

## TERMS AND CONDITIONS OF SALE

**IT IS AGREED** by the parties that the following terms and conditions shall apply to the fullest extent legally permissible to all dealings between the Company and the Client:

### **1 VALIDITY OF QUOTATION**

- 1.1 All quotations for the prices for the goods supplied by the Company ("Quotation") are valid for a period of thirty (30) days, and are subject to change without notice thereafter.
- 1.2 Notwithstanding any provisions in this Agreement, all goods are offered subject to availability and may be withdrawn from sale by the Company at any time at its absolute discretion.
- 1.3 Orders placed upon any Quotation:
  - 1.3.1 are not binding on the Company unless they are made in writing by the Client and until they are accepted by the Company in writing; and
  - 1.3.2 are subject to the terms and conditions of this Agreement.

- 1.4 All Quotation supplied by the Company is based on the Australian currency and on the rates of award, wages, freight, insurance, costs of materials, transport and other expenses ruling or in force at the date of the Quotation. Any variation in the rates and / or costs will be chargeable to the Client's account at the absolute discretion of the Company.

### **2 TAX**

- 2.1 Unless otherwise stipulated by the Company in writing, all Quotation is exclusive of any Goods and Services Tax ("GST"), sales tax, value added tax, retail tax, customs duty, government imposts or any other tax or duty that may be imposed on or in relation to any supply made by the Company.
- 2.2 GST in relation to a supply has the same meaning as in the *A New Tax System (Goods and Services Tax) Act 1999 (Cth)*.
- 2.3 The Client will be liable for all such taxes and in the case of GST or any other amount payable by the Client on account of taxes, the Client hereby undertakes to reimburse the Company the full amount of such taxes within fourteen (14) days of it receiving a demand in writing from the Company.

### **3 DRAWINGS, SPECIFICATIONS AND DESCRIPTIONS**

- 3.1 All drawings, descriptive matter, plans, specifications, particular of weights and dimensions, shipping specifications and any descriptions submitted with the Quotation and the descriptions, illustrations and performances contained in catalogues, price lists and other advertising materials are estimates only and do not form part of the contract of sale or of the description applied to the goods. They are intended merely to present a general idea of the goods described therein.
- 3.2 Where specifications, drawings or other particulars are supplied by the Client, the Company's price:
  - 3.2.1 is made on estimates of quantities required and the information given to the Company; and
  - 3.2.2 is not final and binding on the Company.
- 3.3 Detailed drawings, specifications and other descriptions may be supplied by the Company upon request in writing by the Client.
- 3.4 The Client acknowledges that minor variations between the description of the goods and the actual goods sold to the Client do not breach this Agreement.

### **4 FITNESS FOR PURPOSE**

- 4.1 The Client acknowledges that there has been no warranty representation or guarantee made or given by the Company to the Client as to the suitability of, and fitness for, the goods.
- 4.2 The Client further acknowledges that it enters into any contract for the supply of the goods with the Company (or an affiliate, associate or related entity of the Company) free of any coercion or inducement

from the Company or its representatives, and assumes full responsibility for the capacity and performance of the goods being sufficient and suitable for its purpose.

### **5 DESPATCH**

- 5.1 Unless otherwise stated in the purchase order, any times quoted for the despatch are to be treated as estimates only and shall be extended by a reasonable period if delay in despatch is caused by instructions or lack of instructions from the Client, or by any cause whatsoever beyond the reasonable control of the Company.
- 5.2 The Client hereby irrevocably accepts that any failure by the Company to despatch the goods on time shall not expose the Company to any liability whatsoever.

### **6 DELIVERY**

- 6.1 Delivery is at the Company's premises or another premises as may be nominated by the Company.
- 6.2 The Company may, at its absolute discretion, deliver the goods to the Client's nominated premises in accordance with its usual practice, or arrange another form of method of delivery for the Client at the Client's expense. If a time or date for delivery is specified, that time or date is an estimate only and the Company is not liable for any delay in delivery.
- 6.3 The Company is not responsible to the Client or any person claiming through the Client for any loss or damage to goods in transit or on delivery caused by any event of any kind by any person (whether the Company is legally responsible for the person who caused or contributed to that loss or damage).
- 6.4 Where the place of delivery is not at the Company's premises, the Company may, at its absolute discretion, repair or replace the goods damaged in transit up to the point of delivery specified in the purchase order, free of charge, provided always that the Client shall:
  - 6.4.1 immediately inspect the goods upon delivery;
  - 6.4.2 note any shortage of goods or damage on the consignment note and delivery receipt and the carrier; and
  - 6.4.3 notify the Company in writing of such damage or shortage within seven (7) days of the delivery of the goods.
- 6.5 The Client acknowledges and accepts that shortage of goods or damaged goods is not a repudiation of the Agreement. If they are incapable of being repaired or rectified, they will at best give rise only to a claim for compensation.
- 6.6 An additional charge or fee may be required by the Company for handling, delivering or storing the goods for the Client.

### **7 TERMS OF PAYMENT**

- 7.1 All payments shall be made in full to the Company in Australian currency within thirty (30) days of the date of the tax invoice issued by the Company, or such other date as the Company may require in writing ("Invoice").
- 7.2 The Client must check all Invoices and advise the Company of any errors within seven (7) days of receipt.
- 7.3 Payment by the Client in accordance with the foregoing stipulations will be the essence of the Agreement and failure on the part of the Client to make payment on any due date for payment is a breach of an essential term and shall constitute repudiation of the Agreement by the Client. In this respect, time is of the essence.
- 7.4 If payment of an Invoice is not received by the Company by 3.00pm on the due date for payment, the Company may, at its absolute discretion, and without prejudice to any other rights or remedies (whether pursuant to this Agreement, at common law or in equity):

- 7.4.1 request the Client to pay interest on the outstanding amount at the rate of twenty (20) percent per annum calculated daily and compounded weekly until payment is made in full ("Interest");
- 7.4.2 recover the outstanding amount and the Interest forthwith from the Client as liquidated debt in a court or tribunal of competent jurisdictions irrespective of any claim that the Client may have against the Company for any thing or matter related to the goods supplied under this Agreement;
- 7.4.3 suspend or cease deliveries of any goods;
- 7.4.4 appropriate any payment made by the Client to such of the goods supplied under any agreement with the Client as the Company sees fit;
- 7.4.5 terminate any contracts between the Company and the Client (or its affiliates, associates or related entity) and demand immediate payment of any moneys due and outstanding under those contracts;
- 7.4.6 enter any premises in which the Company's goods are stored by the Client at any times to enable the Company to inspect the goods and / or to reclaim possession of the goods without any liabilities whatsoever for the tort of trespass, negligence or payment of any compensation to the Client whatsoever;
- 7.4.7 lodge a caveat or charge or any similar instruments over any property of the Client at the Client's expense; and
- 7.4.8 institute any recovery process as the Company sees fit at the Client's expense.

## **8 PROPERTY IN THE GOODS**

- 8.1 The property in the goods does not pass to the Client or any third party until the Client has paid the full price (plus any increases and Interest) for the goods, even if the goods have been delivered to, or installed by, or in the possession of, the Client.
- 8.2 Until payment has been made in full as aforesaid, the Client will retain the goods as fiduciary agent and bailee of the Company, and must:
  - 8.2.1 not supply any of the goods to any person;
  - 8.2.2 not allow any person to have or acquire any security interest in the goods;
  - 8.2.3 not remove, deface or obliterate any identifying serial number on any of the goods, or open the casing, or deal or tamper with the goods in any other way;
  - 8.2.4 insure the goods against loss or damage for their full insurable or replacement value (whichever is the higher of) with an insurer licensed or authorised to conduct the business of insurance in the place where the Company carries on the business; and
  - 8.2.5 store the goods separately and distinct from any other goods and properties belonging to the Client, and ensure that the goods are clearly identifiable as the property of the Company.
- 8.3 In the event that the goods are purportedly sold by the Client whilst the property in the goods has not passed to the Client:
  - 8.3.1 the Company has a right to trace the proceeds of such sale both under this Agreement and at law or in equity;
  - 8.3.2 any proceeds of such sale are held by the Client on trust for the Company and must forthwith be forwarded by the Client to the Company to be off-set against any and all amount outstanding (plus Interest and other charges) to the Company from time to time; and
  - 8.3.3 notwithstanding the aforesaid sub-clauses, the Company is entitled to maintain an action against the Client for the outstanding amount, Interest and other charges as permitted by this Agreement.
- 8.4 The Company may, for the purpose of recovering the goods owned by it, enter upon any premises where such goods are stored or where the goods are reasonably thought to be stored, without liability for trespass or any resulting damage, and the Client hereby irrevocably grants a licence to the Company to enter into or upon any of those premises and to remove any of the Company's goods located or stored on those premises from them.

## **9 CANCELLATIONS OR RETURNS**

- 9.1 Once the goods have been delivered to the Client or a third party as nominated by the Client, the Client shall, to the extent permitted by law, be deemed to have accepted those goods in the state and condition

- in which they were delivered and shall not be entitled to return the goods or any part of the goods to the Company for any reason whatsoever unless the Client identifies the delivered goods as not conforming with the Client's orders or otherwise defective beyond repair.
- 9.2 The acceptance of any cancellation or the Client's liability for cancellation charges and credit for the return of the goods and any part of the goods shall be within the absolute discretion of the Company.
- 9.3 No goods, parts or repairs will be accepted on any freight forward basis by the Company.
- 9.4 In the event that the Company accepts the return of the goods, the Client must forthwith pay the Company a restocking fee and freight both ways as may be required by the Company.

## **10 INTELLECTUAL PROPERTY**

- 10.1 All the intellectual property (including, but without limitation, all rights in patent, copyright, trade names, trade marks, designs, logos, images (including photographs, videos, multimedia or films) or service marks, in each case whether registered or registrable) in the goods is the property of the Company, its advertisers or third party providers.
- 10.2 The Purchaser, its servants or agents must not reproduce, adapt, modify, display, perform or distribute any or part of the intellectual property.

## **11 SECURITY FOR PAYMENT**

- 11.1 As security for payment to the Company of all monies payable by the Client, the Client hereby:
  - 11.1.1 charges in favour of the Company all of the Client's right, title or interest in any real property both current and later acquired; and
  - 11.1.2 consents to the lodgement of a caveat noting the Company's interest in any such property.
- 11.2 The Client agrees to execute all instruments and do all things reasonably required by the Company to give effect to this provision.

## **12 GUARANTEE BY CLIENT**

- 12.1 If the Client is a company, all the directors of the Client company hereby:
  - 12.1.1 guarantee, jointly and severally, to the Company the due and punctual payment of all moneys payable by the Client to the Company, including any Interest hereunder; and
  - 12.1.2 charges all or any of his or her right title and interest in any real estate in favour of the Company, and grants the Company a caveatable right as security for payment for any moneys owing hereunder.
- 12.2 This guarantee shall be a continuing guarantee notwithstanding any partial indulgence granted by the Company.
- 12.3 If there are two (2) or more directors, then this guarantee binds them separately, together and in any combination.
- 12.4 All the directors of the Client company agree to execute all instruments and do all things reasonably required by the Company to give effect to this provision, including signing a deed of guarantee and indemnity in the form required by the Company.

## **13 TERMINATION BY COMPANY**

- 13.1 Notwithstanding any provisions in this Agreement, the Company may, at its absolute discretion, and without liability whatsoever, elect not to complete a purchase order submitted by the Client, or to discontinue its dealing with the Client (or its affiliates, associate or related entity), if:
  - 13.1.1 the Client commits, has committed, or is likely to commit, an act of default; or
  - 13.1.2 the Company has grounds to believe that the Client will not be able to meet its payment obligation.
- 13.2 The occurrence of any one or more of the following events in relation to the Client is an act of default:
  - 13.2.1 A breach the Agreement and failure to rectify such breach within seven (7) days after receiving a notice of the breach; or
  - 13.2.2 Cancellation of the Agreement without consent in writing from the Company;

- 13.2.3 An application is made to a court for an order that it be wound up, declared bankrupt or that a provisional liquidator or receiver, or receiver and manager be appointed, unless the application is withdrawn, struck out or dismissed within seven (7) days of it being made;
- 13.2.4 A liquidator, a provisional liquidator, an administrator or a controller is appointed to it or any of its assets;
- 13.2.5 It enters into, or proposes to enter into, an arrangement or composition with one or more of its creditors, or an assignment for the benefit of one or more of its creditors, or a reorganisation, moratorium, deed of company arrangement or other administration involving one or more of its creditors, or its winding up or dissolution other than for the purpose of a bona fide solvent reconstruction;
- 13.2.6 It is insolvent as disclosed in its accounts or otherwise, states that it is insolvent or it is presumed to be insolvent under an applicable law;
- 13.2.7 It becomes insolvent under administration or action is taken which could result in that event;
- 13.2.8 It is taken to have failed to comply with a statutory demand as a result of section 459F(1) of the *Corporations Act 2001* (Cth);
- 13.2.9 A notice is issued under sections 601AA or 601AB of the *Corporations Act 2001* (Cth);
- 13.2.10 A writ of execution is levied against it or its property; or
- 13.2.11 Anything occurs under the law of any applicable jurisdiction which has substantially similar effect to any of the above sub-clauses.
- 13.3 In the event this Agreement is terminated pursuant to this clause, the Company may, at its absolute discretion, and without liability whatsoever:
- 13.3.1 enter upon the Client's premises or such other premises where the goods are stored or where the goods are reasonably thought to be stored, to remove and retake possession of any of the goods located or stored on those premises;
- 13.3.2 resell the goods so recovered in any manner the Company sees fit, in addition, and without prejudice, to any other rights or remedies that the Company is entitled to exercise pursuant to this Agreement, at common law or in equity.

#### **14 TERMINATION BY CLIENT**

- 14.1 This Agreement may not be cancelled by the Client, except with the consent in writing of the Company, and on the condition that:
- 14.1.1 the Client indemnifies, and agrees to keep indemnified, the Company against all losses and pay all costs and expenses incurred by the Company, including any out of pocket expenses and any expenses paid to a third party in the normal course of business; and / or
- 14.1.2 the Client forfeits, or pays to the Company, an amount equivalent to 10% of the total price of the goods that the Company would have received if the Client completes the Agreement.

#### **15 WARRANTY AND GUARANTEE**

- 15.1 The Company agrees to assign to the Client, on request made by the Client, the benefit of any warranty to the goods that the manufacturer or the supplier has granted to the Company under any contract, or by implication or operation of law, to the extent that the benefit of any warranty or entitlement is assignable.
- 15.2 The Company is not liable for, and the Client releases the Company from, any claims in respect of faulty or defective goods supplied.
- 15.3 Except as provided in this Agreement and to the extent permitted by law, all express and implied warranties, guarantees and conditions under statute or general law as to merchantability, description, quality, suitability or fitness of the goods for any purpose, or as to design, assembly, installation, materials or workmanship or otherwise, are expressly excluded. The Company is not liable for physical or financial injury, loss or damage or for consequential loss or damage of any kind arising out of the supply, layout, assembly, installation or operation of the goods or arising out of the Company's negligence or in any way whatsoever.
- 15.4 To the extent permitted by law, the Company's liability for a breach of a condition or warranty pursuant to the Australian Consumer Law is limited to:

- 15.4.1 the replacement of the goods or the supply of equivalent goods;
- 15.4.2 the repair of the goods;
- 15.4.3 the payment of the cost of replacing the goods or of acquiring equivalent goods; and
- 15.4.4 the payment of the cost of having the goods repaired.
- 15.5 To the extent permitted by law, the Company's liability under the Australian Consumer Law is expressly limited to a liability to pay to the Client an amount equal to:
- 15.5.1 the cost of replacing the goods;
- 15.5.2 the cost of obtaining equivalent goods; or
- 15.5.3 the cost of having the goods repaired, whichever is the lowest amount.

#### **16 ACKNOWLEDGEMENTS**

- 16.1 The Client agrees and acknowledges that:
- 16.1.1 it has relied only on its own enquiries in connection with any matters raised in this Agreement and not on any statement, promises, representation, warranty, undertaking or guarantee made by or on behalf of the Company; and
- 16.1.2 it has not been induced to enter into this Agreement by any representation (verbal or otherwise) made by or on behalf of the Company that is not set out in this Agreement.
- 16.2 The Client acknowledges that delays may be caused, and the Company's performance of the Agreement may be affected, by the following:
- 16.2.1 any variations permitted under this Agreement;
- 16.2.2 civil commotion or industrial action affecting the work of tradespeople or the work of a manufacturer or supplier of materials;
- 16.2.3 anything done or not done by the Client or by an agent, contractor or employee of the Client;
- 16.2.4 delay in getting any approval consent permit necessary for the goods; or
- 16.2.5 any other cause that is beyond the Company's direct control.

The Client agrees to release the Company from any claims that the Client may have in this event.

- 16.3 The Client further acknowledges that the Company is not the manufacturer or installer of the goods and does not hold out the Company to the public as the manufacturer or installer of the goods. The goods are subject to every manufacturer's trading terms and conditions and are protected by each and every manufacturer's warranty and the Company shall not be liable to the extent that any manufacturer is liable under a manufacturer's warranty unless otherwise required by law.

#### **17 GENERAL**

- 17.1 **Notices**
- 17.1.1 Any notice to be given to or by any party to this Agreement may be given by post, by facsimile or by hand delivery to the party's last known address or registered office.
- 17.1.2 Posted notices will be taken to have been received 72 hours after posting unless proved otherwise.
- 17.1.3 Notices delivered or sent by facsimile after 5.00pm will be taken to have been received at 9.00am on the next business day at the place where it is received.
- 17.2 **Joint and several liability**
- If the Client shall be more than one person or corporation, then the terms covenants and agreements under this Agreement shall be deemed to be joint and several and this Agreement shall be interpreted to impose joint and several liability on each of them.
- 17.3 **Exercise of rights and powers**
- The Company may exercise any of its rights and powers under this Agreement using any of its employees, agents, contractors, consultants or representatives.

#### **17.4 Force majeure**

The Company shall be relieved of any liabilities otherwise incurred under this Agreement whenever and to the extent to which performance of the Agreement is frustrated, prevented or impeded by statute or act of regulation of any government or by non-availability of import or export licence or allocation of overseas funds, or by reason of strikes, lock-outs, perils of the sea or air, delay of equipment or transport, acts of God (including fire, explosions, tempest, inevitable accident, flood, earthquake, storm or other natural disaster), act of the Queen's enemies, war, terrorist activities or failure of the suppliers of the Company to deliver to the Company, or by unavailability or delay in availability of equipment or transport, or by inability or delay in obtaining governmental or quasi-governmental approvals, consents, permits, licences, authorities or allocations, or any other cause whether of the kind specifically enumerated above or otherwise which is not reasonably within the control of the Company.

#### **17.5 Assignment**

- 17.5.1 The Company may assign this Agreement at anytime for any reason.
- 17.5.2 The Client is only permitted to assign this Agreement if it has obtained the prior written consent of the Company (which consent may be absolutely withheld).

#### **17.6 Variation**

The Company may amend or vary the terms and conditions of this Agreement, at anytime, by giving the Client a notice in writing of the amendment or variation.

#### **17.7 Set-Off**

- 17.7.1 The Client agrees that the Company may set-off any credit amount that the Company owes to the Client against any debit due by the Client to the Company.
- 17.7.2 The Client is not entitled to withhold payment of any money in respect of any set-off or claim that the Client might have against the Company.

#### **17.8 No Waiver**

Failure or omission by any party at any time to enforce or require strict or timely compliance with any provision of this Agreement will not affect or impair that provision in any way or the rights and remedies that the party may have in respect of that provision.

#### **17.9 Severability**

If any provision of this Agreement is found to be illegal, invalid, void, unenforceable or of no force or effect, this Agreement shall be construed as though such part had not been inserted herein, and the remainder of this Agreement shall retain its full force and effect and will not be invalidated by an illegal, void or unenforceable provision.

#### **17.10 Antecedent breaches**

The termination of this Agreement does not affect the rights of any party for a breach of this Agreement by any other party before the termination.

#### **17.11 Entire Agreement**

This Agreement comprises and constitutes the entire agreement between the parties, and supersedes and excludes any prior representations, negotiations, writings, memoranda and agreements relating to the supply of the goods or any parts of the goods, the performance of the goods or any parts of the goods, or the results that ought to be expected from using or applying the goods.

#### **17.12 Governing law**

This Agreement is governed by and construed in accordance with the laws of the State of Victoria. The parties submit to the non-exclusive jurisdiction of the courts of the State of Victoria.