and the Buyer shall have no right to retain such cylinder or drum.

13. GENERAL LIEN

In addition to any right of lien to which Orica may be entitled under the common law, Orica shall be entitled to exercise a general lien over all items in its possession belonging to the Buyer until the Buyer has paid in full for all Goods supplied by Orica to the Buyer. Orica may in its sole discretion sell any item that is subject to the said lien, provided that Orica shall pay to the Buyer any surplus proceeds that are realised by it from a sale of any such items after discharging in full all monies outstanding to Orica in respect of all Goods that have been delivered by it to the Buyer and all reasonable costs of sale incurred by Orica. The Buyer acknowledges that Orica has a security interest (for the purposes of the PPS Act) in all, the proceeds of these items, until the Buyer has paid in full for all Goods supplied by Orica in accordance with this clause 13. The Buyer will do anything required by Orica to enable Orica to register this lien. Without limiting its rights under this clause, with the aid of the Buyer, Orica requires, and to maintain that registration. Despite this requirement for registration of this security interest, and regardless of whether or not it is actually registered, Orica may perfect this security interest by possession of the relevant items.

14. WAIVER

No waiver by Orica to exercise or any delay or omission in exercising any right, power or remedy by Orica operates as or constitutes a waiver. A single or partial exercise by Orica of any right, power or remedy does not preclude any other or further exercise by it of that or any other right, power or remedy. A waiver is not valid or binding on Orica unless made in writing. No failure by Orica to exercise, nor any delay or omission by Orica in exercising, any right, power or remedy, nor any representation or conduct carried out by Orica under the Contract or in connection with the supply of the Goods or any of them shall constitute or provide grounds for a common law or equitable estoppel.

15. SEVERANCE

If any provision of these Conditions of Sale is or its application to any person or circumstance is or becomes invalid, unenforceable or enforceable the provision shall as far as possible be read down to such extent as may be necessary to ensure that it is invalid, unlawful 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 these Conditions of Sale shall not in any way be affected or impaired.

16. GOVERNING LAW

The supply of Goods under these Conditions of Sale is governed by the law of the State of Victoria and Orica and the Buyer submit to the non-exclusive jurisdiction of the courts of the State of Victoria.

17. TRANSACTION TAX

Where a transaction tax, including a goods and services tax (“GST”) and any transaction taxes that come into existence after the date of these Conditions of Sale, applies to any supply made under these Conditions of Sale, Orica may recover from the Buyer an additional amount on account of that transaction tax in accordance with clause 10.

18. CHANGE OF LAWS

Without losing to either party or Orica any of its rights: Orica may at any time change any of its laws of:

(a) manufacturing, importing, supplying or transporting the Goods;
(b) processing raw materials, services or inputs directly related to the activities in (a), increase as a result of compliance by Orica, Orica’s affiliates and related bodies corporate, or third parties, with:

(i) the introduction of or any change (including a change in interpretation) in any federal, state, local or other law or regulation or order, including any introduction of or a change in a tax, tax rebate, excise or duty; or
(ii) any introduction of or change in (including a change in interpretation) in a scheme for management or reduction of greenhouse gas emissions or concentrations, or water use conservation or management,
then Orica may, by notice to the Buyer, increase the Price for the Goods to the extent required to pass through such increased costs (which may include, without limitation costs of acquiring permits or credits or cost of required plant modifications or additions). Such cost increase shall take effect immediately from the date such notice is provided.

19. MISCELLANEOUS

Additional terms relating to price, delivery date/time frame, place(s) of delivery, delivery quantities, purchase orders, documents and specifications and other commercial matters are as indicated in the pricing letter or letter of offer to which the supply of the Goods relates, as updated in writing by the mutual agreement of the parties.

20. CONFIDENTIALITY

The Buyer and Orica agree that neither of us will disclose to an “interested person” (as defined in section 275(9) of the PPS Act) or any other person, any information of the kind described in section 275(1) of the PPS Act.

21. ENFORCEMENT OF SECURITY INTERESTS

If Chapter 4 of the PPS Act would otherwise operate to the enforcement of the security interests created under this Contract, the Buyer 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 Orica to give a notice to the Buyer;
(b) section 120 (enforcement of liquid assets);
(c) section 121(4) (enforcement of liquid assets – notice to grantor);
(d) section 125 (obligation to dispose of or retain collateral);
(e) section 126 (security interest may be disposed of collateral);
(f) section 129 (disposal by purchase);
(g) section 130 (notice of disposal), to the extent that it requires Orica to give a notice to the Buyer;
(h) paragraph 132(3)(d) (contents of statement of account after disposal);
(i) section 132(4) (statement of account if no disposal);
(j) section 134(1) (retention of collateral);
(k) section 135 (notice of retention);
(l) section 142 (redemption of collateral); or
(m) section 143 (reinstatement of security agreement).

22. NOTICES UNDER PPS ACT

Orica does not need to give the Buyer any notice under the PPS Act (including a notice of a registration statement) unless the notice is required by the PPS Act and that requirement cannot be excluded.