

Terms & Conditions of Trade

**1. Definitions**

In these Terms:

**ACL** means the Australian Consumer Law Schedule of the *Competition and Consumer Act 2010* (Cth) and its associated Regulations as amended;

**Agreement** means any agreement for the provision of goods or services by the Supplier to the Customer;

**consumer** is as defined in the ACL and in determining if the Customer is a consumer, the determination is made if Customer is a consumer under the Agreement;

**Customer** means the person, jointly and severally if more than one, acquiring goods or services from the Supplier;

**goods** means goods supplied by the Supplier to the Customer as described in item 1 of the Schedule to the Terms and Conditions;

**GST** means the Goods and Services tax as defined in *A New Tax System (Goods and Services Tax) Act 1999* (Cth) and its associated Regulations as amended;

**PPSA** means the *Personal Property Securities Act 2009* (Cth) and its associated Regulations as amended;

**services** means services supplied by the Supplier to the Customer;

**Supplier** means E.J. Hadaway Pty Ltd (ACN 005 912 256); and

**Terms** means these Terms and Conditions of Trade.

**2. Basis of Agreement**

2.1. Unless otherwise agreed by the Supplier in writing, the Terms apply exclusively to every Agreement and cannot be varied or replaced by any other terms, including the Customer's terms and conditions of purchase (if any).

2.2. Any quotation provided by the Supplier to the Customer for the proposed supply of goods or services is:

- (a) valid for 30 days;
- (b) an invitation to treat only; and
- (c) only valid if in writing.

2.3. The Terms may include additional terms in the Supplier's quotation, which are not inconsistent with the Terms.

2.4. An Agreement is accepted by the Supplier when the Supplier accepts, in writing or electronic means, an offer from the Customer or provides the Customer with the goods or services.

2.5. The Supplier may refuse to accept any offer.

2.6. The Customer must provide the Supplier with its specific requirements, if any, in relation to the goods and services.

**3. Pricing**

3.1. Prices quoted for the supply of goods and services include GST and any other taxes or duties imposed on or in relation to the goods and services.

3.2. If the Customer requests any variation to the Agreement, the Supplier may increase the price to account for the variation.

3.3. Where there is any change in the costs incurred by the Supplier in relation to goods or services, the Supplier may vary its price to take account of any such change, by notifying the Customer.

**4. Payment**

4.1. Unless otherwise agreed in writing:

- (a) Subject to 4.1(b), full payment for the goods or services must be made in accordance with item 4 of the Schedule to the Terms and Conditions.
- (b) The Supplier reserves the right to require payment in full on delivery of the goods or completion of the services.

4.2. Payment by cheque is not deemed made until the proceeds of the cheque have cleared.

4.3. Payment terms may be revoked or amended at the Supplier's sole discretion immediately upon giving the Customer written notice. If the Supplier provides the Customer with written notice of its revocation or amendment to the payment terms, the Customer may elect to withdraw its order by providing written notice to the Supplier.

4.4. The time for payment is of the essence.

**5. Payment Default**

5.1. If the Customer defaults in payment by the due date of any amount payable to the Supplier, then all money which would become payable by the Customer to the Supplier at a later date on any account, becomes immediately due and payable without the requirement of any notice to the Customer, and the Supplier may, without prejudice to any of its other accrued or contingent rights:

- (a) charge the Customer interest on any sum due at the prevailing rate pursuant to the *Penalty Interest Rates Act 1983* (Vic) plus 4% for the period from the due date until the date of payment in full;
- (b) charge the Customer for, and the Customer must indemnify the Supplier from, all costs and expenses (including without limitation all legal costs and expenses) incurred by it resulting from the default or in taking action to enforce compliance with the Agreement or to recover any goods;
- (c) cease or suspend supply of any further goods or services to the Customer;
- (d) by written notice to the Customer, terminate any uncompleted contract with the Customer.

5.2. Clauses 5.1(c) and 5.1(d) may also be relied upon, at the Supplier's option:

- (a) where the Customer is a natural person and becomes bankrupt or enters into any scheme of arrangement or any assignment or composition with or for the benefit of his or her creditors or any class of his or her creditors generally; or
- (b) where the Customer is a corporation and, it enters into any scheme of arrangement or any assignment or composition with or for the benefit of its creditors or any class of its creditors generally, or has a liquidator, administrator, receiver or manager or similar functionary appointed in respect of its assets, or any action is taken for, or with the view to, the liquidation

(including provisional liquidation), winding up or dissolution without winding up of the Customer.

## **6. Passing of Property**

6.1. Until the Supplier receives full payment in cleared funds for all goods and services supplied by it to the Customer, as well as all other amounts owing to the Supplier by the Customer:

- (a) title and property in all goods remain vested in the Supplier and do not pass to the Customer;
- (b) the Customer must hold the goods as fiduciary bailee and agent for the Supplier;
- (c) the Customer must keep the goods separate from its goods and maintain the Supplier's labelling and packaging;
- (d) the Customer must hold the proceeds of sale of the goods on trust for the Supplier in a separate account with a bank to whom the Customer has not given security however failure to do so will not affect the Customer's obligation as trustee;
- (e) in addition to its rights under the PPSA, the Supplier may without notice, enter any premises where it suspects the goods are and remove them, notwithstanding that they may have been attached to other goods not the property of the Supplier, and for this purpose the Customer irrevocably licences the Supplier to enter such premises and also indemnifies the Supplier from and against all costs, claims, demands or actions by any party arising from such action.

## **7. Personal Property Securities Act**

7.1. Notwithstanding anything to the contrary contained in these Terms, the PPSA applies to these Terms.

7.2. For the purposes of the PPSA:

- (a) terms used in clause 7 that are defined in the PPSA have the same meaning as in the PPSA;
- (b) these Terms are a security agreement and the Supplier has a Purchase Money Security Interest in all present and future goods supplied by the Supplier to the Customer and the proceeds of the goods;
- (c) the security interest is a continuing interest irrespective of whether there are monies or obligations owing by the Customer at any particular time; and
- (d) the Customer must do whatever is necessary in order to give a valid security interest over the goods which is able to be registered by the Supplier on the Personal Property Securities Register.

7.3. The security interest arising under this clause 7 attaches to the goods when the goods are collected or dispatched from the Supplier's premises and not at any later time.

7.4. Where permitted by the PPSA, the Customer waives any rights to receive the notifications, verifications, disclosures or other documentation specified under sections 95, 118, 121(4), 130, 132(3)(d), 132(4), 135 and 157 of the PPSA.

7.5. The Supplier and the Customer agree to contract out of and nothing in the provisions of sections 96, 125, 129, 142 and 143 of the PPSA will apply to these Terms.

7.6. To the extent permitted by the PPSA, the Customer agrees that:

- (a) the provisions of Chapter 4 of the PPSA which are for the benefit of the Customer or which place obligations on the Supplier will apply only to the extent that they are mandatory or the Supplier agrees to their application in writing; and

(b) where the Supplier has rights in addition to those in Chapter 4 of the PPSA, those rights will continue to apply.

7.7. The Customer must immediately upon the Supplier's request:

- (a) do all things and execute all documents necessary to give effect to the security interest created under this Agreement; and
- (b) procure from any person considered by the Supplier to be relevant to its security position such agreements and waivers (including as equivalent to those above) as the Supplier may at any time require.

7.8. The Supplier may allocate amounts received from the Customer in any manner the Supplier determines, including in any manner required to preserve any Purchase Money Security Interest it has in goods supplied by the Supplier.

7.9. For the purposes of section 275(6) of the PPSA, the parties agree and undertake that these Terms and any information pertaining to the sale of goods and details of the goods shall be kept confidential at all times. Neither party may disclose any information pertaining to these Terms or the sale of the goods, except as otherwise required by law or that is already in the public domain.

## **8. Risk and Insurance**

8.1. The risk in the goods and all insurance responsibility for theft, damage or otherwise will pass to the Customer immediately on the goods being delivered to the Customer or taken from the Supplier's premises.

8.2. The goods are sold to the Customer on the basis that the Customer has obtained all necessary licenses or permits under all relevant laws and regulations in relation to the goods.

8.3. The Customer assumes all risk and liability for loss, damage or injury to persons or to property of the Customer, or third parties arising out of the use, installation or possession of any of the goods sold by the Supplier, unless recoverable from the Supplier on the failure of any statutory guarantee under the ACL.

## **9. Performance of Agreement**

9.1. Any period or date for delivery of goods or provision of services stated by the Supplier is an estimate only and not a contractual commitment.

9.2. The Supplier will use its reasonable endeavours to meet any estimated dates for delivery of the goods but will not be liable for any loss or damage suffered by the Customer or any third party for failure to meet any estimated date.

9.3. If the Supplier cannot complete the services by any estimated date, it will complete the services within a reasonable time.

## **10. Delivery**

10.1. Subject to clause 10.6, the Supplier will arrange for the delivery of the goods to the Customer.

10.2. The Customer is responsible for all costs associated with delivery, including freight, insurance and other charges arising from the point of dispatch of the goods to the Customer to the point of delivery.

10.3. The Supplier may make part delivery of goods or provision of services and the Supplier may invoice the Customer for the goods or services provided.

10.4. The Customer indemnifies the Supplier against any loss or damage suffered by the Supplier, its sub-contractors or employees as a result of delivery, except where the Customer is a consumer and the Supplier has not used due care and skill.

- 10.5. If delivery is attempted and is unable to be completed the Customer is deemed to have taken delivery of the goods. The Customer is liable for storage charges payable monthly on demand.
- 10.6. If agreed that the Customer will collect the goods:
- (a) the Customer must collect the goods with seven days of being advised they are ready;
  - (b) if the Customer does not collect the goods within this time, the Customer is deemed to have taken delivery of the goods and is liable for storage charges payable monthly on demand.

## 11. Inspection

- 11.1. The Customer must:
- (a) inspect the goods within 5 business days of delivery; and
  - (b) notify the Supplier of any alleged damage or non-conformance with the specifications of the Agreement within 8 business days of delivery, otherwise the Customer will be deemed to have accepted the goods.
- 11.2. If the Customer on-sells the goods prior to the expiration of the time periods set out in clause 11.1(a) and (b), the Customer is deemed to have accepted the goods.

## 12. Liability

- 12.1. Except as the Terms specifically state, or as contained in any express warranty provided in relation to the goods or services, the Agreement does not include by implication any other term, condition or warranty in respect of the quality, merchantability, acceptability, fitness for purpose, condition, description, assembly, manufacture, design or performance of the goods or services or any contractual remedy for their failure.
- 12.2. If the Customer is a consumer nothing in these Terms restricts, limits or modifies the Customer's rights or remedies against the Supplier for failure of a statutory guarantee under the ACL.
- 12.3. If the Customer on-supplies the goods to a consumer and:
- (a) the goods or services are not of a kind ordinarily acquired for personal, domestic or household use or consumption, then the amount specified in section 276A(1) of the ACL is the absolute limit of the Supplier's liability to the Customer;
  - (b) the goods or services are of a kind ordinarily acquired for personal, domestic or household use or consumption, payment of any amount required under section 274 of the ACL is the absolute limit of the Supplier's liability to the Customer;
- howsoever arising under or in connection with the sale, installation, use of, storage or any other dealings with the goods or services by the Customer or any third party.
- 12.4. If clause 12.2 or 12.3 do not apply, then other than as stated in the Terms or any written warranty statement the Supplier is not liable to the Customer in any way arising under or in connection with the sale, installation, use of, storage or any other dealings with the goods or services by the Customer or any third party.
- 12.5. If the Customer accepts the Supplier's delivery of incomplete goods and the Customer does not notify the Supplier in accordance with clause 11.1 above, the Supplier will not be liable for any indirect or consequential loss or expenses suffered by the Customer or any third party in respect of the incomplete goods, except to the extent of any liability imposed by the ACL.
- 12.6. For the avoidance of doubt, in circumstances in which the goods supplied are unfinished goods in which the Customer or an agent of the customer performs further

manufacturing, processing or finishing processes, the Supplier shall not be liable to the Customer for any fault or defect caused or contributed to by any such manufacturing processes, value adding processes, processing or finishing and the Customer further indemnifies and holds the Supplier harmless for all claims, losses, damages, actions, suits and demands (including any consequential and economic loss) from any third parties arising out of or in relation to such goods to the extent that such losses arise from any further manufacturing processes, value adding processes, processing or finishing.

- 12.7. If the Customer provides goods to the Supplier for manufacturing purposes and the goods contain defects:
- (a) the Supplier shall not be held liable for any failure of the goods after the completion of the manufacturing process; and
  - (b) the Customer indemnifies and holds the Supplier harmless for all claims, losses, damages, actions, suits and demands (including any consequential losses and economic loss) from any third parties arising out of or in relation to such losses to the extent that such losses are due to the defective nature of the goods provided by the Customer to the Supplier.
- 12.8. The Supplier is not liable for any indirect or consequential losses or expenses suffered by the Customer or any third party, howsoever caused, including but not limited to loss of turnover, profits, business or goodwill or any liability to any other party, except to the extent of any liability imposed by the ACL.
- 12.9. The Customer acknowledges that:
- (a) it has not relied on any service involving skill and judgement, or on any advice, recommendation, information or assistance provided by the Supplier in relation to the goods or services or their use or application.
  - (b) it has not made known, either expressly or by implication, to the Supplier any purpose for which it requires the goods or services and it has the sole responsibility of satisfying itself that the goods or services are suitable for the use of the Customer.
  - (c) It has made its own enquiries about the suitability of the goods purchased for its use and has read and understood any specification listed in item 2 of the Schedule to the Terms and Conditions.
- 12.10. Nothing in the Terms is to be interpreted as excluding, restricting or modifying or having the effect of excluding, restricting or modifying the application of any State or Federal legislation applicable to the sale of goods or supply of services which cannot be excluded, restricted or modified.
- ## 13. Cancellation
- 13.1. If the Supplier is unable to deliver the goods or provide the services, then it may cancel the Customer's order (even if it has been accepted) by written notice to the Customer.
- 13.2. The Supplier may cancel the Customer's order if the Customer becomes bankrupt or insolvent or has a liquidator, administrator or similar functionary appointed in respect of its assets.
- 13.3. No purported cancellation or suspension of an order or any part of it by the Customer is binding on the Supplier once the order has been accepted.
- 13.4. If the Supplier accepts a cancellation by the Customer, then the Customer is liable to reimburse the Supplier for

all of the Supplier's costs and expenses incurred in respect of the Agreement up to the date of cancellation.

#### **14. Shortages and Exchanges**

- 14.1. Subject to clause 14.2 and 14.3, the Supplier will not be liable for any shortages, damage or non-compliance with the specifications in the Agreement unless the Customer notifies the Supplier with full details and description within 8 days of delivery otherwise the Customer is deemed to have accepted the goods.
- 14.2. When any shortages, claim for damaged goods or non-compliance with the Agreement specifications is accepted by the Supplier, the Supplier may, at its option, replace the goods, or refund the price of the goods.
- (a) subject to clause 14.3, the Supplier will not under any circumstances accept goods for return that:
  - (b) have been specifically produced, imported or acquired to fulfil the Agreement;
  - (c) are discontinued goods or no longer stocked by the Supplier;
  - (d) have been altered in any way;
  - (e) have been used; or
  - (f) are not in their original condition and packaging.
- 14.3. If the Customer is a consumer, nothing in this clause 14 limits any remedy available for a failure of the guarantees in sections 56 and 57 of the ACL.

#### **15. Force Majeure**

- 15.1. The Supplier is not liable in any way howsoever arising under the Agreement to the extent that it is prevented

from acting by events beyond its reasonable control including, without limitation, industrial disputes, strikes, lockouts, accident, breakdown, import or export restrictions, acts of God, acts or threats of terrorism or war. If an event of force majeure occurs, the Supplier may suspend or terminate the Agreement by written notice to the Customer.

#### **16. Miscellaneous**

- 16.1. The law of Victoria from time to time governs the Terms. The parties agree to the non-exclusive jurisdiction of the courts of Victoria, the Federal Court of Australia, and of courts entitled to hear appeals from those Courts.
- 16.2. The Supplier's failure to enforce any of these Terms shall not be construed as a waiver of any of the Supplier's rights.
- 16.3. If a clause is unenforceable it must be read down to be enforceable or, if it cannot be read down, the term must be severed from the Terms, without affecting the enforceability of the remaining terms.
- 16.4. A notice must be in writing and handed personally or sent by email, facsimile or prepaid mail to the last known address of the addressee. Notices sent by pre-paid post are deemed to be received upon posting. Notices sent by facsimile or email are deemed received on confirmation of successful transmission.
- 16.5. The Customer must comply with the Australian Privacy Principles in connection with any personal information supplied to it in connection with this Agreement.