

# TERMS & CONDITIONS OF TRADE (APPLICABLE FOR AUSTRALIA)

## TURBOSMART PTY LIMITED (ABN 69 081 069 794)

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### 1 Interpretation

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In these Terms and Conditions unless the context otherwise requires:

- (a) **"Applicant"** means the person(s), firm, company, trustee(s), trust, partnership or any entity that applies for credit facilities with us and submits either an Application for Dealer Credit Account or Distributor Credit Account or Prepaid Dealer Account with Us.
- (b) **"Application"** means the document entitled Application for Dealer Credit Account or Distributor Credit Account or Prepaid Dealer Account, as the case may be, issued by Us to the Applicant.
- (c) **"Customer"** means any purchaser of the Goods from Us.
- (d) **"Goods"** means the goods, equipment, products or stock ordered or purchased by You from Us from time to time.
- (e) **"GST"** has the same meaning given to that expression in the GST Law.
- (f) **"GST Law"** means A New Tax System (Goods and Services Tax) Act 1999 as amended.
- (g) **"Primary Payment"** means any payment by You to Us of the price for the Goods or any monies payable by You to Us under these Terms and Conditions.
- (h) **"Services"** means any services to be provided by Us to You as agreed by Us.
- (i) **"Tax Invoice"** means an invoice in the format required by the GST Law and which also shows the amount of GST payable by You in respect of the relevant Primary Payment.
- (j) **"Terms and Conditions"** means these terms and conditions as amended by Us from time to time.
- (k) **"We"** and **"Our"** and **"Us"** and **"Seller"** means Turbosmart Pty Limited (ABN 69 081 069 794) which is the provider of the Goods.
- (l) **"You"** and **"Your"** means You the Applicant, or the Customer, as the case may be.

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### 2 Terms and Conditions of Sale

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All Goods sold by Us to You are sold subject to these Terms and Conditions.

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### 3 Our Quotations

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- 3.1 You acknowledge and accept that the receipt of an order number or an email order confirmation does not constitute the acceptance of an order or confirmation of an offer to sell. Turbosmart reserves the right without prior notification to limit the order quantity on any Goods and/or refuse to service to You. Verification of information may be required prior to the acceptance of any order.
- 3.2 You acknowledge and accept the availability of Goods are subject to change without notice. Turbosmart reserves the right to not accept any order and revoke any stated offer and to correct any errors, inaccuracies or omissions including after an order has been submitted.
- 3.3 All pricing is subject to change at any time upon You receiving notice from Us, however, the price on orders placed by You and accepted by Us prior to the notice of a price change being issued will not alter subject to changes in GST payable, excise, duty and/or any identified or new taxes being payable in relation to the Goods and/or Services ordered.

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### 4 Delivery

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- 4.1 The delivery times made known to You are estimates only and, to the maximum extent permitted by law, We are not liable for late delivery or non-delivery.
- 4.2 We use different couriers to deliver the Goods dependent upon the location and weight of Your order. We reserve the right to use our preferred couriers when shipping the Goods as ordered. Depending on stock availability orders will be dispatched up to three (3) business days after Your order has been received, accepted and payment made by You.
- 4.3 We will endeavour to deliver Your order however there may be times when Goods are unavailable due to raw materials being out of stock or of a deleted line. If You plan to place a large order for Goods then You must place it at least seven (7) days in advance to prevent any unnecessary delays. If we are unable to fill the entire order a Turbosmart representative will contact You accordingly.
- 4.4 To the maximum extent permitted by law, We are not liable for any loss, damage or delay occasioned to You or Your customers arising from late delivery or non-delivery of the Goods.
- 4.5 We may at our option deliver the Goods to You in any number of installments unless otherwise agreed in writing.

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### 5 Loss or Damage in Transit & Risk

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- 5.1 To the maximum extent permitted by law, We are not responsible to You or any person claiming through You for any loss or damage to Goods in transit caused by any event of any kind by any person (whether or not We are legally responsible for the person who caused or contributed to that loss or damage).
- 5.2 We must provide You with such assistance as may be necessary to press claims on couriers so long as You:
  - (a) have notified Us and the carriers in writing immediately after loss or damage is discovered on receipt of Goods; and
  - (b) lodge a claim for compensation on the courier within five (5) days of the date of receipt of the Goods.

- 5.3 Risk in the Goods will pass to You upon delivery (including all risks associated with unloading) of the Goods to You or upon collection of the Goods by You or Your agent or courier as the case may be.

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## **6 Returned Goods**

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- 6.1 Subject to clauses 7 and 8, We are not under any duty to accept Goods returned by You and will do so only on terms to be agreed in writing in each individual case.
- 6.2 If We agree to accept returned Goods from you under clause 6.1, You must return the Goods to Us at Our place of business.

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## **7 Exclusion of Warranties & Limitation of Liability**

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- 7.1 Nothing in this agreement is intended to have the effect of restricting, excluding or modifying the application of any or all of provisions of the Australian Consumer Law in a way that is not permitted by the Australian Consumer law, or any other law, or any law in a way that is not permitted by law.
- 7.2 You acknowledge and accept that the Goods are intended for off road use only. As with any activity involving the racing of motor vehicles there are risks associated with performance modifications. Therefore, to the maximum extent permitted by law, all installation of Goods are at Your own risk and We hold no responsibility either express or implied for any mechanical, electrical or other failure when using after market performance products.
- 7.3 You acknowledge and accept that some of the Goods supplied by Us may only be lawfully used for vehicles for racing purposes and not on road purposes.
- 7.4 All warranties whether express or implied and whether statutory or otherwise with regard to the Goods supplied by Us as to quality, fitness for purpose or any other matter are hereby excluded except in so far as any such warranties are incapable of exclusion at law.
- 7.5 To the maximum extent permitted by law, You acknowledge and accept that Turbosmart will not be liable to you for any consequential damages, damages to property, damages for loss of use, loss of time, loss of profit, loss of income or any other incidental damages.
- 7.6 You acknowledge, accept and take full responsibility to carry out all necessary investigations and research to ensure the Goods meet all necessary legal requirements having regard to your intended use of the Goods.

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## **8 Warranty as to Defects**

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- 8.1 We warrant for a period of twelve (12) months from the date of supply of the Goods and/or Services that if due to the fault of Turbosmart the Goods and/or Services (as the case may be) provided by Us are defective then We will, as determined by Us do one or more of the following:  
The replacement of the Goods, the supply of equivalent Goods, the repair of the Goods, the payment of the cost of replacing the Goods or of acquiring equivalent Goods, or the payment of having the Goods repaired;
- 8.2 You will only be entitled to the benefit of the warranty set out in clause 8, if You have not wholly or partially caused or contributed to the defect to the Goods by the misuse of the Goods or the failure to use the Goods in accordance with any specifications or instructions applicable to the Goods.
- 8.3 The warranty contained in clause 8 is provided by Turbosmart Pty Limited of 32 Milton Street North, Ashfield NSW 2131, Australia, Telephone: 02 9740 2866, Email: sales@turbosmart.com.au
- 8.4 In order for a You to make a claim on the warranty You must within twelve (12) months of delivery of the Goods or Services give written notice to Us at the address specified in clause 8.3 above of the details of any defects in respect thereof. Any Goods referred to in a notice given pursuant to this clause should be left in the state and condition in which they were at the time the issue arose until such time as We or Our duly authorised agent have inspected the Goods with such inspection to be carried out within a reasonable time after service of such notice. If the Goods are not left in the state and condition in which they were at the time the issue arose, so that We or Our duly appointed agent is unable to inspect the Good in the condition it was in when the issue arose, then the warranty contained in clause 8 shall not apply.
- 8.5 You shall be responsible for all expenses associated with making a warranty claim under clause 8 however if the Goods and/or Services are found to be defective due to Our fault then We shall reimburse You for any expenses incurred by You in making a warranty claim upon receiving evidence satisfactory to Turbosmart to support such expenditure.
- 8.6 In accordance with the Australian Consumer Law We makes the following statement:  
"Our goods and services come with guarantees that cannot be excluded under the Australian Consumer Law. For major failures with the service, you are entitled:  
  - to cancel your service contract with us; and
  - to a refund for the unused portion, or to compensation for its reduced value.You are also entitled to choose a refund or replacement for major failures with goods. If a failure with the goods or a service does not amount to a major failure, you are entitled to have the failure rectified in a reasonable time. If this is not done you are entitled to a refund for the goods and to cancel the contract for the service and obtain a refund of any unused portion. You are also entitled to be compensated for any other reasonably foreseeable loss or damage from a failure in the goods or service."
- 8.7 The warranty provided in this clause is in addition to other rights and remedies that may be available under the law.

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## **9 Prices & Payment**

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- 9.1 Unless otherwise stated all prices quoted by Us are net, exclusive of GST.
- 9.2 Prices quoted are those ruling at the date of issue of quotation and are based on rates of freight, insurance, customs duties, exchange, shipping expenses, sorting and stacking charges, cartage, cost of materials and other charges affecting the cost of production on the date is made.
- 9.3 We must issue to You a Tax Invoice in accordance with the GST Law.
- 9.4 In the case of any orders that are placed by You to meet with Your specifications or co-branded with Your name or logo then You must pay for the Goods in the following manner:  
(a) a deposit of 50% of the price of the Goods when You order the Goods; and

- (b) the balance of the price of the Goods prior to the delivery of the Goods to You.
- 9.5 In the case of account customers You must pay for the price of the Goods within thirty (30) days of the date of Our Tax Invoice issued in relation to the relevant Goods, or with our prior agreement 30 days after the end of the month during which Our tax invoice is issued. In the case of any default in payment then any future orders made by You will be subject to the payment of the price of the Goods in advance of delivery.
- 9.6 You acknowledge and accept that You are liable to pay Us the price of all Goods ordered by You at all times.
- 9.7 If You do not pay for the Goods as required in this clause 9, We reserve the right to charge interest on amounts overdue, which interest is calculated daily at the rate of 12% per annum from the date of the outstanding order and/or tax invoice until payment is made.
- 9.8 Payments can be made by You by electronic transfer to Turbosmart's bank account, BPay, company cheque, credit card payments however you acknowledge and accept that surcharges may be payable for any American Express payments and any Visa and Mastercard payments made by credit account customers.

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## **10 Retention of Title**

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- 10.1 Notwithstanding delivery of the Goods to You, until You have effected full payment for the Goods and for any other Goods previously supplied by Us:
- (a) legal title to the Goods will remain with Us;
  - (b) the risk in the Goods will pass to You on delivery to You or to Your agent;
  - (c) the relationship between Us and You will be as fiduciary;
  - (d) You will:
    - (i) hold the Goods as bailee for Us;
    - (ii) keep the Goods separate from other goods; and
    - (iii) label the Goods so that they are identifiable as Our Goods;
  - (e) You are at liberty to sell the Goods, in the ordinary course of Your business, provided that the money resulting from the sale will:
    - (i) be held in a separate account in trust for Us;
    - (ii) not be mingled with any other money;
    - (iii) not be placed into an overdrawn account.
- 10.2 In the event that the Goods are used in any vehicle or other equipment or some other construction or manufacturing process of your own or some third party then You will hold such part of the proceeds of such process as it relates to the Goods for and on behalf of Us. Such part will be deemed equal in dollar terms to the amount owing by You to Us at the time of receipt of such proceeds.
- 10.3 Without limitation to our rights at law or in equity, in the event that You fail to pay Us for the Goods by the due date required for payment in accordance with these Terms and Conditions or Our Tax Invoice then We may, without demand, retake possession of the Goods and may, without notice, sell the Goods on such terms and in such manner as We determine and We will be entitled to deduct all expenses incurred. For the purposes of recovering possession and without limiting the generality of the foregoing, You irrevocably authorise Us and Our servants and agents to enter any premises where the Goods may be stored and to take possession of the Goods.

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## **11 Personal Properties Securities Act (2009) (Cth)**

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- 11.1 In this clause 11:
- (a) "PPSA" means the Personal Properties Securities Act (2009) (Cth) as amended.
  - (b) "PPSA Security Interest" has the meaning given to the term "security interest" in the PPSA.
  - (c) "PPS Register" means the Personal Properties Securities Register established under Section 147 of the PPSA
  - (d) "Financing Statement" has the meaning given to it by the PPSA.
  - (e) "Financing Change Statement" has the meaning given to it by the PPSA
  - (f) "Security Agreement" means the security agreement under the PPSA created between Us and You under the se Terms and Conditions
- 11.2 You acknowledge that these Terms and Conditions constitute a Security Agreement for the purposes of the PPSA and that a PPSA Security Interest exists on all Goods supplied by Us to You pursuant to these Terms and Conditions.
- 11.3 You consent to Us effecting a registration on the PPS Register (in any manner We deem appropriate) in relation to any PPSA Security Interest arising under these Terms and Conditions.
- 11.4 You undertake to do the following:
- (a) Promptly execute all documents and provide all relevant information and cooperate with Us to do any act or thing that We require to ensure that We have a perfected PPSA Security Interest and have priority over other PPSA Security Interests in the Goods including, but not limited to, enabling Us to register a Financing Statement or Financing Change Statement with the PPS Register
  - (b) Indemnify and upon demand reimburse Us for all expenses incurred in registering a Financing Statement or Financing Change Statement on the PPS Register or any release of Our PPSA Security Interest.
  - (c) That until all monies owing to Us are paid in full You must not grant any other PPSA Security Interest in the Goods.
  - (d) Not give to Us a written demand or allow any other person to give to Us a written demand requiring Us to register a Financing Change Statement under the PPSA without Our prior written consent.
  - (e) Not register or permit to be registered a Financing Statement or Financing Change Statement in relation to the Goods in favour of any third party or entity without Our prior written consent.
- 11.5 To the extent that Chapter 4 of the PPSA would otherwise apply to the enforcement by Us of any PPSA Security Interest in the Goods then You agree that, to the extent permitted under the PPSA, the following provisions of the PPSA are excluded and You expressly waive Your rights under each of those provisions of the PPSA:
- (a) Section 95 – Notice of intention of removal of an accession to the extent that section requires Us to give such a notice to You.
  - (b) Section 96 – When a person with an interest in the whole of the Goods may retain an access
  - (c) Section 118 – To receive a notice that We decide to enforce our PPSA Security Interest in accordance with land law.
  - (d) Section 121(4) – To receive a notice of enforcement action against liquid assets.

- (e) Section 125 – Obligation to dispose of or retain collateral.
  - (f) Section 130 – To receive a notice of the disposal of the Goods to the extent that section requires Us to give such a notice to You.
  - (g) Section 132(2) – To receive a statement of account following disposal of the Goods.
  - (h) Section 132(3)(d) – The contents of a statement of account after disposal of the Goods.
  - (i) Section 132(4) – To receive a statement of account if no disposal of the Goods for each six month period.
  - (j) Section 135 – To receive a notice of any proposal of Ours to retain the Goods.
  - (k) Section 142 – To redeem the Goods.
  - (l) Section 143 – To reinstate the Security Agreement.
  - (m) Section 157 - To receive notice of any verification statement.
- 11.6 We and You agree for the purpose of confidentiality, not to disclose the information of the kind set out in subsection 275(1) of the PPSA except in circumstances required by subsection 275(7)(b)-(e) of the PPSA.
- 11.7 You agree that where We have rights in addition to those under Chapter 4 of the PPSA those rights will continue to apply.
- 11.8 You acknowledge and accept that You have received value as at the time of first delivery of the Goods and do not agree to postpone the time for attachment of the PPSA Security Interest granted to Us under these Terms and Conditions.
- 11.9 In the event We are entitled to exercise our rights under Section 128 of the PPSA, to the extent permitted by law, You grant to Us the right to enter upon any premises where the Goods are stored so We may take possession of the Goods without being liable to You or any third party and You shall indemnify Us from any claims made by any third party in the event We exercise our rights pursuant to this clause 11.9.

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## **12 Goods sold**

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All Goods to be supplied by Us to You are as described on the order agreed by Us and You and the description on such order prevails over all other descriptions including any specification or requirements stipulated by You.

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## **13 Cancellation**

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- 13.1 No order may be cancelled except with Our consent in writing and on terms which will indemnify Us against all losses incurred by Us.
- 13.2 We shall be entitled to charge a reasonable cancellation fee (being not less than 10% of the amount of the order) for any work done on your behalf to the date of cancellation, including a fee for the processing and acceptance of your order and request for cancellation.

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## **14 Proper Law**

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- 14.1 This contract shall be governed by and construed pursuant to the laws for the time being in force in New South Wales.
- 14.2 The parties submit all disputes arising between them to the courts of New South Wales and any court competent to hear appeals from those courts of first instance.

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## **15 Force Majeure**

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If for any reason beyond Our control (including without limitation as a result of any strike, war, terrorist attack, trade dispute, fire, tempest, theft or breakdown), orders cannot be delivered at the time stipulated by You, We shall be entitled to cancel the order and You shall not have any claim against Us for loss, damages, costs or expenses arising out of such cancellation. The cancellation of an order is without prejudice to Our rights to recover all sums owing to Us in respect of deliveries made or Goods provided prior to the date of such cancellation.

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## **16 Waiver or Variation**

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Our failure or delay to exercise a power or right under these Terms and Conditions does not operate as a waiver of that power or right.

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## **17 Default**

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- 17.1 In the event of Your default under these terms and conditions, We shall be entitled to withhold the delivery to You of any Goods ordered by You as at the date of such default.
- 17.2 In the event of Your default under these terms and conditions You shall pay to Us on demand all costs including without limitation all legal costs (on a solicitor/own client basis) and mercantile agents fees incurred by Us in recovering or attempting to recover all amounts outstanding and payable under these Terms and Conditions including but not limited to any dishonour or bank fees incurred by Us relating to payments made by You from time to time.

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## **18 Intellectual Property Rights**

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- 18.1 You acknowledge and accept that all intellectual property including trademarks, registered designs, patents, copyright, used on or related to the Goods are the property of Turbosmart.
- 18.2 You will not do or permit to be done any act or thing which might in any way impair upon the goodwill or intellectual property rights of Turbosmart to the Goods.
- 18.3 To the extent You provide Turbosmart with any designs or plans pursuant to any order for the Goods then you hereby indemnify Turbosmart against all loss or damage including legal costs incurred by Turbosmart arising from any actions,

claims or demands made by any third party which claims any intellectual property rights, title or interest to such designs or plans.

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## **19 Trademark Use Agreement**

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- 19.1 To the extent You are a wholesaler or a dealer then We grant you a non exclusive licence to include the Turbosmart logo and reference to Turbosmart Goods in your promotional advertising, website, shop front, motor vehicles, uniforms and business cards.
- 19.2 You acknowledge and accept that the non exclusive licence referred to in clause 19.1 will immediately cease in the event of any default under these Terms and Conditions and You will immediately cease and desist from using the Turbosmart logo and referring to Turbosmart Goods in the manner contemplated by clause 19.1.

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## **20 Change of Ownership**

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You agree to notify Us in writing of any change of Your ownership within seven (7) days from the date of such change and to indemnify Us against any loss or damage incurred by Us as a result of Your failure to do so.

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## **21 Severance**

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If any part of these Terms and Conditions are invalid or unenforceable, these Terms and Conditions do not include it. The remainder of these Terms and Conditions continue in full force.

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## **22 Amendment**

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These conditions may be amended at any time by Us. We will then reissue the updated terms and conditions to its customers. Unless notified by the customer to the contrary, acceptance by the customer will be assumed.