I. General Provisions

1. These general terms and conditions (hereinafter “GTCs”) shall apply to all offers, deliveries and services by SMA Australia Pty. Ltd. (including its parent, subsidiary and affiliated companies) (“SMA”) pursuant to any order, invoice or other purchase document between SMA and the Customer (any of which, hereinafter a “Contract”). Unless otherwise expressly agreed in writing, the following terms of any Contract shall apply:

2. The price and terms of delivery shall be those indicated in the order. Stated delivery terms shall be ignored in the case of obvious price set errors. The price includes all taxes and duties required by law. The Customer is entitled to arrange air transportation at its own expense. SMA shall be entitled to make any changes in the quality, design and specifications of the products or services, without prior notice, if the Customer shall have agreed in writing thereto. In case of delay or default in payment by the Customer, SMA reserves the right to make any changes in the quality, design and specifications of the products or services, without prior notice. If any such changes are required by law, the price shall be adjusted accordingly.

3. SMA shall be entitled to all the rights in and to any bidding or tendering documents and their contents. SMA shall be entitled, in its discretion and with no prejudice to any rights or to such documents. If an offer is not placed, all such documents shall be immediately returned by the Customer upon SMA’s request.

4. All documents, prototypes, examples or samples, technical data and descriptions in the respective product information or advertising materials included in any Contract are non-binding and are for information purposes only. To the extent permitted by law, they do not constitute any guarantee of quality or durability in relation to any products to be supplied or services to be rendered by SMA.

II. Prices & Terms of Payment

1. Prices are quoted FCA (manufacturing facility) per INCOTERMS 2020. For products delivered from the SMA Australia warehouse, the delivery terms shall be FCA Sydney warehouse or DAP place of destination indicated on the purchase order per INCOTERMS 2020. Notwithstanding the price excluding shipping, handling, insurance, applicable taxes, duties and other governmental fees, the price indicated in the sales data shall be charged to the Customer and if applicable, the price shall be charged to the Customer, unless otherwise indicated in the order confirmation.

2. Delay in whole or in part of any confirmed order shall not be attempted, permitted, or accepted, except by mutual agreement in writing.

3. Unless otherwise directed by SMA in writing, all payments shall be made in Australian dollars within 30 days of the invoice date. Delay in payment shall be charged interest on overdue accounts at a rate of 12% per annum, calculated and payable monthly. Interest shall accrue on overdue interest in the same manner.

4. If the Customer defaults on any payments owing to SMA, whether under any Contract or any other agreement or (b) circumstances arise or become known to SMA that SMA’s Customer’s creditworthiness is in question, including but not limited to insolvency proceedings instituted involving the Customer or the Customer’s related companies or if SMA reasonably verifies that any other remedies available hereunder or at law, to any or all of the following remedies: (i) to declare any amounts outstanding to then immediately due and payable; (ii) demand and recognize the interest; (iii) set off or cancel the Contract if the Customer fails to pay the amount due after a reasonable period of notice.

5. The Customer shall not be entitled to any set off or deduction of any amount payable.

III. Delivery and Performance - Delay - Delivery Document

1. Deliveries of residential, commercial, and off-grid storage products will be made on a CIP arrival port, Australia basis per INCOTERMS 2020. For products deliverable from the local SMA warehouse, the delivery terms shall be FCA Sydney warehouse or DAP place of destination indicated on the purchase order per INCOTERMS 2020. If requested by the Customer, products will be made available to a carrier selected by SMA, at the Customer’s sole expense.

2. SMA shall be entitled to provide and invoice partial deliveries and services from time to time and shall be entitled to modify the materials used in the manufacture of the products without prior notice to the Customer, provided this does not materially alter the function or characteristics of the products.

3. Deadlines for any delivery are estimates only. However, SMA will use reasonable commercial efforts to meet any such deadline, provided that all provisions, documents, payments and releases to be supplied by the Customer are received in due time, and if the agreed payment terms, including advance payments and all other obligations required for the delivery are fulfilled. Otherwise, the delivery estimate will be extended by a reasonable period, time and cost. The delivery estimate may be extended by a reasonable period, time and cost.

4. In the case of a force majeure, including but not limited to acts of God, war, riot, insurrection, labor disputes, measures by public authorities, power outages, severe weather or any other similar event, the occurrence of similar events beyond the reasonable control and foreseeability of SMA, SMA shall not be responsible for the performance of any obligation affected by such force majeure for so long as it is in effect. The time for performance will be extended by a period of time equal to the length of the force majeure. If the force majeure event prevents SMA’s performance of its obligation for a period of 6 months or more, either party shall be entitled in its sole discretion to terminate the Contract, in which event SMA will refund any amount of the price for such Contract paid by the Customer, other than those relating to costs incurred by SMA which cannot be mitigated.

5. If the goods ordered in the Contract are not available because there is a lack of supply or because of defects in the materials or processing, SMA shall notify the Customer immediately. The delivery date cannot be adjusted. If the delivery of the Customer’s products is delayed in the event of a force majeure, then any costs incurred by SMA shall be billed directly to the Customer including, but not limited to the following fees: (i) $100 per unit/month or part of any month) for storage fees; (ii) $1 per kWh for each kWh of energy loaded by SMA. No costs shall incur or be levied for the first fifteen (15) days of storage following the original requested delivery date. SMA retain the right to modify costs provided to any unit, without prior notice.

IV. Retention of title

1. In this clause IV, (a) “PPS Act” means the Personal Property Securities Act 2009 (Cth); (b) “PPS Law” means the PPS Act and each regulation made pursuant to it, in each case as amended from time to time. (c) “Customer” means the person to whom the products are sold (hereinafter “the “Customer”) pursuant to any order, invoice or other purchase document between SMA and the Customer (any of which, hereinafter a “Contract”). Unless otherwise expressly agreed in writing, the provisions hereof shall apply to all contracts and transactions, including and without limitation to all sales of the products and any PPS Law transactions, in connection with the delivery terms and/or services furnished by SMA. The PPS Law shall not apply to any products supplied or otherwise provided by SMA to the Customer in connection with the Contract from time to time, together with any proceeds, assignments or replacements in respect of such property, and otherwise undelivered items have the meaning given to them in the PPS Law.

2. Legal title shall not pass, and the delivered products shall remain the exclusive property of SMA, until all obligations of the Customer arising from the Contract have been performed, including full payment. Until then, the Customer shall not sell or transfer in any way or lien, pledge, or assign or otherwise dispose of the products, and all obligations of the Customer to SMA under the PPS Act or otherwise, any claim or action arising therefrom or if the security interest is not otherwise perfected, the Customer shall notify SMA immediately of such a disposition.

3. The Customer is entitled to sell the products supplied by SMA purchased as inventory in the ordinary course of business notwithstanding the above retention of title, provided, however, that the Customer hereby assures all claims it has against its customers with respect to payment for the products to SMA to the extent of the value of the obligations outstanding to SMA, and shall use its best efforts to collect such claims on behalf of SMA. To the extent the Customer acquires such onward obligations, the Customer shall hold such obligations in such connection with such a sale in trust for SMA and shall forthwith remit those proceeds to SMA upon receipt.

4. Any processing or manufacturing of the supplied products while title retention rights apply shall be carried out for SMA without binding SMA to any additional obligations.

5. If the products to which title is retained by SMA are covered by a security agreement, all goods that do not belong to SMA or become fixtures, SMA is entitled to the resulting co-ownership share of the new goods in proportion to the invoiced value of the supplied goods with the remaining goods.

6. If the Customer breaches the Contract or fails to pay SMA any amount when due, the Customer shall return the products to SMA upon demand. If the Customer fails to promptly return the products, SMA, or a private receiver appointed by it, shall be entitled to enter upon the premises where the products are located and take possession of them at the cost and risk of the Customer.

7. As security for the payment and performance of its obligations hereunder and under any Contract, now or hereinafter arising, the Customer grants to SMA a security interest in all PPS Law. The Customer agrees to cause SMA to register a financing statement with regard to such security interest against the Customer pursuant to the PPS Law or other such applicable legislation in the relevant jurisdiction. The Customer shall take all actions that SMA requests to ensure that the security interest is enforceable, perfected and otherwise effective, enabling SMA to apply for, any registration, complete any financing statement or give any notice, in connection with the security interest or enable SMA to exercise its rights in connection with the security interest, and the Customer shall pay or reimburse SMA for all fees, costs and other charges incurred in connection with maintaining and perfecting such priority and security interest.

8. SMA is not required to provide the Customer with any notice under the PPS Law (including a notice of verification statement or any notice required upon enforcement of SMA’s security interest) unless the obligation to provide the notice required under the PPS Law cannot be excluded. This security interest shall apply regardless of whether any product is or becomes a fixture.

9. Without limiting any duty of confidentiality arising from the Contract or otherwise, neither SMA nor the Customer may, without the consent of the other party, disclose any information of the kind referred to in section 275(1) of the PPS Act, except where required by law. The Customer agrees not to authorize the disclosure of any information as contemplated by section 275(1) of the PPS Act.

10. All costs and expenses incurred by SMA in enforcing these provisions, including legal fees on a full indemnity basis, shall be for the Customer’s account, and constitute a lawful debt due to SMA.

V. Acceptance – Limited Warranty

1. The Customer shall inspect all goods and products purchased from SMA immediately upon delivery to ensure that the products are complete and free from defects. Material defects, or incorrect/incomplete delivery must be reported to SMA, in writing, within 7 days of receipt of the products. Otherwise, delivery will be deemed to have been accepted by the Customer. Notwithstanding the above, the Customer may refuse acceptance of deliveries due to material defects (including but not limited to cosmetic damage or variations in color or texture) and subject to the terms of this clause, SMA shall not be responsible for any damaged or defects which occur after risk has passed to the Customer.

2. Goods purchased from SMA are warranted to be free from manufacturing and material defects as set forth in SMA’s applicable Limited Factory Warranty. This warranty shall not apply to immaterial defects, normal wear and tear, damage caused after the transfer of risk, or damage related to or caused by the use of unsuitable equipment or improper use, mishandling, improper construction work, overload, lightning, modifications, improper maintenance, and external influences such as extreme weather or negligence.

3. The warranties expressly extended under this clause are excluded. SMA DISCLAIMS ALL OTHER WARRANTIES, CONDITIONS AND OBLIGATIONS OF ANY KIND WHATSOEVER, IMPLIED OR IMPLIED.

4. Without limitation to section VI(b) concerning guarantees under the Australian Consumer Law, all warranted defective products reported to SMA within the applicable limitation period will be investigated, and, in SMA’s sole discretion, either repaired or replaced in accordance with SMA’s Limited Factory Warranty. SMA’s liability is limited to the repair or replacement of the products. SMA makes no warranty that any product will satisfy domestic content requirements, unless otherwise expressly made in writing in the Contract.

6. Notwithstanding any other provision of these GTC, other than for goods that are to be returned to the Customer, SMA shall have no further responsibilities to the Customer for any goods, supplies or services purchased by the Customer under the Australian Consumer Law. The Customer is entitled to a replacement or refund for a major fault and compensation for any other reasonably foreseeable loss or damage. The Customer has no other remedies under the Australian Consumer Law. If any such goods fail to be of acceptable quality and the failure does not amount to a major fault.

VI. Other Compensation Claims
TO THE EXTENT PERMITTED BY LAW AND SUBJECT TO THE CUSTOMER’S RIGHTS UNDER AUSTRALIAN CONSUMER LAW AS SET OUT IN SECTION V(6) ABOVE:

1. SMA’S LIABILITY WITH RESPECT TO ALL CLAIMS OF ANY KIND, WHETHER IN CONTRACT, TORT (INCLUDING NEGLIGENCE) OR OTHER LEGAL THEORY, FOR ALL LOSSES OR DAMAGES ARISING OUT OF OR CONNECTED WITH ANY CONTRACT OR THESE GENERAL TERMS & CONDITIONS OR THE PERFORMANCE OF ANY OF ITS OBLIGATIONS THEREUNDER SHALL BE LIMITED TO THE PURCHASE PRICE ACTUALLY PAID BY THE CUSTOMER FOR THE PRODUCT GIVING RISE TO THE CLAIM.

2. In no event shall SMA be liable for special, incidental, punitive, exemplary or consequential damages or other similar damages, including but not limited to loss of profits, revenue or anticipating savings, loss of use, loss of business or loss of data or records, whether or not SMA was informed or aware of the possibility of such loss.

VII. Other Conditions

1. SMA products may NOT be used in the medical or in aviation applications without SMA’s prior written consent.

2. These GTC and all Contracts incorporating them shall be governed and construed in accordance with the laws of New South Wales, and the applicable federal laws of Australia, excluding conflicts of law provisions.

3. These GTC, together with the appropriate Contract documents, constitute the entire agreement between the parties with respect to the subject matter hereof and supersede all prior agreements. No oral agreements shall be binding on either party.

4. The invalidity or unenforceability of any provision of these GTC or any Contract shall not impair the validity or enforceability of any of the other provisions.

5. Any dispute under these GTC shall be subject to non-binding mediation followed by binding arbitration under Rules 5 through 18 inclusive, of the Institute of Arbitrators Australia (ACN 008 651 232) for Small Commercial Disputes, by their Sydney, NSW offices, in lieu of trial. No party shall resort to court except to record and enforce any arbitral award.

6. Customer shall comply with Australian federal law in any re-export of items purchased hereunder.

7. SMA reserves the right to not provide services in countries with a high safety risk or to provide them only under certain limited conditions. Please refer to the general terms of delivery and the Limited Factory Warranty for more details.