

STANDARD TERMS AND CONDITIONS OF SALE

SmartCap Products are part of a fatigue monitoring technology to be used within a Customer's overall Fatigue Risk Management Framework. SmartCap Products provide decision support tools, providing additional information to assist in making better fatigue management decisions. SmartCap Products do not reduce the responsibility of the user to monitor their own fatigue levels, and to act in a proper and safe manner.

SCOPE

1. These are the terms and conditions referred to in the Quote or Tender overleaf, attached or forwarded separately.
2. In the event of any conflict between the Quote or Tender and these standard Terms and Conditions, then the Quote or Tender shall prevail to the extent of the conflict.
3. These standard Terms and Conditions (along with any Quote or Tender) apply to the contract entered into with the Customer whether as an offer, or as an acceptance of an offer (the Contract), and shall prevail in any conflict between them and the terms of any offer or acceptance by the Customer.

CUSTOMER DOCUMENTATION INCLUDING POs

4. If the Customer provides, refers to, submits or otherwise uses terms and conditions other than those included herein (including as part of the submission of a PO) such terms and conditions will not form part of or become incorporated into these standard Terms and Conditions and is strictly limited to invoicing and accounting purposes only and is not acceptance of any the Customer documentation.
5. The Customer shall be deemed to have carefully examined all documents furnished by the Supplier and fully satisfied itself regarding all the conditions, risks, contingencies and other circumstances which might affect the supply of Products and associated services.

PROVISION OF PRODUCTS

6. All right and title to any Products and any accompanying materials and documentation or other deliverables produced pursuant to the Quote or Tender remains with the Supplier until full and final payment is received as cleared funds.
7. Notwithstanding clause 6, risk and responsibility for loss and damage to the Products commences from departure from the specified Supplier premises.
8. Use of the Products provided as set out in the Quote or Tender to the Customer, is at the sole responsibility and risk of the Customer.

FREIGHT

9. All Products are sold Ex Works (Incoterms 2000) Supplier premises as set out in the Quote or Tender.
10. The Supplier will make reasonable efforts to adhere to quoted, requested or agreed delivery dates, however it is agreed that time is not of the essence with respect to delivery.
11. The Supplier will not be liable for any loss or damage in respect of any failure or delay in performance of its obligations under these standard Terms and Conditions if that failure or delay is due in whole or in part to any cause beyond its control (including, without limitation, fire, storm, flood, earthquake, strikes, delays in transit, shortage of materials or machinery, delays in delivery or shipment on the part of manufacturers, suppliers or agents).

CANCELLATION OF ORDERS

12. Any order cancellation by a Customer will only be accepted if it is received prior to dispatch of the order from the Supplier's premises, and will incur a cancellation fee of 10% of the total value of the order.

INSPECTION AND ACCEPTANCE OF PRODUCTS

13. The Customer should inspect all items of Products immediately on delivery.
14. The Customer has seven (7) days following delivery to reject all or part of the delivery, and in the event that it does not do so, it shall be deemed to have accepted the Products as being free of any defects which would be apparent on reasonable examination.
15. Any Products damaged during transit will be repaired or replaced at the Customer's cost.
16. Without limiting the Supplier's right to dispute any claim, any Product that is damaged or contains a Defect so as to not conform with the Product Specifications (other than as a result of the delivery to the Customer) shall be replaced or repaired by the Supplier at its cost.
17. Products rejected by the Customer as being damaged or Defective must be returned in accordance with clauses 60 - 63 and be received by the Supplier in their original packaging.

TITLE TO UNDERLYING SMARTCAP TECHNOLOGY

18. SmartCap Technologies Pty Ltd (SmartCap) retains all proprietary rights title and interest throughout the world in the IP and technology existing in the Products including new releases updates or enhancements, instruction manuals and methods of work, and no right, title or ownership (including copyright, patent or trade secret) therein is conveyed, sold or transferred to the Customer under the Quote or Tender or these standard Terms and Conditions.

PROVISION OF SUPPORT

19. The Supplier shall provide support for the Product in accordance with the SmartCap SLA and on request of the Customer, additional ad hoc site support visits.

PROVISION OF CUSTOMER LICENCE

20. SmartCap Technology Licence consists of two parts:
 - (a) Up front, one off licence for the use of the LifeBand. This is for a non-exclusive, perpetual, revocable, non-transferrable licence purchased by the customer, which covers the use of the life band and the Bluetooth transmission of data to a receiver; and
 - (b) An ongoing, annual support and service subscription consisting of a licence to access to LifeHub, LifeApp, business support with core SLA and software maintenance and upgrades.
21. On the payment of the Customer Licence Fee, or Subscription Fee, the Customer is granted a non-exclusive, non-sub-licensable and non-transferable licence (the Customer Licence), to install, use and execute the software solely for the purpose of operating the Products specified in the Quote or Tender, at the nominated Customer site (or end user site if different).
22. The terms of the Customer Licence are set out on the reverse of the Customer Licence Certificate provided to the Customer.
23. The Customer may only operate the Products with a valid Customer Licence.

24. The Customer Licence may be revoked or suspended in the event of any breach of these standard Terms and Conditions, including but not limited to the payment provisions, or a breach of the Customer Licence conditions.

OWNERSHIP & ACCESS TO DATA

25. All data generated at the Customer site by the Products shall be owned by the Customer, however the Customer grants the Supplier a non-exclusive licence to store and use the data for reporting purposes and further product development.

FEES & CHARGES

26. The price of all Products and associated services provided excludes all duties, taxes and other imposts and are the net amounts receivable by the Supplier.
27. All prices set out in a Quote or Tender (or amendment) are FIXED and are not subject to variation unless specified.
28. For all contracts, a Customer shall pay:
- Sale Price for the Products and any additional spares or components selected;
 - Support fees (amount dependent on which option has been selected);
 - Reimbursable Expenses (as applicable);
 - any additional ad hoc site attendance or service visits (as requested by the Customer);
 - Customer Licence Fee; and
 - Service Subscription Fee.

INVOICES & PAYMENT

29. The Sale Price of the Products shall be invoiced on dispatch and payable by the Customer within 30 days after dispatch to the Customer.
30. The cost of any additional spares or components purchased shall be invoiced on dispatch and payable within 30 days after dispatch to the Customer.
31. All training, Reimbursable Expenses and additional ad hoc site visits as specified in the Quote or Tender or requested by the Customer shall be paid within 30 days after the receipt of a correctly rendered invoice.
32. The first year support and license subscription is compulsory, and is part of the upfront costs of the system.
33. All payments required to be made to The Supplier must be in AUD or USD as specified in the Quote or Tender (unless agreed otherwise), and by electronic funds transfer into the Supplier's nominated bank account.
34. An invoice will be correctly rendered if it identifies the Quote or Tender number, or any applicable PO, is accompanied by documentation substantiating the amount claimed if necessary and where applicable is a valid tax invoice.
35. In the event of any dispute, all monies not in dispute (if any) shall be immediately paid and the particulars of the dispute notified to the other party. Both parties shall use their best endeavours to resolve the dispute at the management level within ten days of notification.
36. Until full payment has been received by the Supplier, the Customer acknowledges that all Product is held by it in a fiduciary capacity and as bailee for and on behalf of the Supplier and that the Supplier has a security interest in all Products supplied and the proceeds thereof.

37. The Customer agrees that any security interest arising under this Contract may be registered by the Supplier to secure the Customers obligations to make full payment.

GST, VAT & WITHHOLDING TAXES

38. Any Goods and Services Tax (GST), withholding or value added tax (VAT) or similar that is payable will be added to the amount payable to the Supplier and a tax invoice will be issued.

INTEREST & COSTS OF COLLECTION

39. Correctly rendered invoices must be paid by the due date of the invoice.
40. All and any amounts that remain unpaid after the due date shall be deemed overdue and subject to interest at the rate of 1.5 % per month, calculated daily, from the due date until the date that payment is received.
41. The Supplier shall also be entitled to recover all out of pocket expenses incurred solely as a result of the non-payment or late payment of any correctly rendered invoices.

CONFIDENTIALITY & INTELLECTUAL PROPERTY

42. All confidential information and Intellectual Property provided by or on behalf of either party or SmartCap shall remain the property of that party and is provided solely for the purposes outlined in the Quote or Tender.
43. Copyright in all materials produced under this Contract shall remain the property of SmartCap.
44. The Customer agrees to keep all aspects of the Products, the underlying technology and software, and the commercial terms strictly confidential, and shall not issue or disclose any information to any third party whatsoever without the prior written approval of the Supplier; however, such obligations shall not be breached where such information is legally required to be disclosed.
45. The Customer agrees not to replicate any aspect of the Products, technology or software, its components, manuals, any intellectual property or confidential information for its own use or for commercialisation.
46. The Customer shall take no action which will jeopardise SmartCap's ability or right to protect its intellectual property and confidential information; nor do any action that will diminish the value of such rights.
47. Any information provided by any party to the other during the performance of any obligations under this Contract and which are noted or designated as confidential shall not be disclosed to any third party without the prior consent of the issuing party.
48. If the Customer becomes aware of any infringement or potential infringement in the intellectual or other property rights in the Products or by the Products it must immediately notify the Supplier of the infringement or potential infringement or claim.
49. The obligations of confidentiality shall be continuing obligations and shall survive the completion or termination of the Contract.

LIABILITY FOR OTHER PARTIES

50. The Customer will be liable for breach of the Customer's obligations under this Contract, whether such breach arose from the acts and omissions of the Customer, from the acts or omissions of any the Customer related bodies corporate, third party contractor or subcontractor as if those were the acts or omissions of the Customer.

CUSTOMER IDENTIFICATION

51. The Customer agrees that the Supplier may use the name of the Customer to identify them as a user of SmartCap system, technology and Products.

WARRANTIES

52. For the purpose of this warranty, Defect or Defective means the Product does not substantially perform in accordance with the Specifications provided by the Supplier.
53. Provided that the terms of Customer Licence are strictly complied with, and subject to the warranty exclusions in clause 59, the Supplier warrants the Products against damage or Defects for the Warranty Period set out in the Quote or Tender.
54. Where no Warranty Period is specified in the Quote or Tender, the Warranty Period for any item of Products provided shall be:
 - (a) software: 90 days from installation;
 - (b) hardware (other than headwear and sensors): 12 months from delivery to the Customer site;
 - (c) headwear and sensors: 6 months from delivery to the Customer site.
55. The sole and exclusive remedy for any Defect in the Products provided to the Customer shall be:
 - (a) repair or replacement of the Products or supply of equivalent products or the software which the Defect relates plus the cost of the return as specified in clause 611; or
 - (b) resupply or repeat of any associated services.
56. Unless specified in the Quote or Tender all other express or implied warranties and representations including any implied warranty of merchantability, or fitness for purpose of any Products or associated services or training, are disclaimed except to the extent that these disclaimers are held to be legally invalid by any law which cannot be excluded, restricted or modified by agreement between the parties.
57. Refurbished or used parts may be used to repair the Products if necessary.
58. Any Product repaired or replaced under this warranty will be warranted only for the remainder of the original period.

WARRANTY EXCLUSIONS

59. The warranty provided by the Supplier does not cover any damage or defect arising from:
 - (a) shipment to the Customer;
 - (b) repairs or alterations made by the Customer or any third party other than with the Supplier's prior written consent;
 - (c) improper storage, operation or maintenance, operation under abnormal or unsuitable conditions, misuse, neglect, abuse, accident or act of God; or
 - (d) accessories or consumables such as antennas, fuses and batteries.

PRODUCT RETURNS

60. Whether during the Warranty Period or not, no Products may be returned to the Supplier for repair, replacement or servicing without a Returns Merchandise Authorisation (RMA), including Product name and serial number, details of proof of purchase and a description of the alleged Defect.
61. The responsibility for the cost of returning any Product shall:

- (a) during the Warranty Period: be borne by the Supplier unless damage or Defect is excluded by clause 59;
- (b) outside Warranty Period: be borne by the Customer.

62. All Products returned to the Supplier outside the Warranty Period or are determined to be excluded from the warranty provided herein will be quoted on for repair, valid for thirty (30) days.
63. Should a Customer not accept a quote provided under clause 61, the Product shall be either returned to the Customer at their cost or disposed of, with no compensation.

INDEMNITIES

64. Subject to clause 65, and the limitations in clause 66 and 67, each party shall indemnify and hold the other harmless against all loss, damage liability or expense arising in respect of any action, claim, or proceeding brought against it, whether it be in relation to property damage, death or personal injury, third party rights or otherwise, where such loss, cost expense or liability arose as a direct consequence of any wilful, wrongful, unlawful or grossly negligent act or omission of that party.
65. The Customer indemnifies and holds The Supplier harmless against all and any actions claims or losses which may be brought against them arising directly or indirectly from:
 - (a) the Customer' use or interpretation of the data generated by the Product; or
 - (b) fatigue alarm level settings and thresholds the Customer has applied; or
 - (c) the Customer's operational or site response to a fatigue alarm trigger.
66. The maximum liability of the Supplier no matter how so arising shall be an amount limited to the lesser of:
 - (a) the amount of actual damage;
 - (b) the proceeds of insurances received in relation to the loss; and
 - (c) the monetary value of the Contract.
67. To the maximum extent permitted by law and notwithstanding anything to the contrary, neither party shall be liable to the other for any consequential loss (including but not limited to loss of profit, revenue or opportunity) regardless of whether the other party has been advised of the possibility of such damages arising.
68. Any liability of a party shall be reduced proportionately to the extent the loss or damage was caused or contributed to by the other party; and each party shall do their utmost to mitigate any losses incurred as a result of any damage or loss sustained.
69. The indemnities referred to in these standard Terms and Conditions shall survive the expiration or termination of the Contract.

ASSIGNMENT

70. Neither party may, without prior written consent, assign, sell transfer or subcontract any rights or obligations arising under the Contract unless specified in the Quote or Tender.

DISPUTES

71. In the event of any dispute, all monies not in dispute (if any) shall be immediately paid and the particulars of the dispute notified to the other party.

72. Both parties shall use their best endeavours to resolve the dispute at the management level within 10 days of notification.
73. Any disputes not able to be settled at management level will be referred to a mediator for settlement, and only if it is still unresolved within an additional 30 days, shall the parties be entitled to commence litigation in relation to the dispute.

WAIVER & VARIATION

74. These standard Terms and Conditions shall not be varied, supplemented, qualified or interpreted by any prior course of dealing or by any usage of trade.
75. Any variation shall only be binding when in writing signed by an authorized representative of both The Supplier and the Customer.
76. No failure or delay on the part of either party shall be construed as constituting a waiver of any such rights.

ENTIRE AGREEMENT

77. These standard Terms and Conditions along with the Quote or Tender and any M&S Plans, training or other supplementary schedules provided to the Customer merge all discussions and for a complete and exclusive statement of all terms and representations and constitute the entire agreement between the parties.

APPLICABLE LAW

78. The Contract will be governed by and construed in accordance with the law in force in Queensland, Australia.
79. and the Customer hereby agrees to submit to that applicable jurisdiction for the purpose of settling any disputes.