

# TERMS AND CONDITIONS OF SALE

## 1. DEFINITIONS AND INTERPRETATION

### 1.1 Definitions

In these terms and conditions, unless the context otherwise requires:

- (a) "Application" in relation to a Buyer means the Credit Account Application signed by the Buyer which refers to these terms and conditions.
- (b) "Consequential Loss" means, in connection with a breach of these terms and conditions or other event, fact, matter or circumstance:
  - (i) any loss suffered by a person that:
    - a. would not be suffered by every other person in a like situation to that person; or
    - b. cannot reasonably be considered to arise naturally from that breach or event, fact, matter or circumstance;
  - (ii) any and all consequential, special, indirect, exemplary or punitive loss, even if such loss could reasonably be considered to arise naturally from that breach or event, fact, matter or circumstance; or
  - (iii) any and all loss of profit, loss of revenue, loss of goodwill, loss of opportunity or loss of savings, even if such loss could reasonably be considered to arise naturally from that breach or event, fact, matter or circumstance.
- (c) "Buyer" means the Person named in the relevant Sales Invoice or Quotation.
- (d) "GST" means the goods and services tax as imposed by the GST law together with any related interest, penalties, fines or other charge.
- (e) "GST Amount" means any Payment (or the relevant part of that Payment) multiplied by the appropriate rate of GST.
- (f) "GST Law" has the meaning given to that term in A New Tax System (Goods and Services TAX) Act 1999, or, if that Act does not exist for any reason, means any Act imposing or relating to the imposition or administration of a goods and services tax in Australia and any regulation made under that Act.
- (g) "Insolvency Event" means the happening of any one or more of the following events:
  - (i) the Buyer being unable to pay its debts as and when they fall due;
  - (ii) a receiver, liquidator, controller, trustee in bankruptcy or other external administrator being appointed over the Buyer's assets or undertaking or any of them;
  - (iii) if the Buyer is a corporation:
    - a. an application for winding up or other process being filed and not being withdrawn within 30 days, seeking orders which, if granted, would render the Buyer an externally administered body corporate; or
    - b. the Buyer being or becoming the subject of an order, or a resolution being passed, for the winding up or dissolution of that party; or
  - (iv) the Buyer entering into or resolving to enter into a deed of company arrangement or an arrangement, composition or compromise with or assignment for the benefit of its creditors generally or any class of creditors, or proceedings being commenced to sanction such an arrangement, composition or compromise in each case, where the Buyer is a corporation, other than for the purposes of a bona fide scheme of solvent reconstruction or amalgamation.
- (h) "Payment" means any amount payable under or in connection with a Sales Invoice including any amount payable by way of indemnity, reimbursement or otherwise (other than a GST Amount) and includes the provision of any non-monetary consideration.
- (i) "Person" includes an individual, the estate of an individual, a body politic, a corporation, an association (incorporated or unincorporated) and a statutory or other authority.
- (j) "Purchase Price" means the price for the goods set out in the relevant Quotation or Sales Invoice.
- (k) "Quotation" means the form of quotation submitted by the Seller to the Buyer in which these terms and conditions are deemed to be incorporated.
- (l) "Sales Invoice" means the sales invoice issued by the Seller to the Buyer in which these terms and conditions are or are deemed to be incorporated.
- (m) "Seller" in relation to any Quotation or Sales Invoice means: Australian Water Systems trading as Clark Tanks Pty Ltd ABN92 114 587 692 .
- (n) "Tax Invoice" has the meaning given to that term by the GST Law.
- (o) "Taxable Supply" has the meaning given to that term by the GST Law.

### 1.2 Interpretation

- (a) Any special conditions specified on a Quotation or Sales Invoice shall, to the extent they are inconsistent with these terms and conditions, take precedence over these terms and conditions.
- (b) Words importing the singular shall include the plural (and vice versa).

## 2. GOVERNING TERMS AND CONDITIONS

These are the only terms and conditions which are binding upon the Seller with the exception of those otherwise agreed in writing by the Seller or which are imposed by a statute and which cannot be excluded.

## 3. TERMS OF PAYMENT

Payment by the Buyer for goods delivered and accepted **is due within the period specified in the applicable Sales Invoice**. If the Buyer fails to make payment in accordance with this clause, all amounts owing by the Buyer to the Seller on any account shall immediately become due and payable. Each outstanding amount shall bear interest of the rate equivalent to the N.A.B. overdraft rate plus 2% per annum calculated on a daily basis from the day it falls due until the day it is paid.

#### 4. **GUARANTEE**

If the Buyer is a company or an incorporated association, the directors personally guarantee the payment of all debts owing by the Buyer.

#### 5. **INSPECTION AND ACCEPTANCE**

The Buyer shall inspect all goods upon delivery and shall within 48 hours of delivery give notice to the Seller of any matter or thing by which the Buyer alleges that the goods are not in accordance with the Buyer's order. Failing such notice, subject to any non-excludable guarantee or condition that applies by law, such as those in the *Competition and Consumer Act 2010* (Cth), the goods shall be deemed to:

- (a) have been delivered to and accepted by the Buyer;
- (b) be of acceptable quality;
- (c) be fit for the Buyer's disclosed purpose (if any); and
- (d) be in a form which corresponds with the Seller's description.

#### 6. **GST**

The parties agree that:

- (a) the Purchase Price and all other Payments, unless otherwise stated, exclusive of GST and have been calculated without regard to GST;
- (b) if the whole or any part of any Payment is the consideration for a Taxable Supply for which is liable to GST, the payer must pay to the payee an additional amount equal to the GST Amount concurrently with that Payment.

#### 7. **PASSING OF PROPERTY AND RISK**

- (a) Goods supplied by the Seller to the Buyer shall be at the Buyer's risk immediately upon delivery to the Buyer, into the Buyer's custody or at the Buyer's direction (whichever happens first).
- (b) Property in the goods supplied by the Seller to the Buyer under these terms and conditions shall not pass to the Buyer until those goods and other goods have been paid for in full.
- (c) Until the goods have been paid for in full:
  - (i) the Buyer shall store the goods in a manner which shows clearly that they are the property of the Seller; and
  - (ii) the Buyer may sell the goods, in the ordinary course of its business, unless the Buyer breaches these terms and conditions or suffers an Insolvency Event.
- (d) The Buyer's irrevocably authorises the Seller at any time to enter onto any premises upon which:
  - (i) the Seller's goods are stored and to:- inspect the goods; or, if the Buyer has breached these terms and conditions, take repossession of the goods (and for this purpose the Buyer shall provide the Seller all reasonable assistance); and
  - (ii) the Buyer's records pertaining to the goods are held and to inspect and copy such records.
- (e) The Buyer acknowledges that by virtue of this clause 7, the Seller has a 'purchase money security interest' or 'PMSI' (as defined by the *Personal Property Securities Act 2009* (Cth) ("PPSA")) for the purposes of the PPSA in respect of all goods supplied by or on behalf of the Seller to the Buyer for which payment has not been received in full and the proceeds from the sale of those goods, as security for that payment.
- (f) The Buyer consents to the Seller affecting a registration on the Personal Property Securities Register (in any manner the Seller considers appropriate) in relation to the PMSI referred to in clause 7(e) or any other 'security interest' arising under these terms and conditions and agrees to provide all assistance reasonably required to facilitate this.
- (g) The Buyer and the Seller agree that the provisions of the clause apply notwithstanding any arrangement under which the Seller grants credit to the Buyer.

#### 8. **SUPPLY**

The Seller reserves the right to:

- (a) suspend or discontinue the supply of goods to the Buyer without being obliged to give any reason; or
- (b) make part deliveries of any order, and each part delivery shall constitute a separate sale of goods upon these terms and conditions without invalidating the balance of the order.

#### 9. **DIMENSIONS, PERFORMANCE DATA AND OTHER DESCRIPTIVE DETAILS**

- (a) Photographs, drawings, illustrations, weights, dimensions and any other particulars given in a Quotation, descriptive literature or catalogue approximate the goods offered but may be subject to alteration without notice.
- (b) Any performance data provided by the Seller or a manufacturer is an estimate only and should be construed accordingly.

#### 10. **SHIPMENT AND DELIVERY**

Upon acceptance of an order by the Seller will seek confirmation of the period of shipment or delivery. While the Seller will endeavour to meet shipment or delivery timeframes, the Seller accepts no liability to the Buyer or to any other person if for any reason whatsoever it is unable to do so.

#### 11. **CONTINGENCIES**

Any charge, duty, impost, sales tax or other expenditure which is not applicable at the date of Quotation of Sales Invoice but which is subsequently levied upon the Seller in relation of a Quotation or Sales Invoice as a result of the introduction of any legislation, regulation or governmental policy, shall be to the Buyer's account.

#### 12. **DELIVERIES**

Unless otherwise agreed in writing, if the Seller prepays freight, insurance, delivery charges and all other charges in connection with shipment and delivery of the goods, then any such charges shall be to the Buyer's account. The Seller reserves the right to nominate the means of delivery.

**13. FORCE MAJEURE**

If the performance or observance of any obligations of the Seller is prevented, restricted or affected by reason of a force majeure event (including strike, lock out, industrial dispute, raw material shortage, breakdown of plant, transport or equipment or any other cause beyond the reasonable control of the Seller), the Seller may, in its absolute discretion give notice of that cause to the Buyer. On deliver of that notice the Seller is excused from such performance or observance to the extent of the relevant prevention, restriction of affection.

**14. DEFAULT OF BUYER**

If these terms and conditions are not strictly observed by the Buyer, the Seller may in its absolute discretion, refuse to supply to the Buyer and the Seller shall not be liable to the Buyer for any loss of damage the Buyer may sustain as a result of such refusal.

**15. BUYER'S CANCELLATION**

Unless otherwise agreed by the Seller in writing, the Buyer shall have no right to cancel an order which has been accepted by the Seller. If a right of cancellation is expressly reserved to the Buyer, such right of cancellation must be exercised by notice in writing from the Buyer to the Seller within the time frame the subject of that agreement or, if no such timeframe is stipulated, not later than 7 days prior to the estimated date of shipment by the manufacturer or the Seller as the case may be. Unless otherwise agreed between the Buyer and the Seller, upon cancellation prior to shipment any deposit paid by the Buyer shall be forfeited to the manufacturer or the Seller (as the case may be).

**16. WARRANTY**

- (a) The Seller makes no express warranties under or in connection with these terms and conditions or any supplied under them, except to the extent of any written warranty that accompanies the goods at the time of supply.
- (b) Notwithstanding the foregoing, the Seller acknowledges that the Buyer may have rights arising under the *Australian Consumer Law* by virtue of a failure of goods to comply with one or more guarantees arising under the *Australian Consumer Law* which are in addition to the Buyer's rights under these terms and conditions and as required by law makes the following:
  - "Our goods come with guarantees that cannot be excluded under the Australian Consumer Law. You are entitled to a replacement or refund for a major failure and for compensation for any other reasonable foreseeable loss or damage. You are also entitled to have the goods repaired or replaced if the goods fail to be of acceptable quality and the failure does not amount to a major failure.
- (c) Upon discovery of any defect in the goods supplied by the Seller, the Buyer shall immediately notify the Seller in writing. The Buyer shall not carry out any remedial work to allegedly defective goods without first obtaining the written consent of the Seller to do so.

**17. LIABILITY OF THE SELLER**

- (a) The Seller does not exclude or limit application of any provision of any statute (including the *Competition and Consumer Act 2010 (Cth)*) where to do so would contravene that statute or cause any part of this clause to be void.
- (b) Subject to clauses 17 and 18(a):
  - (i) the Seller excludes all conditions, guarantees, warranties and terms, whether expressed or implied by law or otherwise in respect of the goods which may apart from this clause be binding upon the Seller.
  - (ii) the liability, if any, of the Seller arising from the breach of any condition, guarantee or warranty or term in relation to the supply of goods, shall at the Seller's election be limited to:
    - a. the replacement of the goods or resupply of the goods by the Seller;
    - b. the repair of the goods;
    - c. the payment of the cost of replacement of the goods; or
    - d. the payment of the cost of repair of the goods.
- (c) The Seller excludes all liability to the Buyer:
  - (i) in negligence for acts or omissions of the Seller, its employees, agents and contractors; and
  - (ii) to the extent permitted by statute, for any Consequential Loss which is in any way connected with these terms and conditions or any goods supplied under them whether such liability arises under statute, contract, tort (including negligence) or otherwise.
- (d) The Buyer expressly acknowledges and agrees that it has not relied upon any advice given by the Seller, its agents or employees in relation to the suitability for any particular purpose of goods or materials supplied by the Seller.

**18. PRIVACY ACT**

The Seller is committed to protecting the privacy of the personal information provided by the Buyer. Only personal information required to process the application by the Buyer for a credit account will be collected and stored. The Seller may disclose personal information to relevant staff and agents, contractors and third party suppliers engaged by the Seller to deliver goods and services. The Buyer warrants that information provided by the Buyer on behalf of any person, has been collected with the knowledge and consent of that person.

**19. VARIATION**

The Seller may, at any time and from time to time, vary these terms and conditions without prior notice, provided that the varied terms and conditions will only apply to goods order after the date of change.

**20. GOVERNING LAW**

These terms and conditions and any contract including them shall be governed by and construed in accordance with the laws of the State of New South Wales and the Seller and the Buyer submit to the non-exclusive jurisdiction of the Courts of New South Wales.