

Terms for Sale, Delivery and License



1 Application of Conditions

1.1 These Terms for Sale, Delivery and Licence ("Conditions") apply to sales and deliveries of hardware and software products, and all services like repair, consultancy, training and support of IGEL Technology Pty Ltd (ABN 12 167 699 023) ("Company") of Level 11, 1 Margaret Street, Sydney NSW 2000 ("Products") to any purchaser of the Products ("Customer").

1.2 These Conditions (which can only be waived or varied in writing by the Company) will prevail over all conditions of the Customer to the extent of any inconsistency.

2 Orders

2.1 Neither a Customer's quotation nor any order submitted or placed by a Customer ("Order") shall be binding on the Company unless and until the Company has given written acknowledgement of its acceptance on terms which include these Conditions ("Order Confirmation"). If Products are supplied without an Order Confirmation, the applicable invoice shall be deemed to constitute the Order Confirmation.

2.2 Each supply which the Company makes in response to an Order will be regarded as a separate contract for sale.

2.3 Unless previously withdrawn, all quotations by the Company are binding and valid for 30 days from the date of the quotation or such other period as stated in that quotation.

3 Specification

3.1 Products are supplied in accordance with a specification and test results proving conformance with the specification (if any) in force at the time of concluding the agreement between the Company and the Customer ("Specification"). Any additions and alterations made to a Specification by the Company at the request of the Customer shall be subject to an additional charge as specified by the Company.

3.2 The Customer is solely responsible, and must itself examine and test the Products at its cost, to ensure they are fit or suitable for the Customer's purposes. The Company accepts no liability for the fitness or suitability of the Products for the Customer's particular purposes.

4 Prices and Payment

4.1 The prices of the Products are the prices which have been notified individually and in writing by the Company to the Customer ("Prices").

4.2 Unless otherwise specified by the Company in writing, all prices are:

(a) quoted Products EXW (INCOTERMS 2010) Company's warehouse in Bremen (Germany) or such other warehouse location as notified by the Company in writing ; and [

(b) exclusive of all freight costs, import charges, including customs duties, imposts and levies relating to the import, supply or use of the Products.

4.3 Unless otherwise agreed by the Company in writing, payment is due in full within 30 days from the date of the invoice ("Payment Date"). The Company reserves the right to refuse cheques and bills of exchange ("Conditional Payments") as payment by a Customer. Any Conditional Payments which the Company accepts do not constitute payment by the Customer until the Company has received payment under those Conditional Payments. The Customer must reimburse the Company for any fees, taxes, cancellation fees and other costs which the Company incurs or becomes liable for as a result of the Customer providing Conditional Payment.

4.4 If the Customer defaults in the payment of any money due to the Company pursuant to these Conditions on the Payment Date, then in addition to any other rights which may be conferred upon the Company by law or equity, the Company will be entitled to be paid interest by the Customer on such money at the rate prescribed in Rule 36.7 of the Uniform Civil Procedure Rules 2005 (NSW) from the date of such default until full payment to the Company.

4.5 If payment is not made in accordance with clause 4.3, or if at any time the credit standing of the Customer, in the opinion of the Company, is at risk or has been impaired, the Company may refuse delivery of any Products ordered until alternative arrangements as to payment or credit in terms satisfactory to the Company have been agreed.

4.6 If GST is imposed on a Taxable Supply made by the Company to the Customer under or in connection with these Conditions,

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- the Price of the Taxable Supply shall be equal to the GST-exclusive consideration that the Customer must pay to the Company for the Taxable Supply under these Conditions increased by an amount (the GST Amount) equal to the amount of GST payable on that Taxable Supply and the GST Amount is, subject to the Company issuing a Tax Invoice to the Customer, payable at the same time and in the same manner as the consideration to which it relates. In these Conditions "GST" means the goods and services tax or similar value added tax levied or imposed in Australia under the GST Act and includes any replacement or subsequent similar tax; "GST Act" means A New Tax System (Goods and Services Tax) Act 1999 (Cth) and "Taxable Supply" and "Tax Invoice" have the same meaning as in the GST Act.
- 4.7 The Customer may not withhold or set off any payment or make deductions from any amount owing to the Company without the Company's prior written consent.
- 5 Cancellation**
- 5.1 A notice of cancellation or variation of an Order must be submitted by the Customer in writing and is only effective upon the written approval by the Company, whereby such approval can be withheld by the Company in its discretion.
- 5.2 When a Customer gives written notice of cancellation or variation and the Company approves such a request in accordance with clause 5.1, without prejudice to its other rights, the Company reserves the right to charge for all Products and Services it has performed and shall need to perform in fulfilling the Order or, if the work is substantially complete or the Products were made to order or are otherwise not immediately available for sale to another customer at an equivalent price, to charge for the full amount set out in the applicable Order Confirmation in addition to any other costs the Company incurs on the Customer's behalf.
- 6 Delivery**
- 6.1 Unless the Company otherwise agrees, delivery of Products shall be made Products EXW (INCOTERMS 2010) Company's warehouse in Bremen (Germany) or such other warehouse location as notified by the Company in writing. The Customer shall be responsible, and will be charged for, any costs incurred in delivery and transport.
- 6.2 Stated delivery times are no more than an estimate by the Company and shall not be binding upon the Company. The Company will not be liable for any consequential or other loss resulting partly or wholly from late delivery.
- 6.3 If the quantity of Products delivered does not correspond with the quantity stated in an Order Confirmation, the Customer shall only be liable to pay for the quantity delivered in the case of short-delivery and for the price stated in the Order Confirmation in the case of over-delivery (subject in the latter case to the Customer permitting the Company to collect the surplus Products), provided that in no event shall such short or over-delivery entitle the Customer to damages or give the Customer a right to rescind the agreement of which these Conditions form part.
- 6.4 Any surplus Products delivered shall remain the property of the Company and the Customer shall take all necessary precautions for the safe custody and protection of such surplus Products until the time of their removal by the Company.
- 6.5 In no circumstances shall any Products be returned to the Company without its prior written consent.
- 6.6 If the Customer is unable or unwilling to accept physical delivery of the Products, the Company will be entitled to arrange for storage of the Products at the Customer's risk and cost, including all transportation, storage and other associated costs.
- 6.7 Unless otherwise agreed by the Company in writing:
- (a) The Customer must inspect the Products on delivery. Where the Customer believes that there has been damage to or loss of the Products during transport, the Customer must note in writing any such damage or loss at the time of delivery on the delivery documents of the transport company.
- (b) If the Customer believes that there is a defect in the products, the Customer must not on-sell the Products and must notify the Company in writing within 7 days after becoming aware of the defect.
- (c) In the event of the Customer's failure to comply with the terms of this clause at the times as specified in (a) and (b) above, the Customer shall be deemed to have accepted the Products and to the extent permitted by law, the Customer

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waives all rights to claim in respect of damage, loss or defects in the Products.

7 Instalment Deliveries

7.1 Deliveries by instalments during an agreed period ("Delivery Period") must be agreed by the parties at the time the Order is accepted in writing by the Company.

7.2 If the parties agree a specific quantity of Products is to be delivered by way of instalments during the Delivery Period, the Customer must make the individual requests for the delivery of each instalment of the Products at regular intervals during the term of the Delivery Period on the relevant dates agreed by the parties.

7.3 In the event that during a particular Delivery Period the Customer makes requests for less than the total amount of the Products ordered by the Customer with respect to that Delivery Period, the Company is no longer obliged to deliver the remaining Products, however the Company has the right to invoice the Customer, and the Customer is obliged to pay for, the total amount of the Products under that Order.

7.4 Where the Customer fails to request or accept instalment deliveries in accordance with these Conditions, the Company may store the Products at the risk and cost of the Customer, and the Customer will be deemed to be in default of payment for the delivery.

7.5 Where Products are ordered for delivery by instalments, each instalment is deemed to be a separate order and a separate contract performed by the Company upon delivery of that instalment.

8 Packaging

8.1 Whether or not expressly stated by the Company as being included in the Price of the Products, packaging cannot be returned by the Customer to the Company.

9 Passing of Risk and Title

9.1 Unless otherwise agreed by the Company in writing, risk in the Products shall pass to the Customer when the Products are delivered in accordance with clause 6.

9.2 Notwithstanding that risk passes to the Customer under clause 9.1, legal and beneficial title ("Ownership") in the Products shall remain with the Company until:

(a) the Products are the subject of an Order Confirmation; and

(b) the price for the Products as well as any other amounts the Customer may owe the Company have been paid in full.

9.3 Until such time as Ownership in the Products passes to the Customer, the Customer shall:

(d) be in a fiduciary relationship with the Company;

(e) store the Products in a manner which makes them readily identifiable as the property of the Company;

(f) hold the Products as bailee of the Company;

(g) keep, and provide the Company at any time on reasonable request, proper and complete stock records covering the receipt, identification, storage, location, sale and movement of the Products; and

(h) keep the Products insured against theft, damage and destruction.

9.4 Notwithstanding clauses 9.2 and 9.3 the Customer is entitled until notified by the Company or until the happening of any of the events set out in clause 9.7 to sell the Products in the normal course of its business, in which case the proceeds of resale must be held in trust for the Company in a separate account.

9.5 The Company is entitled at any time while any debt remains outstanding by the Customer to notify the Customer of its intention to take possession of the Products and for this purpose the Customer irrevocably authorises and licenses the Company and its servants and agents to enter upon the land and buildings of the Customer with all necessary equipment to take possession of the Products. The Company is not liable for damage or injury to any premises caused by the Company exercising its rights under this clause.

9.6 On receipt of notice from the Company or on the happening of any of the events set out in clause 9.7, the following applies:

- the Customer's authority to sell or otherwise deal with the Products as set out in clause 9.4 is withdrawn;

- the Company may withhold delivering further Products and all invoices issued by the Company to the Customer become due and payable immediately; and

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- the Customer must immediately deliver to the Company all Products which are in the Ownership of the Company at the Customer's own cost.
- 9.7 The Customer shall give immediate notice to the Company of:
- (a) the Customer becomes insolvent under administration as defined in Section 9 of the *Corporations Act 2001*;
 - (b) any step is taken (including without limitation, any application made, proceedings commenced, or resolution passed or proposed in a notice of meeting) for the winding up or dissolution of the Customer or for the appointment of an administrator, receiver, receiver and manager or liquidator to the party or any of its assets;
 - (c) the Customer resolves to enter into or enters into a scheme of arrangement or composition with, or assignment for the benefit of all or any class of its creditors or proposes a reorganisation, moratorium or other administration involving any of them;
 - (d) the Customer becomes unable to pay its debts when they fall due, resolves to wind itself up or otherwise dissolve of itself;
 - (e) proceedings are commenced to make the Customer bankrupt or the Customer becomes bankrupt;
 - (f) an event analogous to any of those set out in clauses 9.7(a) to 9.7(e) occurs.
- 10 Personal Property Securities Act 2009 ("PPSA")**
- 10.1 The Customer acknowledges and agrees that it grants the Company a security interest in the Products and their proceeds by virtue of the Company's retention of title pursuant to clause 9.
- 10.2 The Customer undertakes to:
- a) do all things necessary and provide the Company on request all information the Company requires to register a financing statement or financing change statement on the Personal Property Securities Register ("PPSR"); and
 - b) not to change its name in any form or other details on the PPSR without first notifying the Company.
- 10.3 To the maximum extent permitted by law, the Customer waives any rights it may have pursuant to, and the parties contract out of, the following sections of the PPSA:
- (a) section 95 (notice of removal of accession);
 - (b) section 123(2) (notice of seizure);
 - (c) section 125 (obligation to dispose of or retain collateral);
 - (d) section 129(2) (notice of disposal by purchase);
 - (e) section 130 (notice of disposal);
 - (f) section 132(3)(d) (contents of statement of account after disposal);
 - (g) section 132(4) (statement of account if no disposal)
 - (h) section 135 (notice of retention);
 - (i) section 142 (redemption of collateral); and
 - (j) section 143 (reinstatement of security agreement).
- 10.4 The Customer appoints the Company as its attorney to sign in the Customer's name all documents which the Company considers necessary to enforce or protect its rights and powers under these Conditions and to perfect, preserve, maintain, protect or otherwise give full effect, under the PPSA and related regulations, to these Conditions and the Security Interest created by these Conditions.
- 10.5 The Customer will reimburse the Company for any fees payable by the Company in relation to the registration of the Security Interest created by these Conditions, including registration fees and maintenance fees.
- 10.6 These Conditions create a Security Interest in all Products which the Company has supplied to the Customer and all Products which the Company supplies to the Customer in the future. Initial registration of a financing statement by the Company in respect of the Customer under the PPSA covers Security Interests in Products supplied now or subsequently under these Conditions.
- 10.7 Unless otherwise defined in these Conditions, the terms and expressions used

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in this clause 10 have the meanings given to them, or by virtue of, the PPSA.

11 Limitation of Liability by Company

11.1 To the extent permitted by law, the Company excludes all terms, conditions, warranties, undertakings, inducements or representations relating in any way to the Products not contained in these Terms and Conditions. The Company shall not be liable to the Customer in any circumstances for any loss of profits, anticipated savings, wasted expenditure, loss of contracts with third parties, goodwill or any type of special, indirect or consequential loss whether suffered by the Customer or by any third party and whether or not the Company was aware that such loss was possible or such loss was otherwise foreseeable, whether such loss arises from the use of the Products, or the failure by the Company to observe and fulfil its obligations under these Terms and Conditions or otherwise.

11.2 To the fullest extent permitted by law, the Company's liability for any breach of a consumer guarantee implied by the *Australian Consumer Law* as set out in Schedule 2 of the *Competition and Consumer Act 2010* (and which cannot be excluded) shall be limited to any one or more of the following (as determined by the Company in its absolute discretion):

- (a) replacing the Products or supplying equivalent goods; or
- (b) repairing the Products; or
- (c) paying the cost of replacing the Products or acquiring equivalent goods; or
- (d) paying the cost of repairing the Products.

11.3 Except in relation to:

- (a) liability for personal injury or death; and
- (b) liability for the Company's breach of these Terms and Conditions (which the Customer agrees shall be limited for all claims in aggregate, to paying an amount equal to the amount paid by the Customer to the Company in respect of the Products supplied during the 12 months period preceding the date on which the relevant cause of action first arose),

the Company shall not be under any liability in respect of any loss or damage which may be suffered or incurred or which may arise directly or indirectly in any way in connection with these Terms and Conditions (including in respect of the Products supplied pursuant to these Terms and Conditions).

12 Force Majeure

The Company shall not be liable for any loss or damage caused by delay in the performance or non-performance of any of its obligations under these Conditions occasioned by any cause whatsoever that is beyond the Company's control including but not limited to: Act of God; war; civil disturbance; requisitioning governmental restrictions, prohibitions or enactments of any kind; import or export regulations; strikes; lock-outs or other industrial disputes (whether involving its own employees or those of any other person); difficulties in obtaining workmen or materials; breakdown of machinery; fires; or accident. If any such event occurs the Company may vary, cancel or suspend any Order Confirmation or agreement of which these Conditions form part without incurring any liability for any such loss or damage.

13 Intellectual Property

13.1 The Company for and on behalf of itself and its related bodies corporate reserves ownership in any intellectual property rights, relating to the Products. Nothing in these Conditions operates or is intended to deny the Company or its related bodies corporate, or confer on the Customer, such rights or any other intellectual property rights in the Products.

13.2 The Customer shall indemnify the Company for and in respect of claims by any third party in relation to the Products which arise from, or can be attributed to, the special requirements or specifications of the Customer.

13.3 In this clause 13 a reference to intellectual property rights includes patents, trade marks, copyright, registered designs and licences and applications in respect of any of the above.

14 Local Standards

14.1 It is the responsibility of the Customer at its own costs to:

- ensure that the Products comply with the relevant safety standards and

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product laws in Australia and New Zealand, including, if required, undertake any necessary testing to ensure such compliance;

- observe any applicable laws in Australia and New Zealand in regard to the use and storage of the Products;
- apply for and obtain all necessary licences, permits or other authorisations required by the local law in relation to the use of the Products.

15 Confidentiality

The Customer shall not without the written consent of the Company disclose to any third party or use for any purpose other than contemplated under the agreement of which these Conditions form part any proprietary or confidential documents, knowledge and information, prices, tools, formulas, samples, models, drawings, data standard sheets, manuscripts and other technical documentation supplied or made known to the Customer by the Company.

16 Privacy

The Customer acknowledges and agrees that the Company may provide the Customer's personal information as defined under the *Privacy Act 1988* (Cth) to its related bodies corporate which may be located both in and outside Australia.

17 Import and Export Controls

- 17.1 The Products are intended exclusively for use in Australia. The Customer must comply with all applicable laws, and obtain any required licences, concerning the import into Australia and export or re-export of goods, services or technology and economic or trade sanctions or restrictive measures, including such laws or measures enacted, administered, imposed or enforced by the relevant government authority, including, but not limited to, the US Department of the Treasury's Office of Foreign Assets Control (OFAC), the US Department of State, US-

Department of Commerce, OEA, Washington DC 20230, the United Nations Security Council, the German Federal Office For Export, 65760 Eschborn/Taunus, (**Trade Control Laws**) and all Company policies, procedures or practices regarding Trade Control Laws, as may be communicated to the Customer from time to time.

18 Assignment

The agreement of which these Conditions form part is personal to the Customer and may only be assigned by the Customer with the prior written and informed consent of the Company.

19 Waiver

No neglect, delay or indulgence on the part of the Company in enforcing these Conditions shall prejudice the rights of the Company or be construed as a waiver of any such rights.

20 Severability

If any one or part of these Conditions is illegal, invalid or unenforceable it shall be read down so far as necessary to give it a valid and enforceable operation or, if that is not possible, it shall be severed from these Conditions, but in any event the remaining Conditions and any other provisions of the agreement of which these Conditions form part shall remain in full force and effect.

21 Whole Agreement

In relation to the subject matter of these Conditions, these Conditions supersede all oral and written communications by or on behalf of any of the parties.

22 Governing Law

The Conditions and any agreement of which they form part are governed by and must be construed in accordance with the laws which apply in the State of New South Wales, Australia, and the parties submit to the jurisdiction of that State.