

General Terms & Conditions of Sale

ENDRESS & HAUSER AUSTRALIA PTY LTD

ABN 47 095 963 134

1. Basis of contract

- 1.1 The Order constitutes an offer by the Customer to purchase Goods and/or Services in accordance with these Conditions.
- 1.2 The Order shall only be deemed to be accepted when the Supplier issues written acceptance of the Order at which point and on which date the Contract shall come into existence (Commencement Date) and shall be formed on the terms contained in:
 - (a) the Order Confirmation;
 - (b) these Conditions (including Special Terms if any);
 - (c) the Order (including Goods Specification and/or Service Specification referred to in the Order); and
 - (d) any other documents as referred to in the Order Confirmation.

In the event of any conflict or inconsistency among the documents referred to in the preceding paragraph, the order of priority shall be the order in which such documents are listed above.

- 1.3 The Contract constitutes the entire agreement between the parties and supersedes all previous communications, whether oral or written, relating to the subject matter of the Contract (including the Quotation). The Customer acknowledges that it has not relied on any statement, promise, representation, assurance or warranty made or given by or on behalf of the Supplier that is not set out in the Contract.
- 1.4 Any samples, drawings, descriptive matter or advertising issued by the Supplier and any descriptions of the Goods or illustrations or descriptions of the Services contained in the Supplier's catalogues or brochures are issued or published for the sole purpose of giving an approximate idea of the Services and/or Goods described in them. They shall not form part of the Contract or have any contractual force.
- 1.5 These Conditions apply to the Contract to the exclusion of any other terms that the Customer seeks to impose or incorporate, or which are implied by trade,

custom, practice or course of dealing. For the avoidance of doubt, any terms or conditions contained in, issued with or printed on any order (including the Order), letter of acceptance or the like issued by the Customer do not form part of the Contract and are of no effect whatsoever. The Supplier may amend these Conditions at any time at its discretion.

- 1.6 Any Quotation given by the Supplier shall not constitute an offer capable of acceptance until an Order has been issued by the Customer and an Order Confirmation is provided in writing by the Supplier. Quotations are only valid for a period of 30 days from the date of issue, unless the Supplier agrees in writing to extend that period.
- 1.7 All of these Conditions shall apply to the supply of both Goods and Services except where application to one or the other is specified. Special terms may apply in respect of software support services and/or other specific services if agreed between the parties (Special Terms).
- 1.8 The Customer agrees that any items (including goods and services) that are not expressly set out in the Quotation and/or Order Confirmation are excluded from the Contract.
- 1.9 Any Quotation provided by the Supplier to the Customer will be at the Customer's request and the Customer agrees that it will use its own skill and judgment in assessing the Quotation, and will be responsible for the issuing of any Order on the basis of a Quotation.
- 1.10 The Supplier will use its best endeavours to provide accurate estimates in any Quotation provided to the Customer. The Customer agrees that any prices, specifications, delivery and completion dates provided in the Quotation are estimates only and the Supplier will have no obligation to comply with the details contained within the Quotation unless it is set out in the Order Confirmation.

2. Goods

- 2.1 To the extent that the Goods are to be manufactured in accordance with a specification supplied by the Customer, to the maximum extent permitted by law, the Customer shall indemnify the Supplier against all liabilities, costs, expenses, damages and losses (including any direct, indirect or consequential losses, loss of profit, loss of reputation and all interest, penalties and legal and other professional costs and expenses) suffered or incurred by the Supplier in connection with any claim made against the Supplier for actual or alleged infringement of a third party's Intellectual Property Rights arising out of or in connection with the Supplier's use of the Goods Specification that are supplied by the Customer. This clause 2.2.1 shall survive termination of the Contract.
- 2.2 The Supplier reserves the right to amend the Goods Specifications if required by any applicable statutory or regulatory requirements. The Customer acknowledges and agrees that where the Goods Specifications are varied or changed in accordance with this clause 2.2.2, and the costs of providing the Goods increase, the Customer must pay the Supplier the additional costs and

expenses it suffers or incurs as a debt due and immediately payable to the Supplier.

- 2.3 The Supplier agrees to provide one instruction manual to the Customer for the supply of each Good. The Customer may download additional instruction manuals from <http://www.au.endress.com>.

3. Delivery of Goods

- 3.1 The Supplier shall deliver the Goods to the location as set out in the Order Confirmation (Delivery Location) as per EXW Sydney (Incoterms® 2010), unless otherwise set out in the Order Confirmation.
- 3.2 Delivery of the Goods shall be completed on the Goods' arrival at the Delivery Location.
- 3.3 Any dates quoted for delivery of the Goods are approximate only, and the time of delivery is not of the essence. The Customer agrees that delivery is subject to the Customer's issuance of an Order and the Supplier's provision of an Order Confirmation. The Supplier shall not be liable for any delay in delivery of the Goods that is caused by a Force Majeure Event or the Customer's failure to provide the Supplier with adequate delivery instructions or any other instructions that are relevant to the supply of the Goods. If the Supplier's delay in delivery is due to any act or omission of the Customer, the Customer must pay the Supplier any additional costs that it may suffer or incur as a result of the Customer's non-compliance.
- 3.4 If the Customer fails to accept, take delivery of, or collect the Goods within 7 Business Days of the Supplier notifying the Customer that the Goods are available, then except where such failure or delay is caused by a Force Majeure Event or by the Supplier's failure to comply with its obligations under the Contract in respect of the Goods:
- (a) the Supplier shall be entitled to raise an invoice in respect of the Goods deemed delivered; and/or
 - (b) the Supplier shall store the Goods until the Customer accepts, takes delivery of, or collects the Goods, and charge the Customer for all related costs and expenses (including, without limitation, insurance, unloading and additional transportation). The Supplier shall have the right to charge at least 0.5% of the invoiced value of the stored Goods monthly for storage at the Supplier's premises. If storage at third party's premises is required, the costs incurred shall be borne by the Customer.
- 3.5 If 28 Business Days after the Supplier notified the Customer that the Goods were available and the Customer has not accepted, taken delivery of or collected the Goods, the Supplier may resell or otherwise dispose of part or all of the Goods and, after deducting reasonable storage and selling costs, charge the Customer for any shortfall below the price of the Goods for which the Customer will be liable to pay as a debt immediately due and payable.

- 3.6 The Supplier may deliver the Goods by instalments, which shall be invoiced and paid for separately. Each instalment shall constitute a separate contract. Any delay in delivery or defect in an instalment shall not entitle the Customer to cancel the Order or any other instalment.
- 3.7 If the Supplier is responsible for obtaining licences, particularly but not limited to the export/shipment/import of goods, delivery of the Goods shall be subject to the reservation that there are no impediments to the Supplier obtaining such licence due to national or international regulations, particularly export control regulations, embargo or other sanctions, or any other event or circumstance beyond the Supplier's reasonable control.
- 3.8 The Customer shall provide the Supplier with all information and documents required for the export/shipment/import of goods and warrants that all such information and documents are true and correct.
- 3.9 Notwithstanding any other rights the Supplier may have under this Contract, once an Order Confirmation has been provided, any return or cancellation of the Goods will require payment by the Customer to the Supplier of a restocking fee. The Customer acknowledges that such amount is a genuine pre-estimate of loss that would be suffered or incurred by the Supplier as result of the Customer's return or cancellation of the Goods.

4. Quality of Goods

- 4.1 The Supplier warrants that on delivery, and for a period of 12 months from the date of delivery (Warranty Period), the Goods shall:
- (a) conform in all material respects with their description;
 - (b) be free from material Defects in design, material and workmanship (the Warranty).
- 4.2 Subject to clause 4.3, if:
- (a) the Customer gives notice in writing during the Warranty Period, within a reasonable time of discovery that some or all of the Goods do not comply with the Warranty;
 - (b) the Supplier is given a reasonable opportunity of examining such Goods; and
 - (c) the Customer (if asked to do so by the Supplier) returns such Goods to the Supplier's place of business at the Customer's cost for testing, and in the reasonable opinion of the Supplier, the Goods do not comply with the Warranty, the Supplier shall, at its option, repair or replace the Defective Goods, or refund the price of the Defective Goods in full and refund the costs of returning the Goods to the Supplier.

- 4.3 Despite any provision to the contrary, to the maximum extent permitted by law, the Supplier shall not be liable for any Defect in the Goods:
- (a) the Customer makes any further use of such Goods after giving a notice in accordance with clause 4.4.2(a);
 - (b) the Defect arises because the Customer failed to follow the Supplier's instructions as to the storage, installation, commissioning, use or maintenance of the Goods or (if there are none) good trade practice;
 - (c) the Defect arises as a result of the Supplier following any drawing, design or Goods Specification supplied by the Customer;
 - (d) the Customer alters or repairs (or engages a third party to alter or repair) such Goods without the written consent of the Supplier;
 - (e) the Defect arises as a result of fair wear and tear, willful damage, negligence, or abnormal working conditions; or
 - (f) the Customer has failed to make payment in full for the Goods.
- 4.4 Despite anything to the contrary, to the maximum extent permitted by law (including subject to any rights the Customer may have under the ACL), the Supplier's aggregate liability for any fault, defect, error, omission or lack of functionality or suitability with respect to the Goods will be limited to, and must not exceed, the costs it incurs in complying with clause 4.4.2(c).
- 4.5 The following only applies if the Customer is deemed a "consumer" under the Australian Consumer Law, which is Schedule 2 to the Competition and Consumer Act 2010 (Cth) (ACL) and may not apply in the Customer's particular case. The Supplier's goods come with guarantees that cannot be excluded under the ACL. The Customer is entitled to a replacement or refund for a major failure and compensation for any other reasonably foreseeable loss or damage. The Customer is also entitled to have the goods repaired or replaced if the goods fail to be of acceptable quality and the failure does not amount to a major failure. By stating these rights, the Supplier does not vary or extend the remedies otherwise available to the Customer. The contact details of the entity giving this Warranty are specified in clause 17.1(w).
- 4.6 The Supplier's obligations in this clause 4 are in place and exclude to the fullest extent permitted by law any implied warranties and conditions, including any implied warranties of fitness for purpose and merchantability.

5. Title and risk

- 5.1 Risk in the Goods shall pass to the Customer in accordance with the EXW Sydney (Incoterms® 2010), unless otherwise set out in the Order Confirmation.
- 5.2 Title to the Goods shall not pass to the Customer until the earlier of:

- (a) the Supplier receives payment in full (in cleared funds) for the Goods and any other goods that the Supplier has supplied to the Customer, in which case title to the Goods shall pass at the time of payment of all such sums; or
- (b) the Customer resells the Goods, in which case title to the Goods shall pass to the Customer at the time specified in clause 5.4.

5.3 Until title to the Goods has passed to the Customer, the Customer shall:

- (a) store the Goods separately from all other goods held by the Customer so that they remain readily identifiable as the Supplier's property;
- (b) not remove, deface or obscure any identifying mark or packaging on or relating to the Goods;
- (c) maintain the Goods in satisfactory condition and keep them insured against all risks for their full price on the Supplier's behalf from the date of delivery;
- (d) notify the Supplier immediately if it becomes subject to any of the events listed in clause 14.4(b) to 14.4(d).

5.4 Subject to clause 5.5, the Customer may resell or use the Goods in the ordinary course of its business (but not otherwise) before the Supplier receives payment for the Goods. However, if the Customer resells the Goods before that time:

- (a) it does so as principal and not as the Supplier's agent; and
- (b) title to the Goods shall pass from the Supplier to the Customer immediately before the time at which resale by the Customer occurs.

5.5 If before title to the Goods passes to the Customer the Customer becomes subject to any of the events listed in clause 14.4(b) to clause 14.4(d) then, without limiting any other right or remedy the Supplier may have:

- (a) the Customer's right to resell Goods or use them in the ordinary course of its business ceases immediately; and
- (b) the Supplier may at any time:
 - (1) require the Customer to deliver up all Goods in its possession which have not been resold, or irrevocably incorporated into another product; and
 - (2) if the Customer fails to do so promptly, enter any premises of the Customer or of any third party where the Goods are stored in order to recover them, and the Customer grants the Supplier with all the rights, permissions and consents necessary in order to do so.

- 5.6 The terms used in clauses 5.6 to 5.9 are defined in the *Personal Property Securities Act 2009* (Cth) (PPSA). The Customer hereby acknowledges that the Contract constitutes a security agreement which creates a security interest in favour of the Supplier in all goods or services supplied by the Supplier to the Customer (if any) and all after acquired goods and/or services supplied by the Supplier to the Customer (or for the Customer's account) to secure the Customer's payment obligations to the Supplier from time to time and at any time, including future advances. The Customer agrees to grant a "Purchase Money Security Interest" to the Supplier.
- 5.7 The Customer undertakes to:
- (a) sign any further documents and/or provide any further information (which information the Customer warrants to be complete, accurate and up-to-date in all respects) which the Supplier may reasonably require to enable registration of a financing statement or financing change statement on the Personal Property Securities Register (PPSR);
 - (b) not register a financing change statement as defined in section 10 of the PPSA or make a demand to alter the financing statement pursuant to section 178 of the PPSA in respect of the Goods without the prior written consent of the Supplier;
 - (c) give the Supplier not less than 14 days' written notice of any proposed change in the Customer's name and/or any other changes in the Customer's details (including but not limited to changes in the Customer's address, facsimile number, email address, trading name or business practice);
 - (d) pay all costs incurred by the Supplier in registering and maintaining a financing statement (including registering a financing change statement) on the PPSR and/or enforcing or attempting to enforce the security interest created by these Conditions including executing subordination agreements;
 - (e) be responsible for the full costs incurred by the Supplier (including actual legal fees and disbursements on a solicitor and client basis) in obtaining an order pursuant to section 182 of the PPSA;
 - (f) give the Supplier free and immediate access to its premises or places within its control to enable the Supplier to enforce its security interests;
 - (g) procure, immediately upon request by the Supplier from any persons considered by the Supplier to be relevant to its security position, such agreement and waivers as the Supplier may at any time require; and
 - (h) the Customer waives any rights it may have under sections 115 of the PPSA upon enforcement.
- 5.8 Pursuant to section 157 of the PPSA, unless otherwise agreed to in writing by the Supplier, the Customer waives the right to receive the verification statement

in respect of any financing statement or financing change statement relating to the security interest.

- 5.9 The following provisions of the PPSA do not apply – section 95 (notice of removal of accession, to the extent that it otherwise requires Supplier to give a notice to the Customer), section 130 (notice of disposal, to the extent that it otherwise requires Supplier to give a notice to the Customer), section 132(3)(d) (statement of account), section 132(4) (statement of account if no disposal), section 135(1)(a) (notice of retention, to the extent that it otherwise requires Supplier to give notice to the Customer), and section 143 (reinstatement).

6. Supply of Services

- 6.1 The Supplier shall provide the Services to the Customer in accordance with the Service Specification in all material respects.
- 6.2 The Supplier shall use reasonable endeavours to meet any performance dates for the Services but any such dates shall be estimates only and time shall not be of the essence for the performance of the Services.
- 6.3 The Supplier shall have the right to make any changes to the Services which are necessary to comply with any applicable law or safety requirement, or which do not materially affect the nature or quality of the Services, and the Supplier shall notify the Customer in any such event. The Customer acknowledges and agrees that where the Services are varied or changed in accordance with this clause 6.3, and the costs of providing the Services increase, the Customer must pay the Supplier the additional costs and expenses it suffers or incurs as a debt due and immediately payable to the Supplier. This specifically includes any costs incurred by the Supplier in relation to the disposal of Gamma / Radioactive Sources should such items form part of the Order Confirmation.
- 6.4 The Supplier warrants to the Customer that the Services will be provided using reasonable care and skill.

7. Omissions

- 7.1 If within 12 months after completion of the Services, the Customer has notified the Supplier in writing (using the contact details in clause 17.1(w) and at the Customer's cost) of any fault, defect or error in the Services, which is caused by a breach of these Conditions by the Supplier (Omission), along with a description of the relevant Omission, if the Supplier agrees, at its discretion, that there has been an Omission in the Services, the Supplier will at its own cost:
- (a) remedy the Omission;
 - (b) if the Supplier is unable to remedy the Omission, offer the Customer a choice of a credit or a refund with respect to that part of the price applicable to the Omission.

- 7.2 Despite anything to the contrary, to the maximum extent permitted by law (including subject to any rights the Customer may have under the ACL), the Supplier's aggregate liability for any fault, defect, error, omission or lack of functionality or suitability with respect to the Services will be limited to, and must not exceed, the costs it incurs in complying with clause 7.1.
- 7.3 The following only applies if the Customer is deemed a "consumer" under the ACL and may not apply in the Customer's particular case. The Supplier's services come with guarantees that cannot be excluded under the ACL. For major failures with the service, the Customer is entitled to cancel its service contract with the Supplier; and to a refund for the unused portion, or to compensation for its reduced value. The Customer is entitled to be compensated for any other reasonably foreseeable loss or damage. If the failure does not amount to a major failure, it is entitled to have problems with the service rectified in a reasonable time and, if this is not done, to cancel its contract and obtain a refund for the unused portion of the contract.

8 Customer's obligations

8.1 The Customer shall:

- (a) pay the price for the Goods and Services in accordance with the payment terms agreed between the Parties (which may be set out in the Supplier's customer relationship management system);
- (b) ensure that the terms of the Order and (if submitted by the Customer) the Goods Specification are complete and accurate;
- (c) co-operate with the Supplier in all matters relating to the Services;
- (d) provide the Supplier, its employees, agents, consultants and subcontractors, with unfettered access to the Customer's premises, office accommodation and other facilities as reasonably required by the Supplier to provide the Goods or Services, free from harm or risk to health or safety;
- (e) provide the Supplier with such information and materials and assistance as the Supplier may reasonably require to supply the Goods or Services, and ensure that such information is accurate in all material respects;
- (f) prepare the Customer's premises for the supply of the Goods or Services;
- (g) obtain and maintain all necessary licences, permissions and consents which may be required for the Services before the date on which the Services are to start; and
- (h) keep and maintain all materials, equipment, documents and other property of the Supplier (Supplier Materials) at the Customer's premises in safe custody at its own risk, maintain the Supplier Materials in good condition until returned to the Supplier, and not dispose of or use the Supplier Materials other than in accordance with the Supplier's written instructions or authorisation.

- 8.2 If the Supplier's performance of any of its obligations in respect of the Services is prevented or delayed by any act or omission by the Customer or failure by the Customer to perform any relevant obligation (Customer Default):
- (a) the Supplier shall without limiting its other rights or remedies have the right to suspend performance of the Services until the Customer remedies the Customer Default, and to rely on the Customer Default to relieve it from the performance of any of its obligations to the extent the Customer Default prevents or delays the Supplier's performance of any of its obligations;
 - (b) the Supplier shall not be liable for any costs or losses sustained or incurred by the Customer arising directly or indirectly from the Customer Default; and
 - (c) the Customer shall reimburse the Supplier on written demand for any costs or losses sustained or incurred by the Supplier arising directly or indirectly from the Customer Default.
- 8.3 In instances where the Gamma / Radioactive Sources, the Supplier may be able to provide the Customer with means of disposal of said sources, however the Customer will be liable for any such costs of doing so.

9. Charges and payment

- 9.1 The price for Goods shall be the price set out in the Order Confirmation. The price of the Goods is exclusive of all costs and charges of packaging, insurance, transport of the Goods.
- 9.2 The charges for Services shall be on a time and materials basis as agreed between the Customer and Supplier prior to any Services being provided:
- (a) the charges shall be calculated in accordance with the Supplier's standard daily fee rates, as set out in the Order Confirmation;
 - (b) the number of hours in one working day shall be agreed between the Customer and Supplier;
 - (c) if the number of agreed hours is exceeded, the Supplier shall be entitled to charge overtime rates on a pro-rata basis for each part day or for any time worked by individuals whom it engages on the Services outside the hours referred to in clause 9.2(b) as follows:
 - (1) an additional 33% on the standard daily fee rate for work carried out on week days;
 - (2) an additional 50% on the standard daily fee rate for work carried out on a Saturday;

- (3) an additional 100% on the standard daily fee rate for work carried out on a Sunday.
- (d) the Supplier shall be entitled to charge the Customer for any expenses reasonably incurred by the individuals whom the Supplier engages in connection with the Services including, but not limited to, travelling expenses, hotel costs, subsistence and any associated expenses, and for the cost of services provided by third parties and required by the Supplier for the performance of the Services, and for the cost of any materials.

9.3 The Supplier reserves the right to:

- (a) increase its standard daily fee rates for the charges for the Services, provided that such charges cannot be increased more than once in any 12 month period. The Supplier will give the Customer written notice of any such increase 2 months before the proposed date of the increase. If such increase is not acceptable to the Customer, it shall notify the Supplier in writing within 2 weeks of the date of the Supplier's notice and the Supplier shall have the right without limiting its other rights or remedies to terminate the Contract by giving 8 weeks written notice to the Customer; and
- (b) increase the price of the Goods, by giving notice to the Customer at any time before delivery, to reflect any increase in the cost of the Goods to the Supplier that is due to:
 - (1) any factor beyond the control of the Supplier (including foreign exchange fluctuations, increases in taxes and duties, and increases in labour, materials and other manufacturing costs);
 - (2) any request by the Customer to change the delivery date(s), quantities or types of Goods ordered, or the Goods Specification; or
 - (3) any delay caused by any instructions of the Customer in respect of the Goods or failure of the Customer to give the Supplier adequate or accurate information or instructions in respect of the Goods.

9.4 In respect of Goods and/or Services, the Supplier shall invoice the Customer on or at any time after completion of delivery or the Goods and/or Services.

9.5 The Customer shall pay each invoice submitted by the Supplier:

- (a) within 30 days of the date of the invoice;
- (b) in full and in cleared funds to a bank account nominated in writing by the Supplier; and
- (c) time for payment shall be of the essence of the Contract.

- 9.6 The price for the Goods and/or charges for the Services shall be inclusive of all taxes in connection with the supply of the Goods and/or Services imposed in the country of Supplier (excluding GST (or any sales or value added tax or goods and services tax or the like), which will be added to the price for the Goods or charges for the Services). The Customer shall be responsible for all taxes in connection with the supply of Goods and/or Services imposed in the country of the Customer (if different country from that of Supplier) and shall reimburse Supplier accordingly.
- 9.7 The price for the Goods and/or charges for the Services will be adjusted in respect of any increase in the cost to Supplier as a result of any variation in exchange rates or any change in law between the date of Supplier's offer and the date of supply. For the avoidance of doubt, the Supplier may vary any price in the Quotation if the price is based on an exchange rate and the exchange rate differs by more than 3% from the date of the Quotation and date of Order Confirmation, in which case the Supplier will base the price on the exchange rate on the date of the Order Confirmation. In this clause "change in law" includes any amendment or repeal of any statute, subordinate legislation, any change in interpretation of any law whether under statute or otherwise and any new statute or subordinate legislation including in respect of any new tax, duty or other impost or change in the rate of any tax, duty or other impost.
- 9.8 If the Customer fails to make any payment due to the Supplier under the Contract by the due date for payment, then the Customer shall pay interest on the overdue amount. The interest rate shall be the rate of overdraft facilities for that amount of moneys determined by the Australian and New Zealand Banking Group Limited on the date the moneys become outstanding plus 3%. Such interest shall accrue on a daily basis from the due date until actual payment of the overdue amount, whether before or after judgment. The Customer shall pay the interest together with the overdue amount.
- 9.9 The Customer shall pay all amounts due under the Contract in full without any set-off, counterclaim, deduction or withholding except as required by law. The Supplier may, without limiting its other rights or remedies, set off any amount owing to it by the Customer against any amount payable by the Supplier to the Customer.

10. Completion

- 10.1 The Supplier shall be entitled to a reasonable extension of time for the performance of its obligations under the Contract in the following circumstances:
- (a) any change or variation to or in the Goods or Services to be supplied under the Contract;
 - (b) change in law or any delays of any government or statutory authorities;
 - (c) any act or omission of the Customer or any of its contractors, consultants, representatives or agents;

- (d) any Force Majeure Event, with the reasonable extension of time being the duration of the Force Majeure Event and its impact;
- (e) any suspension by the Supplier under clause 14.4;
- (f) any obstruction or site conditions that could not have been expected by an experienced contractor performing the Services;
- (g) any unusual weather conditions affecting the performance the Services;
or
- (h) any delay in the performance of the Services due to the Customer's failure to comply with clause 8.1.

10.2 The Customer shall pay the Supplier the reasonable costs incurred by the Supplier as a result of the matters referred to in clauses 10.1(a), 10.1(b), 10.1(c), 10.1(e), 10.1(f), 10.1(g) and 10.1(h).

10.3 In the event the Customer fails to make payment when due, the Supplier may suspend the performance of the Contract until such time as payment is made and the Supplier shall be entitled to a corresponding extension of time for performance.

11. Variations

11.1 The Customer may not vary the Goods and/or Services and the Supplier shall not be obliged to carry out any variation, unless the Supplier agrees to such variation in writing. Unless otherwise agreed, any variation to the Goods and/or the Services shall be valued in accordance with any applicable rates or prices set out in the Contract or, if these are not applicable to the work the subject of the variation, the rates or prices usually charged for similar work as advised by the Supplier.

11.2 Where any of the matters referred to in clauses 10.1(b), 10.1(c), 10.1(e), 10.1(f), 10.1(g) and 10.1(h) reasonably require a change in the Goods or Services to be supplied or the conditions in which the Supplier is to perform its obligations under the Contract then the Supplier shall be entitled to vary the Goods or Services in such manner as the Supplier reasonably considers necessary. The value of such variation shall be calculated in accordance with clause 11.1.

12. Intellectual Property Rights

12.1 All Intellectual Property Rights in or arising out of or in connection with the Contract and/or the Goods or Services, including in any designs drawings, software, studies, methods of working and technical documentation provided by the Supplier under the Contract or associated with the Services ("Technical Information") and Pre-existing Materials shall be owned by the Supplier.

- 12.2 The Customer acknowledges that, in respect of any third party Intellectual Property Rights in the Technical Information, the Customer's use of any such Intellectual Property Rights is conditional on the Supplier obtaining a written licence from the relevant licensor on such terms as will entitle the Supplier to license such rights to the Customer.
- 12.3 Technical information must be kept confidential by the Customer, its employees, agents or contractors, must not be copied, modified or disclosed by any of them. Any breach of this obligation by employees, agents or contractors of the Customer is deemed to be a breach by the Customer.
- 12.4 The Supplier grants to the Customer a revocable, non-exclusive and non-transferable right to use the Technical Information provided by Supplier for the purposes of operation and maintenance of the Goods and/or taking the benefit of the Services and for no other purpose.
- 12.5 The Supplier shall defend the Customer against any claims for infringement of third party's Intellectual Property Rights arising out of the use of the Technical Information by the Customer under the Contract provided that: (i) the Technical Information has been used in conformity with all applicable licences and the technical requirements of the Contract, (ii) Supplier is notified promptly in writing by the Customer of the assertion of any claim of infringement or actions threatened to be brought, (iii) Supplier is given the authority, information and assistance necessary for the defence of said claims and (iv) the Customer has not made any admission with respect to the infringement of third party's Intellectual Property Rights which might be prejudicial to the defence of such claim.

This clause 12.5 states the entire liability of the Supplier with respect to third parties' Intellectual Property Rights arising out of the use of the Technical Information by the Customer under the Contract.

- 12.6 The Customer grants the Supplier a perpetual, royalty-free, world-wide, unconditional, transferable and irrevocable licence to use, develop, adapt and modify (Use) all intellectual property owned by, or licensed to, the Customer. The Customer must ensure that any such Use does not infringe any Intellectual Property Rights of any person.
- 12.7 If the Customer or any of its employees, agents or contractors have any Moral Rights in any material provided, used or prepared in connection with this Contract, the Customer must (and must ensure its employees, agents or contractors) consent to the use of infringement of those Moral Rights.

13. Limitation of liability

- 13.1 Notwithstanding any other provision of the Contract, to the maximum extent permitted by law, the liability of the Supplier to the Customer, whether arising under or in connection with the Contract or the performance or non-performance thereof or anything incidental thereto, and whether for breach or repudiation of contract, by way of indemnity, by statute (to the extent that it is possible to exclude and limit such liability), in tort (arising in respect of negligence, bailment or otherwise), or on any other basis in law or equity is hereby limited and excluded as follows:

- (a) the Supplier shall have no liability whatsoever to the Customer for loss of use, production, profit, revenue, business, data, contract or anticipated benefit or saving, or for any delay (except for liquidated delay damages, if any) or for any financing costs or increase in operating costs or any economic loss or financial loss or cost (whether similar to the foregoing or not, and whether suffered by the Customer itself or a result of a claim by a third party) or for any special, indirect or consequential loss or damage;
- (b) the total aggregate liability of the Supplier to the Customer is limited to the amount equal to the price paid by the Customer under the Contract for the Goods and/or Services from which the claim arises.

13.2 Despite anything to the contrary, to the maximum extent permitted by law, the Supplier will have no liability and the Customer releases and discharges the Supplier from all liability, arising from or in connection with any:

- (a) loss of, or damage to, the Goods or Services (or any item used in the provision of the Goods or Services), or any injury or loss to any person;
- (b) failure or delay in providing the Goods or Services; or
- (c) breach of this Contract or any law,

where caused or contributed to by any:

- (d) event or circumstance beyond the Supplier's reasonable control; or
- (e) act or omission of the Supplier or its agents, employees or contractors,

and, in any event, any defect, error, omission or lack of functionality or suitability (or the absence of, or reduction in, any anticipated result, outcome or benefit) with respect to the Goods or Services.

13.3 Despite anything to the contrary, to the maximum extent permitted by law, the Customer indemnifies the Supplier for and against all liability arising from or in connection with any default or wrongful act or omission by the Customer or its agents, employees or contractors.

13.4 Despite anything to the contrary, to the maximum extent permitted by law, the Supplier's liability under or in connection with this Contract will be reduced proportionately to represent the share of responsibility that the Supplier has for the loss, damage, injury, death, claim, demand, action, suit, proceeding, cost or expense according to the extent to which the Supplier's breach of any provision of this Contract or the Supplier's negligent or wrongful acts or omissions caused or contributed to the loss, damage, injury, death, claim, demand, action, suit, proceeding, cost or expense in the course of performing its obligations under this Contract.

13.5 This clause 13 shall survive termination of the Contract.

14. Termination

14.1 Without limiting its other rights or remedies either party may terminate the Contract by giving the other party not less than 3 months' written notice.

14.2 Without limiting its other rights or remedies, the Supplier may terminate the Contract with immediate effect by giving written notice to the Customer if the Customer commits a material breach of its obligations under this Contract and (if such breach is remediable) fails to remedy that breach within 7 days after receipt of notice in writing to do so.

14.3 Without limiting its other rights or remedies, the Customer may terminate the Contract on 30 days' notice by giving such notice in writing to the Supplier, if the Supplier commits a material breach of its obligations under this Contract and (if such breach is remediable) fails to remedy that breach within 21 days after receipt of notice in writing to do so.

14.4 Without limiting its other rights or remedies, the Supplier may, at its discretion; terminate the Contract; suspend the supply of Services or all further deliveries of Goods under the Contract or any other contract between the Customer and the Supplier with immediate effect by giving written notice to the Customer if:

- (a) the Customer fails to pay any amount due under this Contract on the due date for payment.
- (b) the Customer takes any step or action in connection with its entering administration, provisional liquidation or any composition or arrangement with its creditors (other than in relation to a solvent restructuring), being wound up (whether voluntarily or by order of the court, unless for the purpose of a solvent restructuring), having a receiver appointed to any of its assets or ceasing to carry on business or, if the step or action is taken in another jurisdiction, in connection with any analogous procedure in the relevant jurisdiction;
- (c) the Customer suspends, or threatens to suspend, or ceases or threatens to cease to carry on all or a substantial part of its business; or
- (d) the Customer's financial position deteriorates to such an extent that in the Supplier's opinion the Customer's capability to adequately fulfil its obligations under the Contract has been placed in jeopardy.

14.5 On termination of the Contract for any reason:

- (a) the Customer shall immediately pay to the Supplier all of the Supplier's outstanding unpaid invoices and interest and, in respect of Services supplied but for which no invoice has yet been submitted, the Supplier shall submit an invoice, which shall be payable by the Customer immediately on receipt;

- (b) the Customer shall return all of the Supplier Materials and any Deliverables which have not been fully paid for. If the Customer fails to do so, then the Supplier may enter the Customer's premises and take possession of them. Until they have been returned, the Customer shall be solely responsible for their safe keeping and will not use them for any purpose not connected with this Contract;
- (c) the accrued rights and remedies of the parties as at termination shall not be affected, including the right to claim damages in respect of any breach of the Contract which existed at or before the date of termination or expiry;
- (d) immediately return to the Supplier all property, including confidential information and intellectual property belonging to the Supplier or its agents, employees or contractors, in the Customer's (or its agents, employees or contractors) possession; and
- (e) not disparage or otherwise make any unfavourable statements or comments regarding the Supplier (or its agents, employees or contractors) regarding the Supplier (or its agents, employees or contractors) either directly or by implication, verbally or in writing

14.6 Clause 14.5 shall survive termination of the Contract.

15 Force Majeure Event

15.1 For the purposes of this Contract, Force Majeure Event means an event beyond the reasonable control of a Party, including, but not limited to, any one, or combination, of the following events or circumstances:

- (a) fire, flood, storm, hurricane, typhoon, earthquake, cyclone, landslide, tsunami, mudslide or other catastrophic natural disaster;
- (b) strikes, lock-outs or other industrial disputes;
- (c) civil riot, civil rebellion, civil commotion, revolution, terrorism, insurrection, militarily usurped power, act of sabotage, act of a public enemy, war (whether declared or not) or other like hostilities;
- (d) failure of a utility service or transport network, accident, break-down of plant or machinery, energy shortage;
- (e) default of personnel that prevent delivery of the Goods and Services within the agreed upon time schedule;
- (f) ionising radiation, contamination by radioactivity, nuclear, chemical or biological contamination;
- (g) compliance with any law or governmental order, rule, regulation or direction, difficulties in obtaining authorisations, in particular import and export licenses; or
- (h) disease, plague, epidemic, pandemic, government sanctioned shutdown or quarantine or global economic downturn.

15.2 The Supplier will not be in breach of, or otherwise liable to, the Customer for any delay or failure to perform its obligations under this Contract if and to the extent that the delay or failure to perform is due to a Force Majeure Event.

15.3 If the Force Majeure Event prevents the Supplier from providing any of the Services and/or Goods, or from performing all or a part of its obligations under this Contract, for more than 12 weeks, the Supplier will, without limiting its other rights or remedies, have the right to terminate this Contract immediately by giving written notice to the Customer.

16 General

16.1 Assignment and other dealings

- (a) The Supplier may at any time assign, transfer, mortgage, charge, subcontract or deal in any other manner with all or any of its rights under the Contract and may subcontract or delegate in any manner any or all of its obligations under the Contract to any third party.
- (b) The Customer shall not, without the prior written consent of the Supplier, assign, transfer, charge, subcontract, declare a trust over or deal in any other manner with all or any of its rights or obligations under the Contract.

16.2 Notices

- (a) Any notice or other communication given to a party under or in connection with this Contract shall be in writing, addressed to that party at its registered office (if it is a company) or its principal place of business (in any other case).
- (b) The provisions of this clause shall not apply to the service of any proceedings or other documents in any legal action.

16.3 Severance

If any provision or part-provision of the Contract is or becomes invalid, illegal or unenforceable, it shall be deemed modified to the minimum extent necessary to make it legal and enforceable. If such modification is not possible, the relevant provision or part-provision shall be deemed deleted.

16.4 Waiver

A waiver of any right under the Contract or law is only effective if it is in writing and shall not be deemed to be a waiver of any subsequent breach or default.

16.5 No partnership or agency

Nothing in the Contract is intended to, or shall be deemed to, establish any partnership or joint venture between any of the parties. Neither party shall have authority to act as agent for, or to bind, the other party in any way.

16.6 Third parties

A person who is not a party to the Contract shall not have any rights to enforce its terms.

16.7 Confidentiality

Both parties will (and will ensure their agents, employees or contractors) keep confidential, and not use or permit any unauthorized use of any Confidential Information of the other party without its prior written consent, except where the disclosure is required by law.

16.8 Powers, rights, remedies

Except as provided in this Contract or permitted by law, the powers, rights and remedies of a party under this Contract are cumulative and in addition to any other powers, rights and remedies the party may have.

16.9 Further assurance

Each party must promptly do all things and execute all further instruments necessary to give full force and effect to this Contract and their obligations under it.

16.10 Dispute resolution

Any party may not commence court proceedings relating to any dispute, controversy or claim arising from, or in connection with, this Contract (including any question regarding its existence, validity or termination) without the senior representatives of the parties first meeting to seek (in good faith) to resolve the dispute.

16.11 Governing law

This Contract and any dispute or claim arising out of or in connection with it or its subject matter or formation (including non-contractual disputes or claims) shall be governed by and construed in accordance with the law of New South Wales, Australia. The parties agree that the United Nations Convention on Contracts for the International Sale of Goods does not apply to the supply of Goods under the Contract.

16.12 Jurisdiction

Each party irrevocably agrees that the courts of New South Wales shall have exclusive jurisdiction to settle any dispute or claim arising out of or in connection with this Contract or its subject matter or formation (including non-contractual disputes or claims).

17. Interpretation

17.1 In these Conditions, the following definitions apply:

- (a) **Business Day:** a day other than a Saturday, Sunday or public holiday in New South Wales (Australia).

- (b) Commencement Date: has the meaning set out in clause 1.1.2.
- (c) Confidential Information: means information which is disclosed to a receiving party in connection with this Agreement at any time; is prepared or produced under or in connection with this Agreement at any time (including any Quotation or Order Confirmation); relates to the disclosing party's business, assets or affairs; or relates to the subject matter of, the terms of and/or any transactions contemplated by this Agreement, whether or not such information or documentation is reduced to a tangible form or marked in writing as "confidential", and howsoever the receiving party receives that information.
- (d) Conditions: these terms and conditions as amended from time to time in accordance with clause 1.5.
- (e) Contract: the contract between the Supplier and the Customer for the supply of Goods and/or Services in accordance with these Conditions and includes the Order Confirmation and these Conditions, and all documents referred to or attached to in these documents.
- (f) Customer: the person or firm who purchases the Goods and/or Services from the Supplier as specified in the Order Confirmation.
- (g) Defect: means non-compliance with this Contract as a result of the Supplier's default.
- (h) Deliverables: the deliverables set out in the Order (if any).
- (i) Delivery Location: has the meaning set out in clause 13.1
- (j) Force Majeure Event: has the meaning given to it in clause 15.
- (k) Goods: the goods (or any part of them) set out in the Order Confirmation.
- (l) Goods Specification: any specification for the Goods, including any relevant plans or drawings that are agreed in writing by the Customer and the Supplier as set out in the Order Confirmation.
- (m) Incoterm means Incoterm® 2010 as published by the International Chamber of Commerce.
- (n) Intellectual Property Rights: patents, rights to inventions, copyright and related rights, trade marks, business names and domain names, rights in get-up, goodwill and the right to sue for passing off, rights in designs, database rights, rights to use, and protect the confidentiality of, confidential information (including know-how), and all other intellectual property rights, in each case whether registered or unregistered and including all applications and rights to apply for and be granted, renewals or extensions of, and rights to claim priority from, such rights and all similar or equivalent rights or forms

of protection which subsist or will subsist now or in the future in any part of the world.

- (o) Moral Rights: has the meaning given in the *Copyright Act 1968* (Cth).
- (p) Order: the Customer's order for the supply of Goods and/or Services, as set out in the Customer's purchase order form or the Customer's written acceptance of the Supplier's Quotation, as the case may be.
- (q) Order Confirmation: the Supplier's order confirmation issued to the Customer.
- (r) Pre-existing Materials: all Intellectual Property Rights, documents, information and materials owned or provided by the Supplier relating to the Goods and/or Services which existed prior to the commencement of this Contract, including computer programs, data, reports and specifications.
- (s) Quotation: the Suppliers quotation issued to the Customer.
- (t) Services: the services, including the Deliverables, supplied by the Supplier to the Customer as set out in the Service Specification below.
- (u) Service Specification: the description or specification for the Services provided by the Supplier to the Customer as set out in the Order Confirmation.
- (v) Special Terms: has the meaning set out in clause 11.7.
- (w) Supplier: ENDRESS & HAUSER AUSTRALIA PTY LTD ABN 47 095 963 134, Level 1, 16 Giffnock Avenue, North Ryde, NSW, 02 8877 7000, info.au.sc@endress.com.
- (x) Supplier Materials: has the meaning set out in clause 8.1(h).
- (y) Technical Information: has the meaning set out in clause 12.1.
- (z) Use: has the meaning set out in clause 12.6.
- (aa) Warranty: has the meaning set out in clause 4.4.1.