

# TERMS OF TRADE

## 1. Definitions and interpretation

### 1.1 Definitions

In these Terms:

**Additional Charge** means:

- (a) fees or charges for additional work performed or Goods supplied at the Customer's request or reasonably required as a result of the Customer's conduct, calculated in accordance with the Supplier's then current prices; and/or
- (b) expenses incurred by the Supplier, at the Customer's request or reasonably required as a result of the Customer's conduct.

**Business Day** means a day that is not a Saturday, Sunday or public holiday in the place where the Supplier is located.

**Credit Terms** means the credit terms and conditions governing any extension of credit by the Supplier to the Customer in connection with the supply of Goods.

**Customer** means the person identified on any Quote or Order as the customer including its agents and permitted assigns.

**Goods** means any goods supplied by the Supplier to the Customer.

**Intellectual Property Rights** means intellectual property rights at any time protected by statute or common law, including copyright, trademarks, patents and registered designs.

**Loss** includes, but is not limited to, costs (including, but not limited to, party to party legal costs and the Supplier's legal costs), expenses, lost profits, award of damages, personal injury and property damage.

**Order** means an instruction or order for the supply of Goods placed by the Customer and as varied in writing from time to time by the parties pursuant to these Terms.

**PPS Law** means:

- (a) the Personal Property Security Act 2009 (Cth) ("PPS Act") and any regulation made at any time under the PPS Act (each as amended from time to time); and
- (b) any amendment made at any time to any other legislation as a consequence of a PPS Law.

**Price** shall mean the price payable for any Goods supplied or to be supplied to the Customer by the Supplier.

**Quote** means a written description of the Goods to be provided, an estimate of the Supplier's charges for the supply of those Goods and an estimate of the date for delivery of the Goods.

**Supplier** means Kenneth Ayres (Aust) Pty Ltd (ACN 005 724 489).

**Supply Agreement** means any written agreement entered into by the Supplier and the Customer in addition to these Terms and may include (without limitation) any deed, personal guarantee and indemnity agreement, Stock Level Agreement or any other written agreement (however described).

**Terms** means these terms of trade.

### 1.2 Interpretation

In these Terms, unless the context otherwise requires:

- (a) a reference to writing includes email and other communication established through the Supplier's website (if any);
- (b) the singular includes the plural and vice versa;
- (c) a reference to a clause is a reference to a clause of these Terms;
- (d) a reference to a party to these Terms or any other document or arrangement includes that party's executors, administrators, successors and permitted assigns;
- (e) where an expression is defined, another part of speech or grammatical form of that expression has a corresponding meaning;
- (f) headings are for ease of reference only and do not affect the meaning or interpretation of these Terms; and
- (g) if the date on which any act, matter or thing is to be done falls on a day which is not a Business Day, that act, matter or thing:
  - (i) if it involves a payment other than a payment which is due on demand must be done on the preceding Business Day; and
  - (ii) in all other cases, must be done on the next Business Day.

## 2. General

2.1 These Terms apply to all transactions between the Customer and the Supplier relating to the provision of Goods to the Customer by the Supplier and are legally binding.

2.2 These Terms constitute the entire agreement between the Supplier and the Customer unless any effective Supply Agreement and/or Credit Terms are in effect between the Supplier and the Customer. In the event of any inconsistency between any such Supply Agreement and or Credit Terms and these Terms, the Supply Agreement and or Credit Terms shall prevail to the extent of the inconsistency.

2.3 These Terms take precedence over any Terms contained in any document provided to the Supplier by the Customer.

2.4 The variation or waiver of a provision of these terms or a party's consent to a departure from a provision by another party is ineffective unless in writing signed by the parties.

## 3. Quotes

3.1 The Supplier may provide the Customer with a Quote. Any Quote issued by the Supplier is valid for 30 days from the date of issue.

3.2 Unless otherwise expressly agreed in writing, a Quote does not include delivery of the Goods.

3.3 Quotes are based upon the cost of materials available at the time of preparation of the Quote and assume the timely supply by the Customer of all necessary material, artwork and/or instructions to the Supplier.

3.4 Following provision of a Quote to the Customer, the Supplier is not obliged to commence manufacture or supply the Goods until the Quote has been accepted by the Customer by submitting an Order to the Supplier with reference to that Quote.

3.5 The Supplier may at its sole discretion amend any details in a Quote (including but not limited to Price) by notice in writing to the Customer. Such amended details supersede any relevant prior detail in dealings between the parties.

3.6 The Supplier reserves the right to amend any Quote before the Order has been completed to take into account any rise or fall in the cost of completing the Order. The Supplier will notify the Customer of any amendment as soon as practicable, at which point the amended Quote will be the estimate or Quote for the purposes of these Terms.

3.7 An indication in a Quote of the time frame for the provision of the Goods is an estimate only and is not a fixed time frame. Subject to any obligations imposed by law, this estimate is not binding upon the Supplier.

## 4. Orders

4.1 An Order by the Customer for the provision of Goods must be submitted to the Supplier using the Supplier's order form or otherwise in writing.

4.2 An Order will not be placed by the Customer unless the Order clearly identifies the Goods ordered and any relevant Quote (if any). Any costs incurred by the Supplier in reliance on incorrect or inadequate information may result in the imposition of an Additional Charge.

4.3 Orders must be signed by an authorised representative of the Customer and must specify the required date of delivery.

4.4 Placement of an Order by the Customer signifies acceptance by the Customer of these Terms and the most recent Quote (if any).

4.5 The Supplier may in its absolute discretion accept or refuse the Order.

4.6 Once accepted by the Supplier, an Order cannot be cancelled without the prior written consent of the Supplier. Where an Order is cancelled, the Customer indemnifies the Supplier against any Loss incurred by the Supplier as a result of the cancellation, including, but not limited to loss of profit from other orders foregone as a result of the scheduling of the Order which is subsequently cancelled.

## 5. Variations

5.1 The Customer may request that its Order be varied by providing a request in writing to the Supplier. A request for a variation must be agreed to in writing by the Supplier in order to have effect.

5.2 If the Customer wishes to vary its requirements after a Quote has been prepared or after the placement of an Order, the Supplier reserves the right to vary the Quote to include any Additional Charge in respect of any extra costs incurred or additional work carried out due to the variation, in accordance with its then current charge rates. A revised Quote issued by the Supplier in respect of the requested variation supersedes the original Quote. If the revised Quote only specifies additional work, the Quote for that additional work will be in addition to the immediately preceding Quote for the Goods.

5.3 The Supplier has an automatic extension of time for the provision of the Goods equal to the delay caused by the variation.

## 6. Prices

6.1 At the Supplier's sole discretion the Price for the supply of any Goods shall be either:

- (a) the Supplier's current price at the date of an Order according to the Supplier's current price list; and/or
- (b) the Price provided in a Quote which, subject to clause 3 of these Terms, shall be binding upon the Supplier provided that the Client shall accept the Quote in writing within thirty (30) days; and/or
- (c) as indicated on invoices provided by the Supplier to the Customer in respect of Goods supplied.

6.2 Unless otherwise stated in writing, all Prices are exclusive of GST and any other applicable taxes and duties. Any GST or other taxes and/or duties that may be applicable shall be payable by the Customer.

## 7. Payment & Invoicing

7.1 The Supplier may at its sole discretion require that the Customer pay either a deposit amount or the total amount of an Order prior to the Supplier manufacturing or delivering the Goods. The Order will not be processed until payment is received.

7.2 Where Good are supplied to the Customer on credit payment of any amounts are strictly subject to the Supplier's Credit Terms.

7.3 The Supplier may at its sole discretion issue an invoice to the Customer in any one or more of the following ways:

- (a) prior to providing the Goods for full payment of the Order; or
- (b) upon delivery of the Goods or any time thereafter, for the Order or the balance of the Order outstanding, any Additional Charges and any amount not previously invoiced, or if no Quote was provided, for an amount representing the Supplier's charge for the Goods supplied and for any Additional Charges.

7.4 The Customer and the Supplier agree to comply with their obligations in relation to GST under the A New Tax System (Goods and Services Tax) Act 1999 and any other applicable legislation governing GST.

7.5 The Customer must pay an invoice issued by the Supplier to the Supplier within 14 days of the invoice being issued to the Customer.

7.6 If any invoice is due but unpaid, the Supplier may withhold the provision of any further Goods until overdue amounts are paid in full.

7.7 The Supplier may in its complete discretion apply any payment received from the Customer to any amount owing by the Customer to the Supplier.

7.8 The Customer is not entitled to retain any money owing to the Supplier notwithstanding any default or alleged default by the Supplier of these Terms, including (but not limited to) the supply of allegedly faulty or defective Goods, provision of an inadequate standard or a delay in the provision of Goods. Nothing in this paragraph affects the Customer's rights for any alleged failure of a guarantee under the Australian Consumer Law.

7.9 Any amount owing by the Customer to the Supplier pursuant to an invoice which is not paid in accordance with clause 7.5 may, at the sole discretion of the Supplier, incur interest at a rate of 2% above the then current Reserve Bank of Australia Cash Rate calculated daily and compounded monthly but in no circumstances will the interest charged exceed 20% per annum.

7.10 The Customer irrevocably agrees to pay all costs and expenses (including legal costs, commissions paid by the Supplier to any commercial or mercantile agent and dishonour fees) incurred by the Supplier in connection with the recovery of overdue amounts and/or enforcing the charge in clause 7.11 and/or perfecting the purchase money security interest in clause 10.4.

7.11 As security for any amounts due to the Supplier from time to time, the Customer charges all of its legal and equitable interest (both present and future) of whatsoever nature held in any and all real property to the Supplier.

7.12 Without limiting the generality of the charge in clause 7.11 the Customer, agrees, on request by the Supplier, to execute any documents and do all things reasonably required by the Supplier to perfect the charge given in clause 7.11 including registering a mortgage security over any real property. The Customer indemnifies the Supplier on an indemnity basis against all costs and expenses incurred by the Supplier in connection with the preparation and registration of any such steps needed to perfect the security or prepare or register the mortgage documents.

7.13 The Customer consents unconditionally to the Supplier lodging a caveat or caveats noting its interest in any real property.

7.14 A statement in writing signed by an authorised officer of the Supplier setting out the moneys due or owing to the Supplier at the date of the statement shall be sufficient evidence of the amount so due or owing until the contrary is proven.

## 8. Additional Charges

8.1 The Supplier may require the Customer to pay Additional Charges in respect of Loss incurred by the Supplier as a result of reliance on inadequate or incorrect information or material provided by the Customer or information or material supplied later than required by the Supplier in order for it to provide the Goods within the specified time frame (if any).

- 8.2 The imposition of Additional Charges may also occur as a result of cancellation by the Customer of an Order where cancellation results in Loss of the Supplier, storage costs for goods not collected from the Supplier within 2 weeks of the date on which the Goods are manufactured, fabricated, created or formed at the rate set out in the Quote, photocopying, communication costs, couriers, freight costs packing and handling, Government or council taxes or charges, additional work required by the Customer or any other occurrence which causes the Supplier to incur costs in respect of the Customer's Order additional to the quoted cost.
- 9. Acceptance of Goods**
- 9.1 If the Customer fails to advise the Supplier in writing of any fault in Goods or failure of Goods to accord with the Customer's Order within 48 hours of delivery, the Customer is deemed to have accepted the Goods and to have accepted that the Goods are not faulty and accord with the Customer's Order. Nothing in this paragraph affects the Customer's rights for any alleged failure of a guarantee under the Australian Consumer Law.
- 10. Title, Risk & Delivery**
- 10.1 Risk in relation to any Goods passes to the Customer immediately on delivery of the Goods. Delivery of Goods will be at the Supplier's premises on collection of the Goods by the Customer, its employees, agent or contractors or on delivery of the Goods to the Customer's designated place of delivery by the Supplier or its agent.
- 10.2 The Supplier retains legal and equitable title in any Goods supplied to the Customer until payment in full for or in connection with the supply of the relevant Goods has been received by the Supplier. Until payment in full has been received, the following terms apply:
- (a) notwithstanding that title in the Goods remains with the Supplier until payment has been received in full, the Customer may deal with the Goods as it would in the ordinary course of the Customer's business and/or sell the Goods (either as delivered by the Supplier or comingled with other goods or services) to a purchaser. As between the Customer and the purchaser of any item of the Goods, the Customer sells as principal and not as agent of the Supplier. The proceeds from the sale of each item of Goods or use of each item of Goods in connection with any sale by the Customer to a purchaser (as the case may be) must be held by the Customer in a separate fund on trust for the Supplier and the Customer is under a duty to account to the Supplier for such proceeds. The creation of, or any failure of, any such trust shall not in any way limit the obligation of the Customer to pay an amount to the Supplier for Goods supplied;
- (b) until Goods are sold or used by the Customer in the ordinary course of the Customer's business, the Customer must keep the Goods safe and free from deterioration, destruction, loss or harm, clearly designate the Goods as the property of the Supplier, store them in such a way they are clearly identified as the property of the Supplier and keep full and complete records, firstly, of the physical location of the Goods and, secondly, the ownership of the Goods by the Supplier;
- (c) the Supplier is irrevocably entitled at any time and from time to time before the sale or use of any item of Goods by the Customer to inspect or to recover and retake possession of such Goods and otherwise exercise in relation to the Goods any of its rights whether those rights are as owner and/or unpaid supplier or otherwise and whether those rights are conferred by common law, contract, statute or in any other way. In order to exercise such entitlement, the Supplier and its agents are irrevocably authorised by the Customer to enter any of the Customer's premises or vehicles or those of any third party. The Customer agrees to obtain the consent of any such third party to such entry by the Supplier and to indemnify the Supplier and its agents for any liability arising from any entry upon such third parties' premises or vehicles. The Supplier and its agents agree to take all reasonable care in removing the Goods from such premises or vehicles but, to the extent this liability may be disclaimed by law, are not liable for any damage or injury to such premises caused by the removal of the Goods; and
- (d) this reservation of title and ownership is effective whether or not the Goods have been altered from their supplied form, or comingled with other goods.
- 10.3 The parties irrevocably agree that the retention of title arrangement described in this clause constitutes the grant of a purchase money security interest by the Customer in favour of the Supplier in respect of all present and after acquired Goods supplied to the Customer by the Supplier pursuant to the PPS Law.
- 10.4 If requested by the Supplier, the Customer must immediately sign any documents, provide all necessary information and do anything else required by the Supplier to ensure that the Supplier's purchase money security interest is a perfected security interest for the purposes of the PPS Law.
- 10.5 The Customer will not enter into any security agreement that permits any other person to have or to register any security interest in respect of the Goods or any proceeds from the sale of the Goods until the Supplier has perfected its purchase money security interest.
- 11. Intellectual Property Rights**
- 11.1 The Customer warrants that it owns all Intellectual Property Rights pertaining to its Order for Goods or otherwise has a licence to authorise the Supplier to reproduce or use all copyright works or other materials the subject of Intellectual Property Rights supplied by the Customer to the Supplier for the purposes of the Order. Further, the Customer indemnifies and agrees to keep indemnified the Supplier against any Loss incurred by the Supplier in relation to or in any way directly or indirectly connected with any breach of any other Intellectual Property Rights in relation to any material supplied by the Customer.
- 12. Agency and assignment**
- 12.1 The Customer agrees that the Supplier may at any time appoint or engage an agent to perform an obligation of the Supplier arising out of or pursuant to these Terms.
- 12.2 The Supplier has the right to assign and transfer to any person all or any of its title, estate, interest, benefit, rights, duties and obligations arising in, under or from these Terms provided that the assignee agrees to assume any duties and obligations of the Supplier owed to the Customer under these Terms.
- 12.3 The Customer is not to assign, or purport to assign, any of its obligations or rights under these Terms without the prior written consent of the Supplier.
- 13. Default by Customer**
- 13.1 Each of the following occurrences constitutes an event of default:
- (a) the Customer breaches or is alleged to have breached these Terms for any reason (including, but not limited to, defaulting on any payment due under these Terms) and fails to remedy that breach within 14 days of being given notice by the Supplier to do so;
- (b) the Customer, being a natural person, commits an act of bankruptcy;
- (c) the Customer, being a corporation, is subject to:
- a petition being presented, an order being made or a meeting being called to consider a resolution for the Customer to be wound up, deregistered or dissolved;
  - a receiver, receiver and manager or an administrator under Part 5.3A of the Corporations Act 2001 being appointed to all or any part of the Customer's property and undertaking;
  - the entering of a scheme of arrangement (other than for the purpose of restructuring);
  - any assignment for the benefit of creditors;
- (d) the Customer purports to assign its rights under these Terms without the Supplier's prior written consent;
- (e) the Customer ceases or threatens to cease conduct of its business in the normal manner.
- 13.2 Where an event of default occurs, except where payment in full has been received by the Supplier, the Supplier may:
- terminate these Terms;
  - terminate any or all Orders and credit arrangements (if any) with the Customer;
  - refuse to deliver Goods;
  - pursuant to clause 10.2(c), repossess and re-sell any Goods delivered to the Customer, the payment for which has not been received; or
  - retain (where applicable) all money paid on account of Goods or otherwise.
- 13.3 In addition to any action permitted to be taken by the Supplier under this clause, on the occurrence of an event of default all invoices will become immediately due and payable.
- 14. Exclusions and limitation of liability**
- 14.1 The Customer expressly agrees that use of the Goods is at the Customer's risk. To the full extent allowed by law, the Supplier's liability for breach of any term implied into these Terms by any law is excluded.
- 14.2 All information, specifications and samples provided by the Supplier in relation to the Goods are approximations only and, subject to any guarantees under the Australian Consumer Law, small deviations or slight variations from them which do not substantially affect the Customer's use of the Goods will not entitle the Customer to reject the Goods upon delivery, or to make any claim in respect of them.
- 14.3 The Supplier gives no warranty in relation to the Goods provided or supplied. Under no circumstances is the Supplier or any of its suppliers liable or responsible in any way to the Customer or any other person for any loss, damages, costs, expenses or other claims (including consequential damages and loss of profits or loss of revenues), as a result, direct or indirect of any defect, deficiency or discrepancy in the Goods including in their form, content and timeliness of deliveries, failure of performance, error, omission, defect, including, without limitation, for and in relation to any of the following:
- any Goods supplied to the Customer;
  - any delay in supply of the Goods; or
  - any failure to supply the Goods.
- 14.4 Any advice, recommendation, information, assistance or service given by the Supplier in relation to Goods is given in good faith and is believed to be accurate, appropriate and reliable at the time it is given, but is provided without any warranty or accuracy, appropriateness or reliability. The Supplier does not accept any liability or responsibility for any Loss suffered as a result of the Customer's reliance on such advice, recommendation, information, assistance or service.
- 14.5 To the fullest extent permissible at law, the Supplier is not liable for any direct, indirect, punitive, incidental, special, consequential damages or any damages whatsoever including, without limitation, damages for loss of use, data or profits, arising out of or in any way connected with the provision of or failure to provide Goods, or otherwise arising out of the provision of Goods, whether based on Terms, negligence, strict liability or otherwise, even if the Supplier has been advised of the possibility of damages.
- 14.6 The Customer acknowledges that the Goods are not for personal, domestic or household purposes.
- 14.7 The Australian Consumer Law may give to the Customer certain guarantees. Where liability for breach of any such guarantee can be limited, the Supplier's liability (if any) arising from any breach of those guarantees is limited with respect to the supply of Goods, to the replacement or repair of the Goods or the costs of resupply or replacement of the Goods.
- 15. Indemnity**
- 15.1 The Customer indemnifies and keeps indemnified the Supplier, its servants and agents in respect of any claim or demand made or action commenced by any person (including, but not limited to, the Customer) against the Supplier or, for which the Supplier is liable, in connection with any Loss arising from or incidental to the provision of Goods or any Order or the subject matter of these Terms including, but not limited to any legal costs incurred by the Supplier in relation to meeting any claim or demand or any party/party legal costs for which the Supplier is liable in connection with any such claim or demand. This provision remains in force after the termination of these Terms.
- 16. Force majeure**
- 16.1 If circumstances beyond the Supplier's control prevent or hinder its provision of the Goods the Supplier is free from any obligation to provide the Goods while those circumstances continue. The Supplier may elect to terminate this agreement or keep the agreement on foot until such circumstances have ceased.
- 16.2 Circumstances beyond the Supplier's control include, but are not limited to, unavailability of materials or components, strikes, lockouts, riots, natural disasters, fire, war, acts of God, Government decrees, proclamations or orders, transport difficulties and failures or malfunctions of computers or other information technology systems.
- 17. Other matters**
- 17.1 These Terms are governed by the laws of Victoria and each party irrevocably submits to the non-exclusive jurisdiction of the courts of such state.
- 17.2 These Terms supersede all oral and written negotiations and communications by and on behalf of either of the parties.
- 17.3 In entering into these Terms, the Customer warrants that it has not relied on any warranty, representation or statement, whether oral or written, made by the Supplier or any of its employees or agents relating to or in connection with the subject matter of these Terms.
- 17.4 If any provision of these Terms at any time is or becomes void, voidable or unenforceable, the remaining provisions will continue to have full force and effect.
- 17.5 A party's failure or delay to exercise a power or right does not operate as a waiver of that power or right.