

Terms and Conditions of Service



1. Definitions

“**ACL**” means the Australian Consumer Law Schedule of the Competition and Consumer Act 2010 (Cth);

“**Buyer**” means the entity purchasing the goods on these Terms;

“**Consumer**” is as defined in the ACL;

“**Costs of Delivery**” means the costs of insurance and transportation of the goods to the place of delivery;

“**Goods**” means goods supplied by Seller to Buyer;

“**PPSA**” means the Personal Property Securities Act 2009 (Cth);

“**Seller**” means Thomas Warburton Pty Ltd (ABN 43 105 050 824) and any related body corporate;

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

2. Binding Terms

2.1 The only terms which are binding upon Seller are:

- 1)** those set out in these Terms or otherwise agreed to in writing by Seller; and
- 2)** those, if any, which are imposed by law and which cannot be excluded.

3. Price

3.1 The price list of Seller and any quotation issued by Seller to Buyer is an invitation to treat only. Seller reserves the right to accept or reject, in its absolute discretion, any orders which may be received by it.

3.2 The prices shown in the price list are subject to alteration without notice.

3.3 The prices shown in any quotation issued by Seller to Buyer apply only to orders placed within 30 days after the date of the relevant quotation and thereafter the prices are subject to alteration without notice.

3.4 Except where a quotation has been issued, if Seller accepts an order it must supply the goods at the price shown in the price list that is current when Seller accepts the order, unless otherwise agreed in writing.

4. Delivery

4.1 Unless otherwise specified in writing, delivery is at Buyer's business premises, and the Costs of Delivery of the goods must be paid by Buyer.

4.2 Seller must pay the Costs of Delivery of the goods for back order deliveries that are part of an original order that has been partially filled.

4.3 If a delivery date is specified, that date is an estimate only and Seller is not liable for any delays in delivery.

4.4 If Seller is unable to supply Buyer's total order these Terms continue to apply to the goods supplied.

5. Acceptance

5.1 Buyer must inspect the goods immediately upon delivery and must, within 7 days after the date of delivery, give written notice to Seller, with particulars of any claim that the goods are not in accordance with the order. If Buyer fails to give that notice within 7 days, then the goods are deemed to have been accepted by Buyer and Buyer must pay for the goods in accordance with the provisions of these Terms.

6. Payment

6.1 Payment for the goods (including GST) sold by Seller to Buyer must be tendered no later than the expiration of the calendar month following the month of sale.

6.2 Payment is deemed to be made:

- 1)** if cash is tendered - on the date it is tendered; and
- 2)** if a cheque (bank or otherwise) or other negotiable instrument is tendered - on the date upon which the cheque or other negotiable instrument is negotiated and cleared by Seller's bankers.

6.3 Time is of the essence.

6.4 If Buyer defaults in making payment to Seller in accordance with these Terms, Seller may in its absolute discretion:

- 1)** charge Buyer interest calculated on the portion of Buyer's account overdue at the rate of 2% per month from the date on which the default arose; and
 - 2)** require Buyer to reimburse Seller for all collection costs including legal costs incurred by Seller calculated on a solicitor and client basis as a consequence of Seller instructing its solicitor to provide advice to it in connection with the default and/or to institute such recovery process as Seller, in its discretion, decides; and
 - 3)** cease the supply of any further goods to Buyer.
- 6.5** Clause 6.4 may also be relied upon, at Seller's option, where:
- 1)** 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
 - 2)** 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.

7. Returns

7.1 Subject to the ACL, Buyer must not return any goods which Buyer claims are not in accordance with the order (whether or not the goods are deemed to be accepted by Buyer) unless Seller has first given written approval to their return. The Costs of Delivery associated with the return must be paid by Buyer unless otherwise agreed by Seller.

7.2 Subject to the ACL, if Seller has given its written approval to the return of goods deemed to be accepted under clause 7.1:

- 1)** Seller will only give credit for the goods returned if they are in a saleable condition; and
- 2)** Seller may charge a handling charge equivalent to 10% of the price of the goods returned.

8. Risk and Insurance

8.1 Goods supplied by Seller to Buyer are at Buyer's risk immediately on delivery to Buyer or into Buyer's custody (whichever is the sooner).

8.2 Buyer must insure the goods at its own cost, from the time of delivery of the goods to the time that they are paid for in full, against such risks as it thinks appropriate and must note the interest of Seller on the policy and produce a certificate to this effect to Seller on request.

9. Retention of Title

9.1 Until Seller receives full payment in cleared funds for all goods supplied by it to Buyer, as well as all other amounts owing to Seller by Buyer:

- 1)** title and property in all goods remain vested in Seller and do not pass to Buyer;
- 2)** Buyer must hold the goods as fiduciary bailee and agent for Seller;
- 3)** Buyer must properly store and protect the goods and keep the goods separate from its own goods and maintain Seller's labelling and packaging;
- 4)** Buyer must hold the proceeds of any sale of the goods on trust for Seller in a separate account with a bank to whom Buyer has not given security however failure to do so will not affect Buyer's obligation to deal with the proceeds as trustee;
- 5)** in addition to its rights under the PPSA, Seller 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 Seller, and for this purpose Buyer irrevocably licences Seller to enter such premises and also indemnifies Seller from and against all costs, claims, demands or actions by any party arising from such action.

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- 9.2** If Buyer uses any of the goods in a manufacturing or construction process of its own or a third party and sells the product of the manufacturing or construction process (Manufactured Product), then Buyer holds such part of the proceeds of the sale of any Manufactured Product as relates to any goods sold by Seller to Buyer and used in the manufacturing or construction process in trust for Seller in accordance with the PPSA.
- 9.3** If the amount owing by Buyer to Seller is greater than the proceeds of sale of the Manufactured Product the balance remains owing by Buyer to Seller.

10. Personal Property Securities Act

- 10.1** Notwithstanding anything to the contrary contained in these Terms, the PPSA applies to these Terms.
- 10.2** For the purposes of the PPSA:
- 1)** terms used in clause 10 that are defined in the PPSA have the same meaning as in the PPSA;
 - 2)** these Terms are a security agreement and Seller has a Purchase Money Security Interest (PMSI) in all present and future goods supplied by Seller to Buyer and the proceeds of the goods;
 - 3)** The security interest is a continuing interest irrespective of whether there are monies or obligations owing by Buyer at any particular time; and
 - 4)** Buyer must do whatever is necessary in order to give a valid security interest over the goods which is able to be registered by Seller on the Personal Property Securities Register.
- 10.3** The security interest arising under this clause 10 attaches to the goods when the goods are dispatched from Seller's premises and not at any later time.
- 10.4** Where permitted by the PPSA, Buyer 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.
- 10.5** Seller and Buyer 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.
- 10.6** To the extent permitted by the PPSA, Buyer agrees that:
- 1)** the provisions of Chapter 4 of the PPSA which are for the benefit of Buyer or which place obligations on Seller will apply only to the extent that they are mandatory or Seller agrees to their application in writing; and
 - 2)** where Seller has rights in addition to those in Chapter 4 of the PPSA, those rights will continue to apply.
- 10.7** Buyer must immediately upon Seller's request:
- 1)** do all things and execute all documents necessary to give effect to the security interest created under this Agreement; and
 - 2)** procure from any person considered by Seller to be relevant to its security position such agreements and waivers (including as equivalent to those above) as Seller may at any time require.
- 10.8** Seller may allocate amounts received from Buyer in any manner Seller determines, including in any manner required to preserve any PMSI.
- 10.9** For the purposes of section 275(6) of the PPSA, the parties agree that these Terms and any information pertaining to the sale 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.

11. Liability

- 11.1** Except as specifically stated, these terms do 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 any contractual remedy for their failure.
- 11.2** If Buyer is a consumer nothing in these Terms restricts, limits or modifies Buyer's rights or remedies against Seller for failure of a statutory guarantee under the ACL.

- 11.3** If Buyer on-supplies the goods to a consumer and:
- 1)** the goods 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 Seller's liability to Buyer;
 - 2)** the goods are of a kind ordinarily acquired for personal, domestic or household use or consumption, then payment of any amount required under section 274 of the ACL is the absolute limit of Seller's liability to Buyer; howsoever arising under or in connection with the sale, use of, storage or any other dealings with the goods by Buyer or any third party.
- 11.4** If clause 11.2 or 11.3 do not apply, then Seller is not liable to Buyer in any way arising under or in connection with the sale, use of, storage or any other dealings with the goods by Buyer or any third party.
- 11.5** Seller is not liable for any indirect or consequential losses or expenses suffered by Buyer 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.
- 11.6** Buyer acknowledges that:
- 1)** it has not relied on any service involving skill and judgement, or on any advice, recommendation, information or assistance provided by Seller in relation to the goods or their use or application.
 - 2)** it has not made known, either expressly or by implication, to Seller any purpose for which it requires the goods and it has the sole responsibility of satisfying itself that the goods are suitable for Buyer's use.

12. Privacy

- 12.1** Where goods are supplied to Buyer on credit, Buyer irrevocably authorises Seller, its employees and agents to make such enquiries as it deems necessary to investigate the credit worthiness of Buyer including but not limited to making enquiries from persons nominated as trade referees, the bankers of Buyer or any credit providers and Seller may obtain a consumer credit report containing information about Buyer from a credit reporting agency, and may conduct a search of the Personal Property Securities Register (Information Sources) and Buyer authorises the Information Sources to disclose to Seller all information concerning Buyer which is within their possession and which is requested by Seller.

13. Force Majeure

- 13.1** If a party is prevented from or delayed in complying with an obligation (other than to pay money) by an event beyond its reasonable control, then performance by it of that obligation is suspended during the time, but only to the extent that compliance is prevented or delayed.

14. Miscellaneous

- 14.1** If anything in these Terms is unenforceable, illegal or void then it is severed and the rest of these Terms remain in force.
- 14.2** Seller's failure or delay to exercise a power or right does not operate as a waiver of that power or right, and the exercise of a power or right does not preclude its exercise in the future or the exercise of any other power or right.
- 14.3** A waiver is not effective unless it is in writing and is effective only in respect of the specific instance to which it relates and for the specific purpose for which it is given.
- 14.4** A notice must be in writing and handed personally or sent by prepaid mail, fax or email to the last known address of the addressee. Notices sent by prepaid mail are deemed to be received upon posting. Notices sent by fax or email are deemed received on confirmation of successful transmission.
- 14.5** The law of the Victoria governs these Terms.