

# Terms and Conditions

These terms and conditions apply (unless otherwise previously agreed in writing) to the supply of Goods and Services by Thermogroup Trading Pty Ltd ABN 44 632 80 959 to a Customer from time to time. Any supply of Goods by Thermogroup to the Customer made after the date of acceptance of these terms is a supply pursuant to the Contract as defined and any such supply does not give rise to a new or separate agreement.

## 1. Definitions and Interpretation

### 1.1. In this Agreement:

**Agreement** means the agreement between the Customer and Thermogroup comprising the following documents:

- (a) the Order, accepted by Thermogroup;
- (b) these Terms and Conditions of Sale; and
- (c) any other document which is incorporated by reference in the Quotation or these terms and conditions of sale.

**Australian Consumer Law** has the meaning given to it in the *Competition and Consumer Act 2010 (Cth)*.

**Business Day** means any day other than a Saturday, Sunday or public holiday in the whole of Australia.

**Customer** means the party to whom a Quotation is provided by Thermogroup or by whom an Order is placed with Thermogroup for Goods.

**Delivery Time** means the date and time that the Goods are:

- (a) delivered by, or on behalf of, Thermogroup to the Site or any other delivery location nominated by the Customer and agreed to by Thermogroup; or
- (b) collected by, or on behalf of, the Customer or notified as being ready for collection from Thermogroup's premises or any other location at which the Goods are situated; or
- (c) due to be delivered by Thermogroup, but delivery is delayed at the request of the Customer or due to circumstances beyond the reasonable control of Thermogroup.

**Force Majeure Event** means any event outside the reasonable control of Thermogroup including acts of God, war, riots, strikes, lock outs, trade disputes, break downs, mechanical failures, interruptions of transport, Government action or any other cause whatsoever, whether or not of a like nature to those specified above.

**Goods** mean any product, item, equipment or materials sold or to be sold by to the Customer and includes any services provided by Thermogroup to Customer.

**GST** means the tax imposed by *A New Tax System (Goods and Services Tax) Act 1999 (Cth)*.

**GST Act** means *A New Tax System (Goods and Services Tax) Act 1999 (Cth)*.

**Thermogroup** means Thermogroup Trading Pty Ltd ABN 44 632 780 959.

**Invoice** means the written invoice issued by Thermogroup to the Customer upon acceptance of an Order setting out the Price and any delivery charges.

**Order** means a written order to purchase Goods placed by the Customer with Thermogroup in such form as required by Thermogroup.

**PPSA** means the *Personal Property Securities Act 2009 (Cth)*.

**Price** means the Price of Goods determined under clause 3.

**Quotation** means a written quotation issued by Thermogroup for the sale of Goods to the Customer.

**Site** means the location where the Goods are to be delivered, as stated in the Quotation or otherwise nominated by the Customer and agreed to by Thermogroup.

**Standard Specifications** means Thermogroup's standard specification for the Goods current at the time Goods are delivered to the Customer. Copies of the Standard Specifications are available upon request from Thermogroup.

### 1.2. In this Agreement:

- (a) any reference to a party includes its successors and permitted assigns;
- (b) headings are for convenience only and have no legal effect;
- (c) the singular includes the plural and vice versa;
- (d) "including" and similar words do not imply any limitation;
- (e) a reference to \$ is to the Australian dollar;
- (f) a reference to legislation or a legislative provision includes regulations and other instruments under it and consolidations, amendments, re-enactments or replacements of any of them; and
- (g) if the performance of an obligation under this Agreement falls due on a weekend or public holiday day it must be performed on the next Business Day.

## 2. Quotations and Orders

2.1. Quotations are valid for a period of 45 days from date of issue and may be amended or withdrawn at any time by Thermogroup before an Order is placed by the Customer.

2.2. An order given to Thermogroup is binding on Thermogroup and the Customer, if:

- (a) a written acceptance is signed for or on behalf of Thermogroup; or

- (b) the Goods are supplied by Thermogroup in accordance with the Order.

2.3. Once accepted by Thermogroup an Order constitutes a contract between Thermogroup and the Customer on the terms and conditions contained in this Agreement and the terms of the Agreement will override any conditions contained in the Customer's Order.

2.4. Once accepted by Thermogroup, orders cannot be cancelled by the Customer under any circumstances without Thermogroup's prior written consent which it may refuse in its absolute discretion (which consent may include a requirement that the Customer indemnify Thermogroup against any loss or expense suffered by it as a result of the cancelled Order).

## 3. Price

3.1. The Price for Goods is either;

- (a) the price indicated in Thermogroup's Quotation (or any subsequent Quotation if varied); or
- (b) the price listed in any Thermogroup price list current at the date an Order is placed.

3.2. Unless otherwise stated on the Quotation, prices do not include applicable taxes or statutory charges (such as GST) or delivery charges. Delivery charges will be specified in Quotations and Invoices and charged in addition to the Price.

## 4. Payment

4.1. Thermogroup, at its discretion, may require payment of a deposit for Goods on placing of an Order. Thermogroup may also require that the Goods be paid for in instalments by the Customer.

4.2. Unless the Customer has a credit account in the Customer's name with Thermogroup, the total amount of an invoice (less any deposit paid) and the delivery charges are payable by the Customer prior to or on delivery of the Goods.

4.3. If the Customer has an approved credit account, an invoice (less any deposit paid) and the delivery charges are payable by the Customer by the terms stipulated on the invoice.

4.4. Payment must be made by cash, bank cheque, credit card (which may include provider surcharge of 1.5%), direct credit into Thermogroup's bank account or by any other method agreed between the Customer and Thermogroup. Receipt of any form of payment other than cash will not constitute payment until that form of payment has been honoured, cleared or recognised.

4.5. Subject to clause 7, payment will constitute acceptance by the Customer of all Goods.

4.6. All amounts payable by the Customer under this Agreement must be paid without set-off or counter claim of any kind.

## 5. GST

5.1. If GST is imposed on any taxable supply under this Agreement, then the recipient of that taxable supply must pay the supplier an additional amount equal to the GST payable on the taxable supply at the same time as payment for the taxable supply is due.

## 6. Delivery

6.1. Thermogroup will (unless otherwise agreed with the Customer) organise for delivery of the Goods to the Site by a carrier appointed by Thermogroup. Delivery and freight costs will be specified in the Quotation and are payable by the Customer at the same time an invoice or application for payment is payable.

6.2. An estimated timeframe for delivery will be stated in the Quotation. Thermogroup will use reasonable endeavours to meet the delivery timeframe but accepts no responsibility for costs or charges resulting from a delay in delivery due to factors outside its reasonable control. The Customer is not relieved of any obligation to accept or pay for Goods by reason of any delay in delivery. Thermogroup may change the estimated delivery time by written notice to the Customer. Thermogroup reserves the right to deliver the Goods in instalments.

6.3. The Customer acknowledges that Goods do not need to be signed for when delivered and may be unloaded and left on any part of the Site that Thermogroup or its carrier considers reasonable in the circumstances.

## 7. Defects and Returns

7.1. The Customer must inspect the Goods on delivery and notify Thermogroup in writing within 7 days of delivery of any alleged defect, damage or failure of the Goods. If no notice is given within 7 days of delivery, the Customer will be deemed to have accepted the Goods.

7.2. If a notice of defect or damage is given the Customer must allow Thermogroup access to inspect the Goods and determine whether or not that notice is valid. If Thermogroup accepts that Goods are defective or

- damaged the parties acknowledge that the Customer has remedies available to it as a consumer under the Australian Consumer Law.
- 7.3. Thermogroup will not be liable for any defects, damage or failure of Goods which have not been stored or used in a proper manner.
- 7.4. Thermogroup may, at its sole discretion, accept the return of non-defective Goods for credit subject to a handling fee of 20% of the value of the returned Goods plus freight costs.
- 7.5. Any Goods that have been manufactured or supplied specifically to the Customer's instructions or specifications (including bespoke items or Goods with custom finishes) will not be accepted for return in any circumstances other than those specified in this clause 7 or required by law.

## 8. Risk

- 8.1. Risk in the Goods passes to the Customer at the Delivery Time.
- 8.2. The Customer must, from the date 'risk in the Goods' passes to it, until the date that title to the Goods passes to it, insure the Goods against all reasonably insurable risks for their full replacement value and, if required by Thermogroup, store the Goods separately from any other goods and in a way that enables the Goods to be clearly identifiable as the property of Thermogroup.

## 9. Retention of Title

- 9.1. Ownership, title and property in the Goods and in the proceeds of sale of those Goods remains with Thermogroup until payment in full for the Goods and all sums due and owing by the Customer to Thermogroup on any account has been made. Until the date of payment:
- the Customer has the right to sell the Goods in the ordinary course of business;
  - until the Goods have been sold by the Customer in the ordinary course of the Customer's business, the Customer holds the Goods as bailee for Thermogroup;
  - the Goods are always at the risk of the Customer.
- 9.2. The Customer is deemed to be in default immediately upon the happening of any of the following events:
- if any payment to Thermogroup is not made promptly before the due date for payment;
  - if the Customer ceases to carry on business or stops or suspends payment or states its intention of so doing or is unable to pay its debts as they fall due or if any cheque or bill of exchange drawn by the Customer payable to Thermogroup is dishonoured;
- 9.3. In the event of a default by the Customer, then without prejudice to any other rights which Thermogroup may have at law or under this agreement:
- Thermogroup or its agents may without notice to the Customer enter the Customer's premises or any premises under the control of the Customer for the purposes of recovering the Goods.
  - Thermogroup may recover and resell the Goods;
  - if the Goods cannot be distinguished from similar Goods which the Customer has or claims to have paid for in full, Thermogroup may in its absolute discretion seize all goods matching the description of the Goods and hold same for a reasonable period so that the respective claims of Thermogroup and the Customer may be ascertained. Thermogroup must promptly return to the Customer any goods the property of the Customer and Thermogroup is in no way liable or responsible for any loss or damage to the Goods or for any loss, damage or destruction to the Customer's business howsoever arising from the seizure of the Goods.
  - If the Customer uses the Goods in some manufacturing or construction process of its own or some third party, then the Customer must hold such part of the proceeds of sale of such manufacturing or construction process as relates to the Goods in trust for Thermogroup. Such part will be an amount equal in dollar terms to the amount owing by the Customer to Thermogroup at the time of the receipt of such proceeds. The Customer will pay Thermogroup such funds held in trust upon the demand of Thermogroup.
- 9.4. Separately, Customer hereby charges all its right, title and interest to and in the proceeds of sale of the Collateral as original collateral, or any of it, in favour of Thermogroup
- 10. Personal Property Securities Act 2009 ("PPSA")**
- 10.1. Capitalised terms used in this clause but not defined in clause 1 the meanings given to them in the PPSA.
- 10.2. The Customer acknowledges and agrees that:
- this Agreement constitutes a Security Agreement in respect of the Goods;
  - the Goods are Collateral for the purpose of the PPSA;
  - Thermogroup holds (as Secured Party) a Security Interest over all of the present and after acquired Goods supplied by Thermogroup to the Customer and any Proceeds of the sale of those Goods;
  - that any purchase by the Customer on credit terms from Thermogroup or retention of title under clause 9 will constitute a Purchase Money Security Interest;

- the Purchase Money Security Interest granted will continue to apply to any Goods coming into existence or proceeds of sale of Goods coming into existence;
- Thermogroup will continue to hold a Security Interest in the Goods in accordance with, and subject to, the PPSA, notwithstanding that the Goods may be processed, co-mingled or become an accession with other goods.
- any Thermogroup's Security Interest will be a continuing and subsisting interest in the Collateral with priority to the fullest extent permitted by law over all registered or unregistered Security Interests;
- until title in the Goods passes to the Customer, it will keep all Goods supplied by Thermogroup free of any charge, lien or Security Interest and not otherwise deal with the Goods in a way that will or may prejudice any rights of Thermogroup under this Agreement or the PPSA; and
- in addition to any other rights under this Agreement or otherwise arising, Thermogroup may exercise any and all remedies afforded to it as a Secured Party under Chapter 4 of the PPSA, including entry into any building or premises owned, occupied or used by the Customer to search for and seize, dispose of or retain those Goods over which Thermogroup holds a Security Interest.

## 10.3. The Customer undertakes to:

- sign any further documents and provide such information which Thermogroup may reasonably require to register, amend or update a Financing Statement or a Financing Change Statement in relation to a Security Interest on the Personal Securities Register;
- indemnify, and on demand reimburse, Thermogroup for all expense incurred in registering a Finance Statement or Financing Change Statement on the Personal Property Securities Register or releasing any Security Interests;
- not register or permit to be registered a Financing Change Statement in the Collateral without the prior written consent of Thermogroup; and
- provide Thermogroup no less than 7 days prior written notice of any proposed change in the Customer's name, address, contact numbers, business practice or other change in the Customer's details registered on the Personal Property Securities Register to enable Thermogroup to register a Financing Change Statement if required.

## 10.4. Thermogroup and the Customer agree that sections 96, 125 and 132(3)(d) and 132(4) of the PPSA do not apply to the Security Agreement created under this Agreement.

## 10.5. The Customer waives its rights:

- to receive notices under sections 95, 118 121(4), 130, 132(3)(d) and 132(4) of the PPSA; and
- as a Grantor and / or a Debtor under sections 142 and 143 of the PPSA; and
- to receive a Verification Statement in accordance with section 157 of the PPSA.

## 10.6. The Customer must unconditionally ratify any actions taken by Thermogroup under this clause 10.

## 10.7. The Customer appoints and authorises Thermogroup to be its attorney to sign in the Customer's name all documents which Thermogroup reasonably considers necessary to protect, preserve and enforce its rights and powers under this Agreement and the PPSA.

## 11. Default and termination

### 11.1. In relation to any Invoice that has not been paid by the due date:

- default interest will accrue daily at the rate of 2% per calendar month; and
- the Customer agrees to indemnify Thermogroup from and against all costs and disbursements incurred by Thermogroup in pursuing the debt (including legal costs on a solicitor and own client basis and collection agency costs).

### 11.2. In the event that the Customer's payment is dishonoured for any reason the Customer will be liable for any dishonour fees incurred by Thermogroup.

### 11.3. If the Customer:

- is in default of any payment obligation;
- fails to remedy a breach of any non-payment related obligation within 14 days of having been given a written notice to remedy the breach by Thermogroup;
- becomes unable to pay its debts and when they fall due; or
- commits an act of bankruptcy or, being a company, enters into liquidation or provisional liquidation whether compulsory or voluntary or compounds with its creditors generally or has a receiver or receiver manager or administrator appointed over all or part of its assets or passes a resolution for winding-up or a petition is presented for its winding-up;

then Thermogroup may, without prejudice to any other rights or remedies available to it under this Agreement or otherwise, by notice in writing to the Customer:

- (e) suspend further supply of the Goods and require payment in advance for any future supply;
- (f) recover possession of any Goods for which payment has not been made;
- (g) terminate all or any Orders which have been accepted by Thermogroup;
- (h) claim immediate payment of all moneys due by the Customer in respect of all Goods which will then be immediately due and payable notwithstanding the due date or dates for payment; and/or
- (i) continue to enforce its rights against and recover from the Customer such payments and any other amounts owing as and when they fall due.

## 12. Warranties and limitation of liability

- 12.1. Thermogroup warrants that the Goods when delivered to the Customer will comply with any description for the Goods contained in the Quotation and with the Standard Specification (if any) for the Goods, including any manufacturer's warranty.
- 12.2. Unless expressly provided in the Quotation or any other written document of Thermogroup, Thermogroup gives no representations or warranties for the Goods.
- 12.3. The Customer warrants that in placing its Order it has:
  - (a) satisfied itself as to the description and condition of the Goods and their fitness for the purpose for which the Customer will use them; and
  - (b) not relied on any statement, representation, warranty, guarantee, condition, advice, recommendation, information, assistance or service provided by Thermogroup or anyone on Thermogroup's behalf in respect of the Goods, other than those expressly contained in this Agreement, the Quotation or any other document that Thermogroup has provided to the Customer.
- 12.4. Where the customer buys Goods as a consumer, this Agreement is subject to the Australian Consumer Law which governs the rights of consumers and nothing in this Agreement affects the Customer's statutory rights.
- 12.5. Thermogroup's liability to the Customer is limited, to the extent permissible by law, and at Thermogroup's option:
  - (a) in relation to the Goods;
    - i. the replacement of the products or the supply of equivalent products
    - ii. the repair of the products
    - iii. the payment of the cost of replacing the products or of acquiring equivalent products; or
    - iv. The payment of the cost of having the products repaired
  - (b) Where the Goods are services:
    - i. the supply of service again; or
    - ii. the payment of the cost of having the services supplied again.
- 12.6. To the extent permitted at law, all other warranties whether implied or otherwise, not set out in these Terms are excluded and Thermogroup is not liable in contract, tort (including, without limitation, negligence or breach of statutory duty) or otherwise to compensate Customer for:
  - (a) any increased costs or expenses;
  - (b) any loss of profit, revenue, business, contracts or anticipated savings;
  - (c) any loss or expense resulting from a claim by a third party; or
  - (d) any special, indirect or consequential loss or damage of any nature whatsoever caused by Thermogroup's failure to complete or delay in completing the order to deliver the Goods.

## 13. Indemnity

- 13.1. The Customer agrees to indemnify and keep indemnified Thermogroup against all costs, claims, demands, expenses and liabilities of whatsoever nature (including claims of death, personal injury, damage to property and consequential loss (including loss of profit)), suffered or incurred by, or made against Thermogroup as a result of a breach of this Agreement by the Customer, the Customer's use of the Goods, or any other conduct of the Customer, except where those costs, claims, demands, expenses or liabilities are directly and solely attributable to the gross negligence or wilful default of Thermogroup or any of its duly authorised employees or agents.

## 14. Force Majeure

- 14.1. Thermogroup will not be liable for the consequences of any failure or delay in performing any of its obligations under this Agreement to the extent that such failure or delay is due directly or indirectly to any Force Majeure Event.
- 14.2. If a Force Majeure Event arises, Thermogroup will notify the Customer in writing of the Force Majeure Event and the likely impact it will have on Thermogroup's performance under this Agreement. If the Force Majeure Event affects the capacity of Thermogroup to complete its material obligations under this Agreement in a timely manner, Thermogroup may by notice to the Customer terminate this Agreement without any liability whatsoever on its part arising from that termination.

## 15. Confidentiality

- 15.1. The Customer shall treat as confidential all information, data, drawings, specifications, samples and documentation supplied by Thermogroup under or in connection with this Agreement, and will not disclose them to any third party without the prior written consent of Thermogroup.

## 16. Dispute Resolution

- 16.1. If there is a dispute in relation to any aspect of the supply of the Goods either party may notify the other in writing of the dispute.
- 16.2. Following any such notification, there will be a period of 30 days during which both parties must participate in good faith in any negotiations or discussions regarding the dispute which Thermogroup requests the Customer to participate in.
- 16.3. If the dispute has not been resolved by the end of the 30-day period, Thermogroup may require that the dispute be submitted to mediation in accordance with, and subject to, the Institute of Arbitrators and Mediators Australia and its applicable rules.
- 16.4. Subject to clause 16.5 neither party is permitted to commence any court proceedings or other similar actions relating to a dispute unless it has complied with the procedure set out in this clause.
- 16.5. This clause does not prevent a party from exercising any rights it has under the Construction Act or from commencing legal proceedings for urgent interlocutory relief.

## 17. General Provisions

- 17.1. The Customer must not assign or otherwise deal with any of its rights or obligations under this Agreement without the prior written consent of Thermogroup.
- 17.2. Thermogroup may assign or deal with any of its rights or obligations under this Agreement at any time and without any requirement to notify the Customer. Thermogroup reserves the right to subcontract the performance of any of its obligations under this Agreement to any other person it so determines.
- 17.3. Thermogroup may vary this Agreement from time to time and any variation takes effect in relation to subsequent Orders placed after the Customer has received written notice of the variation from Thermogroup.
- 17.4. No failure to exercise or delay in exercising any right under this Agreement constitutes a waiver and any right may be exercised in the future. A waiver of any right under this Agreement must be in writing and is only effective to the extent set out in that written waiver.
- 17.5. If any provision of this Agreement is void, unenforceable or illegal and would not be so if words were omitted, then those words are to be severed and if this cannot be done, the relevant sub-clause is to be severed from this Agreement and if this cannot be done, then the entire relevant clause is to be severed from this Agreement, in each case, without affecting the validity or enforceability of the remaining provisions.
- 17.6. This Agreement (including the Quotation, Order and Invoice) constitutes the entire Agreement between the parties in respect of the sale of Goods and supersedes all previous communications, representations understandings or agreements.
- 17.7. This Agreement is governed by the laws in force in the State of New South Wales and the parties submit to the non-exclusive jurisdiction of the courts of State of New South Wales.
- 17.8. Any notice to be given to a party must be in writing.
- 17.9. Clauses 5, 7, 9, 10, 12, 13, 15 and 16 survive termination or completion of this Agreement.
- 17.10. Any intellectual property rights in the Goods and any instructions relating to them remain with Thermogroup and do not pass to the Customer. Thermogroup grants to the Customer a non-exclusive, royalty free license to use Thermogroup's intellectual property to the extent such materials form part of, or are integral to, the Goods.