

EVONIK AUSTRALIA PTY LTD

General Terms & Conditions of Trade

1. **Definitions**
In these Terms:
"ACL" means the *Australian Consumer Law* contained in Schedule 2 of the *Competition and Consumer Act 2010* (Cth) and its associated Regulations as amended;
"Agreement" means any agreement for the provision of Goods or Services by Evonik to the Customer;
"Consumer" is as defined in the ACL and in determining if the Customer is a consumer, the determination is made if Customer is a consumer under the Agreement;
"Customer" means the person, jointly and severally if more than one, acquiring Goods or Services from Evonik;
"Evonik" means Evonik Australia Pty Ltd (ABN 31 145 739 608) of 1 Ricketts Road Mt Waverley 3149 Australia;
"Goods" means goods supplied by Evonik to the Customer;
"GST" means the Goods and Services tax as defined in *A New Tax System (Goods and Services Tax) Act 1999* (Cth) and its associated Regulations as amended;
"In writing" means in text form (including email, facsimile, computer-generated letters and telegrams);
"PPSA" means the *Personal Property Securities Act 2009* (Cth) and its associated Regulations as amended;
"Terms" means these Terms and Conditions of Trade;
"Services" means services supplied by Evonik to the Customer; and
"Written form" means a hand-signed document.
2. **Basis of Agreement**
 - 2.1 Unless otherwise agreed by Evonik in written form, the Terms apply exclusively to every Agreement and cannot be varied or replaced by any other terms, including the Customer's terms and conditions of purchase (if any).
 - 2.2 Any quotation provided by Evonik to the Customer for the proposed supply of Goods or Services is:
 - (a) valid for 30 days unless otherwise agreed;
 - (b) an invitation to treat only; and
 - (c) only valid if in writing.
 - 2.3 The Terms may include additional terms in Evonik's quotation, which are not inconsistent with the Terms.
 - 2.4 An Agreement is accepted by Evonik when Evonik accepts in writing an offer from the Customer or provides the Customer with the Good or Services.
 - 2.5 Evonik has absolute discretion to refuse to accept any offer.
 - 2.6 The Customer must provide Evonik with its specific requirements, if any, in relation to the Goods.
 - 2.7 Evonik may vary or amend these Terms by notice in written form to the Customer at any time. Any variations or amendments will apply to orders placed after the notice date.
3. **Pricing**
 - 3.1 Prices quoted for the supply of Goods or Services excludes GST and any other taxes or duties imposed on or in relation to the Goods or Services.
 - 3.2 If the Customer requests any variation to the Agreement, Evonik may increase the price to account for the variation.
 - 3.3 Where there is any change in the costs incurred by Evonik in relation to Goods or Services, Evonik may vary its price to take account of any such change, by notifying the Customer.
4. **Payment**
 - 4.1 Unless otherwise agreed in writing:
 - (a) Subject to 4.1(b), full payment for the Goods or Services must be made within 30 days of the date of Evonik's invoice.
 - (b) Evonik reserves the right to require payment in full on delivery of the Goods.
 - 4.2 Payment by cheque is not deemed made until the proceeds of the cheque have cleared.
 - 4.3 Payment terms may be revoked or amended at Evonik's sole discretion immediately upon giving the Customer notice in written form.
 - 4.4 The time for payment is of the essence.
5. **Payment Default**
 - 5.1 If the Customer defaults in payment by the due date of any amount payable to Evonik, then all money which would become payable by the Customer to Evonik at a later date on any account, becomes immediately due and payable without the requirement of any notice to the Customer, and Evonik may, without prejudice to any of its other accrued or contingent right :
 - (a) charge the Customer interest on any sum due at the prevailing rate pursuant to the *Penalty Interest Rates Act 1983* (Vic) plus 2 % for the period from the due date until the date of payment in full;
 - (b) charge the Customer for, and the Customer must indemnify Evonik from, all costs and expenses (including without limitation all legal costs and expenses) incurred by it resulting from the default or in taking action to enforce compliance with the Agreement or to recover any Goods;
 - (c) cease or suspend supply of any further Goods or Services to the Customer;
 - (d) by notice in written form to the Customer, terminate any uncompleted contract with the Customer.
 - 5.2 Clauses 5.1(c) and 5.1(d) may also be relied upon, at Evonik's option:
 - (a) where the Customer is a natural person and becomes bankrupt or enters into any scheme of arrangement or any assignment or composition with or for the benefit of his or her creditors or any class of his or her creditors generally; or
 - (b) where the Customer is a corporation and, it enters into any scheme of arrangement or any assignment or composition with or for the benefit of its creditors or any class of its creditors generally, or has a liquidator, administrator, receiver or manager or similar functionary appointed in respect of its assets, or any action is taken for, or with the view to, the liquidation (including provisional liquidation), winding up or dissolution without winding up of the Customer.
6. **Passing of Property**

- 6.1 Until Evonik receives full payment in cleared funds for all Goods supplied by it to the Customer, as well as all other amounts owing to Evonik by the Customer:
- (a) title and property in all Goods remain vested in Evonik and does not pass to the Customer;
 - (b) the Customer must hold the Goods as fiduciary bailee and agent for Evonik;
 - (c) the Customer must keep the Goods separate from its other goods and maintain Evonik's labelling and packaging;
 - (d) the Customer must hold the proceeds of sale of the Goods on trust for Evonik in a separate account with a bank to whom the Customer has not given security however failure to do so will not affect the Customer's obligation as trustee;
 - (e) in addition to its rights under the PPSA, Evonik may without notice, enter any premises where it suspects the Goods are and remove them, notwithstanding that they may have been attached to other goods not the property of Evonik, and for this purpose the Customer irrevocably licences Evonik to enter such premises and also indemnifies Evonik from and against all costs, claims, demands or actions by any party arising from such action.
- 7. Personal Property Securities Act**
- 7.1 Notwithstanding anything to the contrary contained in these Terms, the PPSA applies to these Terms.
- 7.2 For the purposes of the PPSA:
- (a) terms used in clause 7 that are defined in the PPSA have the same meaning as in the PPSA;
 - (b) these Terms are a security agreement and Evonik has a Purchase Money Security Interest in all present and future Goods supplied by Evonik to the Customer and the proceeds of the Goods;
 - (c) The security interest is a continuing interest irrespective of whether there are monies or obligations owing by the Customer at any particular time; and
 - (d) the Customer must do whatever is necessary in order to give a valid security interest over the Goods which is able to be registered by Evonik on the Personal Property Securities Register.
- 7.3 The security interest arising under this clause 7 attaches to the Goods when the Goods are collected or dispatched from Evonik's premises and not at any later time.
- 7.4 Where permitted by the PPSA, the Customer waives any rights to receive the notifications, verifications, disclosures or other documentation specified under sections 95, 118, 121(4), 130, 132(3)(d), 132(4), 135 and 157 of the PPSA.
- 7.5 Evonik and the Customer agree to contract out of and nothing in the provisions of sections 96, 125, 129, 142 and 143 of the PPSA will apply to these Terms.
- 7.6 To the extent permitted by the PPSA, the Customer agrees that:
- (a) the provisions of Chapter 4 of the PPSA which are for the benefit of the Customer or which place obligations on Evonik will apply only to the extent that they are mandatory or Evonik agrees to their application in written form; and
 - (b) where Evonik has rights in addition to those in Chapter 4 of the PPSA, those rights will continue to apply.
- 7.7 The Customer must immediately upon Evonik's request:
- (a) do all things and execute all documents necessary to give effect to the security interest created under this Agreement; and
 - (b) procure from any person considered by Evonik to be relevant to its security position such agreements and waivers (including as equivalent to those above) as Evonik may at any time require.
- 7.8 Evonik may allocate amounts received from the Customer in any manner Evonik determines, including in any manner required to preserve any Purchase Money Security Interest it has in Goods supplied by Evonik.
- 7.9 For the purposes of section 275(6) of the PPSA, the parties agree and undertake that these Terms and any information pertaining to the sale of Goods and details of the Goods shall be kept confidential at all times. Neither party may disclose any information pertaining to these Terms or the sale of the Goods, except as otherwise required by law or that is already in the public domain.
- 8. Risk and Insurance**
- 8.1 The risk in the Goods and all insurance responsibility for theft, damage or otherwise will pass to the Customer immediately on the Goods being delivered to the Customer or taken from Evonik's premises by the Customer.
- 8.2 The Goods are sold to the Customer on the basis that the Customer has obtained all necessary licenses or permits under all relevant laws and regulations in relation to the Goods.
- 8.3 The Customer assumes all risk and liability for loss, damage or injury to persons or to property of the Customer, or third parties arising out of the use or possession of any of the Goods sold by Evonik, unless recoverable from Evonik on the failure of any statutory guarantee under the ACL.
- 9. Performance of Agreement**
- 9.1 Any period or date for delivery of Goods or performance of Services stated by Evonik is an estimate only and not a contractual commitment.
- 9.2 Evonik will use its reasonable endeavours to meet any estimated dates for delivery of the Goods or performance of the Services but will not be liable for any loss or damage suffered by the Customer or any third party for failure to meet any estimated date.
- 10. Delivery**
- 10.1 Subject to clause 10.5, Evonik will arrange for the delivery of the Goods to the Customer.
- 10.2 Evonik may make part delivery of Goods and Evonik may invoice the Customer for the Goods provided.
- 10.3 The Customer indemnifies Evonik against any loss or damage suffered by Evonik, its sub-contractors or employees as a result of delivery, except where the Customer is a consumer and Evonik has not used due care and skill.
- 10.4 If delivery is attempted and is unable to be completed, the Customer is deemed to have taken delivery of the Goods. The Customer is liable for storage charges payable monthly on demand.
- 10.5 If agreed that the Customer will collect the Goods:
- (a) the Customer must collect the Goods within 7 days of being advised they are ready;

- (b) if the Customer does not collect the Goods within this time, the Customer is deemed to have taken delivery of the Goods and is liable for storage charges payable monthly on demand; and
- (c) the Customer, unless agreed otherwise by Evonik in writing, will be responsible for all costs associated with the collection and transport of the Goods.

11. Warranty and Liability

- 11.1 Except as the Terms specifically state, or as contained in any express warranty provided in relation to the Goods or Services, the Agreement does not include by implication any other term, condition or warranty in respect of the quality, merchantability, acceptability, fitness for purpose, condition, description, assembly, manufacture, design or performance of the Goods or Services or any contractual remedy for their failure.
- 11.2 In any event a warranty does not apply to Goods rendered defective as a result of accident, storage by the Customer in an unsuitable environment or beyond the "use by date", negligent use, tampering, improper handling, use, operation, or storage, or due to any other causes outside of Evonik's control.
- 11.3 If the Customer is a consumer nothing in these Terms restricts, limits or modifies the Customer's rights or remedies against Evonik for failure of a statutory guarantee under the ACL.
- 11.4 If the Customer on-supplies the Goods to a consumer and:
- (a) the Goods are not of a kind ordinarily acquired for personal, domestic or household use or consumption, then the amount specified in section 276A(1) of the ACL is the absolute limit of Evonik's liability to the Customer; or
 - (b) the Goods are of a kind ordinarily acquired for personal, domestic or household use or consumption, payment of any amount required under section 274 of the ACL is the absolute limit of Evonik's liability to the Customer;
- howsoever arising under or in connection with the sale, installation, use of, storage or any other dealings with the Goods by the Customer or any third party.
- 11.5 If clause 11.3 or 11.4 does not apply, then other than as stated in the Terms or any written warranty statement Evonik is not liable to the Customer in any way arising under or in connection with the sale, use of, storage or any other dealings with the Goods by the Customer or any third party.
- 11.6 In any event, the maximum liability that Evonik will accept is the refund of the price of the Goods or Services, or the replacement of the Goods or the re-provision of the Services, at Evonik's sole discretion..
- 11.7 Evonik is not liable for any indirect or consequential losses or expenses suffered by the Customer or any third party, howsoever caused, including but not limited to loss of turnover, profits, business or goodwill or any liability to any other party, except to the extent of any liability imposed by the ACL.
- 11.8 The Customer acknowledges that:
- (a) it has not relied on any Service involving skill and judgement, or on any advice, recommendation, information or assistance provided by Evonik in relation to the Goods or their use or application.
 - (b) it has not made known, either expressly or by implication, to Evonik any purpose for which it requires the Goods or Services and it has the

sole responsibility of satisfying itself that the Goods or Services are suitable for the use of the Customer.

- 11.9 Nothing in the Terms is to be interpreted as excluding, restricting or modifying or having the effect of excluding, restricting or modifying the application of any State or Federal legislation applicable to the sale of Goods which cannot be excluded, restricted or modified.

12. Cancellation

- 12.1 If Evonik is unable to deliver or provide the Goods or Services, then it may cancel the Customer's order (even if it has been accepted) by notice in written form to the Customer.
- 12.2 No purported cancellation or suspension of an order or any part of it by the Customer is binding on Evonik once the order has been accepted.

13. Shortages and Exchanges

- 13.1 Subject to clause 13.2 and 13.5, Evonik will not be liable for any shortages, damage or non-compliance with the specifications in the Agreement unless the Customer notifies Evonik with full details and description within 10 days of delivery otherwise the Customer is deemed to have accepted the Goods.
- 13.2 When any shortages, claim for damaged Goods or non-compliance with the Agreement specifications is accepted by Evonik, Evonik may, at its option, replace the Goods, or refund the price of the Goods.
- 13.3 Subject to clause 13.4, Evonik will not under any circumstances accept Goods for return that:
- (a) have been specifically produced, imported or acquired to fulfil the Agreement;
 - (b) are discontinued Goods or no longer stocked by Evonik;
 - (c) have been altered in any way;
 - (d) have been used or have been stored improperly or are out of "use by date"; or
 - (e) are not in their original condition and packaging, if applicable.
- 13.4 If Goods are accepted for return by Evonik, the Customer will receive a credit for the returned Goods equal to the price charged by Evonik less a 15% deduction for handling and restocking charges, of which deduction will be waived if the return is subject to clause 13.2.
- 13.5 If the Customer is a consumer, nothing in this clause 13 limits any remedy available for a failure of the guarantees in sections 56 and 57 of the ACL.
- ## 14. Force Majeure
- 14.1 Evonik is not liable in any way howsoever arising under the Agreement to the extent that it is prevented from acting by events beyond its reasonable control including, without limitation, industrial disputes, strikes, lockouts, accident, breakdown, import or export restrictions, acts of God, acts or threats of terrorism or war. If an event of force majeure occurs, Evonik may suspend or terminate the Agreement by a notice in written form to the Customer.
- 14.2 Conditions of force majeure shall also apply where our sub-suppliers or associates are affected by any of the above.
- ## 15. Miscellaneous
- 15.1 The law of Victoria from time to time governs the Terms. The parties agree to the non-exclusive jurisdiction of the courts of Victoria, the Federal Court of Australia, and of courts entitled to hear appeals from those Courts.

- 15.2 Notwithstanding clause 15.1, Evonik may elect to bring legal proceedings, including seeking injunctive relief, in any appropriate jurisdiction of its choosing.
- 15.3 If the Customer is outside Australia then the provisions of the *United Nations Convention on Contracts for the International Sales of Goods*, are specifically excluded from these Terms
- 15.4 Evonik's failure to enforce any of these Terms shall not be construed as a waiver of any of Evonik's rights.
- 15.5 If a clause is unenforceable it must be read down to be enforceable or, if it cannot be read down, the term must be severed from the Terms, without affecting the enforceability of the remaining terms.
- 15.6 A notice must be in writing and handed personally or sent by email, facsimile or prepaid mail to the last known address of the addressee. Notices sent by pre-paid post are deemed to be received upon posting. Notices sent by facsimile or email are deemed received on confirmation of successful transmission.
- 15.7 The Customer must comply with the Australian Privacy Principles in connection with any personal information supplied to it in connection with this Agreement.