

Railtech Australia Limited - Terms & Conditions of Sale

1. Interpretation

1.1 In these conditions:

“Delivery” means the date the Goods are delivered by Railtech to the carrier for transport to the Purchaser or, where transport of the Goods is postponed due to the purchaser’s delay or request, the date on which Railtech notifies the Purchaser that the Goods are ready to be transported.

“Goods” means the products and, if any, services specified in the relevant Purchase Order.

“Purchaser” means the purchaser of the Goods specified in the relevant Purchase Order.

“Purchase Order” means a written order in the form from time to time approved by Railtech for the purchaser to order a specified quantity of Goods from Railtech.

“Seller” means the seller and supplier of the Goods, Railtech Australia Limited.

2. Terms and Conditions

2.1 These terms and conditions of sale bind the Purchaser and Railtech whenever Railtech accepts the Purchaser’s written Purchase Order for the supply and sale of the Goods. These terms are considered by the parties to be an amendment of any pre-existing terms presented by the Purchaser in any Purchase Order, and will supersede such terms. These terms cannot be altered except by written agreement of Railtech.

2.2 The Goods and any other products sold by Railtech are sold on these terms and conditions of sale.

3. Quotations

3.1 Subject to clause 4.4, the price of Goods ordered by the purchaser will be as per any written quotation, given by Railtech to the Purchaser within 7 days after the date of receipt of the Purchase Order.

3.2 Railtech will be deemed to have rejected a quotation and the quotation have lapsed, if the Purchaser does not accept the quotation in writing, within 7 days after the date of the quotation, or such other acceptance period stated in the quotation.

3.3 A quotation is only valid for the country of destination that is specified and, if none is specified, for delivery in Australia.

3.4 All prices unless otherwise stated are net of any fees, charges and taxes.

3.5 A quotation may be altered or withdrawn at any time before receipt of acceptance.

4. Shortages and Defects

4.1 The Purchaser waives any right to make a claim for shortage of, or defect in, any Goods delivered by Railtech to the Purchaser, unless such claim has been lodged with Railtech within 7 days from the date of Delivery of the Goods by Railtech to the Purchaser.

4.2 All specifications, drawings and particulars of weights and dimensions for Goods submitted by the Purchaser or to Railtech are approximate only and any deviation shall not constitute a shortage or defect entitling the Purchaser to a claim against Railtech.

4.3 All descriptions, illustrations and performances, relating to Goods, which are contained in Railtech’s catalogues, price lists and other advertising matter do not form part of the contract of sale the Goods.

4.4 Where specifications, drawings or other particulars are supplied by the Purchaser, Railtech’s quotation is an estimate only based on estimates of quantities required. If any adjustments in quantities as set out in a quotation is required, such increased price shall be payable by the Purchaser.

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4.5 Any specifications, drawings, descriptions, illustrations or other particulars are provided to Railtech by the Purchaser according to the Purchaser's design or specifications or developed for the Purchaser shall be held by Railtech at Railtech's disposal and shall not be disclosed or furnished to any other person, firm or government.

5. **Delivery**

5.1 Any delivery times made known to the Purchaser are estimates only and Railtech shall not be liable to the Purchaser for direct or indirect loss suffered by the Purchasers or its customers as a result of late delivery or non-delivery of the Goods.

5.2 The Purchaser will not be entitled to terminate the contract for late delivery or non-delivery of the Goods unless the parties agree otherwise in writing.

6. **Loss or Damage in Transit**

6.1 Railtech is not responsible for any loss, penalties, liquidated damages or damage to the Goods in transit. The Purchaser will be solely responsible for any risk in transit from the point of loading for transit from Railtech's depot or that of its agent. Any carriers engaged to carry the goods are deemed to be agents of the Purchaser, regardless of whether Railtech engaged the carriers.

6.2 Without limiting clause 6.1, Railtech shall provide such reasonable assistance as may be necessary to enable the Purchaser to press claims on carriers of the Goods if the Purchaser has first notified Railtech and the carriers, in writing, immediately such loss or damage of the Goods is discovered by the Purchaser (or its agents) and has lodged a claim on the carrier within 3 days of the date of receipt of the Goods. Any replacement goods must be ordered and paid for under these terms as a new order, before dispatch.

7. **Payment**

7.1 Unless agreed otherwise in writing, the purchaser must pay the invoiced price for all Goods in Australian dollars within 30 days net from the end of the month in which the invoice has been processed. A service charge of 1.5% per month calculated daily is payable by the Purchaser on all past due accounts.

7.2 Railtech reserves the right to require payment prior to delivery of any Goods if it reasonably appears to Railtech that the Purchaser may be unable for any reason to effect payment promptly in accordance with the above terms. Failure or delay on the Purchaser's part to pay in accordance with the above terms shall entitle Railtech to withhold further deliveries both in respect of any other contract for supply of the Goods to the Purchaser until such payment has been made. It is agreed that in the event that the purchaser does not make payment in accordance with the above terms, the credit facilities may be refused, changed or withdrawn and all moneys owing by the Purchaser will become immediately payable.

7.3 Railtech reserves the right from time to time to place limits on the amount of credit to be extended to the Purchaser.

7.4 The Purchaser hereby expressly agrees to charge all of its equitable interest in freehold or leasehold property; present and future and wherever situated with the amount of the Purchaser's indebtedness to Railtech from time to time. Each party to this agreement hereby agrees to the lodgement of a caveat on any such property to properly secure any part of the debt to Railtech and to deliver to Railtech within 7 days of demand, a properly executed mortgage in a form approved by Railtech and which includes a covenant providing that interest may be charged on all outstanding monies at rates set from time to time by the Supreme Court Act, to allow Railtech to obtain relief pursuant to section 99(2) of the *Property Law Act* (QLD) 1974. The purchaser, under these terms, irrevocably provides a

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power of attorney to the senior director of Railtech to sign a mortgage on the Purchasers behalf if such demand is not satisfied.

7.5 Unless otherwise agreed in writing, the Purchaser must pay all financial institution fees, legal costs, debt collection, stamp duty and other government charges relating to the establishment or operation of their credit with Railtech.

7.6 The cost of any special packing and packing materials used by Railtech for the Goods shall be at the purchaser's expense notwithstanding that such costs may have been omitted from any quotation.

7.7 Prices quoted are based on rates of freight, insurance, customs duties, exchange, shipping expenses, sorting and stacking charges, cartage, rate of weights, cost of materials and other charges affecting the cost of production as at the date of quotation and any alterations to any such costs acceptance of which increase or decrease the price quoted shall be to the Purchaser's account.

7.8 The Purchaser is responsible to pay all applicable Federal and State import duties and the process of clearing the goods through any customs process and any other tax including tax in the nature of a goods and services tax, duty, charge or impost which is payable in respect of the Goods in addition to the quoted sale price.

7.9 Railtech may charge a reasonable amount for storage of the Goods if delivery instructions are not provided by the Purchaser within 14 days of a request by Railtech for such information.

7.10 All prices quoted are to be regarded as firm for the validity period stated, or where no period is stated, for a period of 30 days. When firm prices are not quoted, Goods will be invoiced at price ruling at date of dispatch from Railtech's Australian depot or that of its agent.

8. Retention of Title

8.1 Without affecting clause 8.2, until the Goods are paid for in full by the Purchaser, ownership of the Goods remains with Railtech whether or not the Goods pass into the possession of the Purchaser.

8.2 The purchaser assumes the risk for any loss or damage to or deterioration of the Goods as and from the date of Delivery. The assumption of this risk is in addition to the assumption of the risk contemplated in clauses 6.1 and 6.2 supra. The Purchaser is also liable for any costs incurred after the date of Delivery including Railtech storage costs, additional transportation costs that exceed those contemplated by the agreement between parties, increased cost of freight and insurance rates not contemplated by the quoted sale price.

8.3 The Purchaser must keep all ordered Goods insured for their full value from the date of Delivery until full payment for the Goods has been made.

8.4 Until the Goods are paid for in full, while the Purchaser holds the Goods, as bailee for Railtech:

- a) the Purchaser must store Railtech's Goods separately from the Purchaser's own Goods;
- b) the Purchaser must not dispose of the Goods, without first obtaining the specific consent in writing of Railtech. All the monies resulting from the sale of the Goods are to be specifically identified and placed into a separate account until payment in full to Railtech; and
- c) if the purchaser at any time defaults in payment for the Goods, or its obligations under this clause, Railtech is expressly and irrevocably authorized to enter the Purchaser's premises and to take possession of and sell the Goods and exercise such other rights ancillary to the right of re-sale and possession.

9. Railtech's Warranties

9.1 Railtech shall not be obliged to accept Goods returned by the Purchaser and will do so only in accordance with this clause 9 or otherwise on terms agreed in writing by Railtech in its sole and absolute discretion.

9.2 Railtech warrants that the Goods supplied will comply with relevant Australia Safety Standards effective as at the date the order was placed by the Purchaser, not taking into account any changes to the relevant Standards after the date of the order unless otherwise notified in writing by Railtech to the Purchaser.

9.3 Subject to clause 10, Railtech warrants all Goods manufactured by Railtech to be fit for the purpose for which goods of the same kind are commonly supplied and any other purpose made known to Railtech. If any such goods are not fit for their purpose or are not of merchantable quality ("**defective Goods**") Railtech will replace or repair, at its factory of origin, or other location designated by Railtech, any relevant defective part or parts of any such defective Goods provided that the defective Goods are promptly returned by the Purchaser to Railtech.

9.4 Further, assistance, testing, or replacement by Railtech of any Goods shall not in any way be construed as an admission that Railtech have used or supplied an inferior or defective product in the past.

10. Limitation of Liability

10.1 Except as expressly provided in clause 9, Railtech excludes all other warranties and representations and is not responsible for any liability or costs incurred as a direct or indirect result of the use, operation, installation or alteration or repair of Goods by the Purchaser or its employees or agents.

10.2 Without limiting the scope of the above clause 10.1, Railtech excludes and is not responsible for any liability or costs incurred as a direct or indirect result of the following:

- i) Use by the Purchaser of Goods which are old;
- ii) Failure by the Purchaser to properly rotate its Goods in stock;
- iii) Failure by the Purchaser to properly store its Goods in stock;
- iv) Failure by the Purchaser to adequately maintain its rail system;
- v) Failure by the Purchaser to retain adequately trained subcontractors/agents/employees to properly install the Goods supplied by Railtech;
- vi) Excessive weight being placed upon the installed Goods by the Purchaser;
- vii) Use by the Purchaser of Goods which are wet and/or contain mildew;
- viii) Use of the Goods by the Purchaser in conjunction with the rail products of another company;
- ix) Use of the Goods in a manner for which they are not designed;
- x) Failure by the Purchaser to follow current Work Instructions/Procedures and published by Railtech Australia and available at www.railtech.com.au and;
- xi) Failure by the Purchaser to ensure that gas quality (when used to install or maintain the Goods) meet the Railtech recommended standard.

10.3 Railtech does not warrant the accuracy of performance figures or statistics for any of the Goods.

10.4 Without limiting clause 9 or 10.1, Railtech is not liable to the Purchaser under any circumstances for any consequential or indirect loss or damage arising out of the supply and sale of Goods to the Purchaser in accordance with these terms and conditions of sale.

10.5 Without limiting clause 9 or 10.1, to the extent that Railtech is liable to the Purchaser in respect of the Goods under clause 9, or is unable, by law, to exclude its liability, Railtech's liability arising out of damage or loss resulting from the supply and sale of the Goods is limited to:

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- a) replacement of the Goods;
- b) repair of the Goods; or
- c) in the case of services, Railtech supplying the services again,

The choice of which remedy is to apply to rest with Railtech in its sole and absolute discretion.

11. General Provisions

11.1 If required by Railtech, the directors of the Purchaser (where the Purchaser is a company) must guarantee the Purchaser's performance of its obligations (including payments due) set out in these Terms and Conditions of Sale. Such directors must complete and execute Railtech's required form of guarantee documentation and if required under clause 7.4 supra, mortgage documents, promptly upon request.

11.2 The purchaser must keep confidential all information, data, drawings, specifications, and documentation which are disclosed to, or obtained by, the Purchaser in relation to the Goods.

11.3 Railtech may modify or alter the design and construction of the Goods to incorporate improvements or to substitute material equal or superior to that originally specified.

11.4 If this agreement is cancelled, suspended or delayed for reasons beyond Railtech's reasonable control, the Purchaser must pay Railtech all appropriate charges, Railtech's overheads and reasonable profits up to the date of the cancellation, suspension or delay. This includes any charges relating to storage, disposition and/or resumption of the work following cancellation, suspension or delay.

11.5 This guarantee shall be governed by and construed in accordance with the laws of the State of Queensland and the parties irrevocably submit to the non-exclusive jurisdiction of the Courts of that State in respect of all matters arising under or relating to this agreement.

11.6 If any provision of this agreement is void or unenforceable the provision shall be severed from this agreement to the extent it is void or unenforceable without affecting the validity or enforceability of the rest of the agreement.

11.7 These terms and conditions of sale constitute the entire agreement between Railtech and the Purchaser relating to the purchase, transport, storage, liability and insurance of the Goods and supersedes all prior agreements whether written or oral, understandings, representations and negotiations with respect to the Goods. The Purchaser agrees that no other written or verbal communications have been relied upon in consideration for entering into this agreement. Any variation or amendment to these terms and conditions is not binding on Railtech unless in writing and signed by each of the parties.

12. Notice

12.1 Any notice to be given or made under this Agreement shall be in writing and may be signed by the party giving or making the notice (or in the case of a company by director or manager) and may be given by delivery to the other party or by being sent by pre-paid post addressed to the other party at the address of that party mentioned in this agreement and in the case of service by post shall be deemed to have been given on the day following the day of posting.

I/We hereby acknowledge, accept and agree that I/We shall be bound by the terms and conditions of this agreement and fully understand and comprehend same. I/We guarantee that all information supplied to Railtech Australia Limited to allow them to assess and grant credit are true and correct.