

Thomas Marsh & Co. Pty Ltd
ABN 88 009 693 047

Terms & Conditions of Trade at 6 April 2020

Definitions

“**Australian Consumer Law**” or “**ACL**” means Schedule 2 to the *Competition and Consumer Act 2010 (Cth)*.

“**Company and Supplier**” means Thomas Marsh & Co. Pty Ltd ABN 88 009 693 047 -).

“**Customer and Purchaser**” means the party placing the Order with or purchasing Products from the Company.

“**Order**” means an offer by a Customer/Purchaser to purchase Products from the Company/Supplier.

“**PPS Act**” means the Personal Property Securities Act 2009 (Cth) and its associated Regulations as varied from time to time.

“**PPSR**” refers to the Personal Property Securities Register established under the PPS Act.

“**Products**” includes any goods, services or materials ordered by the Customer from the Company/Supplier or supplied by the Company/Supplier on the Order of the Customer/Purchaser.

“**Ts&Cs**” means these Terms & Conditions of Trade as varied and applicable from time to time.

“**GST**” means the tax payable on Taxable Supplies within the meaning of the GST Act.

“**GST Act**” means the A New Tax System (Goods and Services Tax) Act 1999 and any related Act imposing such tax or legislation that is enacted to validate, recapture or recoup such tax.

1. Acceptance of Terms

1.1 Any Order or instructions received by the Supplier from the Purchaser shall be an irrevocable offer and shall constitute an unqualified acceptance by the Customer of the Ts&Cs.

1.2 Orders may not be varied or cancelled by the Customer without the Supplier’s written consent and subject to the conditions set out in the Ts&Cs, there is no right of return.

2. Payment & Credit

2.1 At the Supplier’s discretion a deposit may be required to secure orders for Goods.

2.2 The supplier will at its own discretion approve credit terms as set out in 2.3, until such time as approval is given payment will be required upon acceptance of the order and prior to manufacture.

2.3 Unless an alternate payment term has been reached in writing; full payment for all invoiced Goods shall be made by the 30th day of the month which immediately follows the month in which the invoice was dated (**Due Date**).

3. Default

3.1 In the event that full payment is not received by the Supplier on or before the Due Date the Supplier will be entitled to:

(a) charge the Purchaser interest on the outstanding sum at the rate of 1.5% per Month.

(b) Suspend all further supplies of Goods made pursuant to the Ts&Cs or pursuant to any other Contract with the Purchaser until payment is received by the Supplier.

3.2 If the Purchaser defaults in payment of any invoice when due, the Purchaser shall indemnify the Supplier from and against all losses, expenses, commissions, interest and costs and disbursements incurred by the Supplier in pursuing the debt including but not limited to solicitor and own client legal costs and collection agency costs.

3.3 The Supplier may terminate or suspend performance of the Contract or any other Contract with the Purchaser or require payment of cash in advance of delivery and will be entitled to payment for any Goods already supplied or work in progress under the Contract in question at the rate specified in the Contract if:

- (i) the Purchaser breaches any terms of the Contract; or
- (ii) the Purchaser assigns any of its property for the benefit of creditors; or
- (iii) the Purchaser (in the event that the Purchaser is not a natural person) becomes subject to any form of insolvency administration including, but not limited to, the appointment of a receiver and manager, liquidator, provisional liquidator or administrator; or
- (iv) the Purchaser (in the event that the Purchaser is a natural person) commits an act of bankruptcy or has appointed to him or her a trustee in bankruptcy; or
- (v) any step is taken by a mortgagee to exercise its right to take possession of the property of the Purchaser.

4. GST

4.1 The Company reserves the right, upon production of a Tax Invoice, to recover from the Customer any Goods and Services Tax (GST) payable in respect of supply of Products.

4.2 Unless expressly included all amounts expressed or described in any agreement or in Tax Invoices are GST exclusive.

5. Set-off and assignment

5.1 The Customer shall not be entitled to set off against or deduct from the price of Products sold any sums owed or claimed to be owed to the Customer by the Company.

5.2 The Customer may not assign or subcontract any contract for the purchase of Products or its rights or obligations under an agreement the subject of the Ts&Cs.

6. Delivery

6.1 Delivery of the Products shall be deemed to have taken place when:

- (a) the Customer takes possession of the Products at the Company's address if the Products are collected; or
- (b) the Products are delivered at the Customer's nominated address (in the event that the Products are delivered by the Company or the Company's nominated carrier). Delivery to any person reasonably appearing to be an employee or agent of the Customer shall be deemed effective; or
- (c) the Customer's nominated carrier takes possession of the Products in which event the carrier shall be deemed to be the Customer's agent.

6.2 The Customer's nominated address shall be the address specified by the Customer or agreed to in writing by the Company.

6.3 Delivery of Products may not be refused by the Customer after an Order has been accepted by the Company. Where prices are stated as inclusive of delivery, delivery is to the delivery point accepted by the Company.

6.4 The Customer shall make all arrangements necessary to accept delivery of the Products whenever they are tendered for delivery.

6.5 Delivery of Products to a third party or place nominated in any way by the Customer is deemed to be delivery to the Customer pursuant to these Ts&Cs.

6.6 The Company shall not be liable for any loss or damage or expense arising from failure by the Company to deliver the Products at a specified time, promptly or at all and the failure of the Company to deliver at a specific time or at all shall not entitle either party to treat this contract as repudiated.

7. Passing of Risk

7.1 The Risk (but not title) in respect of Products sold passes to the Customer immediately upon Delivery to the customer, the Customer's agent or courier as the case may be.

8. Retention of Title

8.1 Ownership of the Products shall remain with the Company and shall not pass to the Customer until the Company has received in full (cash or cleared funds) all sums due to it in respect of the Products and all other sums which are or which become due to the Company from the Customer on any credit or other account with the Company or pursuant to these Ts&Cs.

8.2 Until ownership of the Products has passed to the Customer, the Customer shall keep the Products in question as fiduciary agent and bailee for and on behalf of the Company and shall store them so that they are separately identifiable from any other goods held by the Customer. The Customer must notify the Company of all premises at which it holds any Products supplied under this Agreement. The Customer must allow the Company to enter upon its premises to inspect the Products in its possession upon reasonable notice from time to time.

8.3 If:

- (a) the Customer fails to pay any amount (whether in part or whole) payable in respect of any Products by the time required for payment;
- (b) the Customer is the subject of an insolvency event (such as receivership, administration or liquidation);

the Company may, without notice to the Customer, enter at any reasonable time any premises where Products are located (or believed by the Company to be located) and take possession of those Products not paid for. The Company's permission to enter the Customer's premises for that purpose is irrevocable. The Company is not liable to the Customer in contract, tort or otherwise, for any costs, damages, expenses or losses incurred by the Customer as a result of any action taken by the Company under this clause.

9. PPS Act

9.1 Words in italic shall have the meaning and definitions set out in the PPS Act.

9.2 The Customer acknowledges that by virtue of these Ts&Cs the Company has a *security interest* in the Products for the purposes of the PPS Act and the *proceeds of sale* of such Products and to the extent applicable, the PPS Act applies to any agreement pursuant to these Ts&Cs.

9.3 The Customer acknowledges that the Company may do anything reasonably necessary, including but not limited to registering any security interest which the Company has over the Products or the *purchase money security interest (PMSI)* in the Products on the PPSR in order to *perfect* the security interest and comply with the requirement of the PPS Act. The Customer agrees to do all things reasonably necessary to assist the Company to undertake the matters set out above.

9.4 The Customer waives pursuant to section 157(3)(b) of the PPS Act the right to receive notice of a *financing statement*, *financing change statement* or a *verification statement* in relation to any registration on the PPSR.

9.5 The rights of the Company under this document are in addition to and not in substitution for the Company's rights under other law (including the PPS Act) and the Company may choose whether to exercise rights under this document, and/or under such other law, as it sees fit.

- 9.6 The following provisions of the PPS Act do not apply and, for the purposes of section 115 of the PPS Act are “contracted out” of this document in respect of goods that are not used predominantly for personal, domestic or household purposes:
- (a) sections 95 (notice of removal of accession to the extent it requires Company to give a notice to the Customer), 96 (retention of accession), 125 (obligations to dispose of or retain collateral);
 - (b) section 130 (notice of disposal to the extent it requires Company to give a notice to the Customer);
 - (c) section 132(3)(d) (contents of statement of account after disposal);
 - (d) section 132(4) (statement of account if no disposal);
 - (e) section 135 (notice of retention);
 - (f) section 142 (redemption of collateral); and
 - (g) section 143 (re-instatement of security agreement)
- 9.7 The following provisions of the PPS Act:
- (a) section 123 (seizing collateral);
 - (b) section 126 (apparent possession);
 - (c) section 128 (secured party may dispose of collateral);
 - (d) section 129 (disposal by purchase); and
 - (e) section 134(1) (retention of collateral)
- confer rights on the Company. The Customer agrees that in addition to those rights, the Company shall, if there is default by the Customer, have the right to seize, purchase, take possession or apparent possession, retain, deal with or dispose of any goods, not only under those sections but also, as additional and independent rights, under this document and the Customer agrees that the Company may do so in any manner it sees fit including (in respect of dealing and disposal) by private or public sale, lease or licence.
- 9.8 The parties agree not to disclose information of the kind that can be requested under section 275(1) of the PPS Act. The Customer must do everything necessary on its part to ensure that section 275(6)(a) of the PPS Act continues to apply. The agreement in this sub-clause is made solely for the purpose of allowing to the Company the benefit of section 275(6)(a) and the Company shall not be liable to pay damages or any other compensation or be subject to injunction if the Company breaches this sub-clause.
- 9.9 The Customer undertakes:
- (a) promptly to do all things including signing any further documents and providing any further information which the Company may reasonably require to enable it to perfect and maintain the *perfection of its security interest* or PMSI (including by registration of a *financing statement* or *financing change statement* on the PPSR and the Customer warrants that any such information the Customer provides will be complete, accurate and up-to-date in all respects);
 - (b) to give the Company not less than 14 days prior notice of any proposed change in the Customer’s name or any other change in the Customer’s details (including, but not limited to, changes in its address, phone or facsimile number and trading name).

10. Warranties, Limitation of Liability and the ACL

- 10.1 The Australian Consumer Law (ACL) provides consumers with guarantees that cannot be excluded, restricted or modified. This Agreement does not affect any rights the Customer has under the ACL or any other legal rights which cannot be excluded or modified. However, to the extent permitted by the ACL and subject to any other legal restriction, the Company excludes:
- (a) any terms, conditions, warranties, guarantees or other liability that might apply in respect of this Agreement, any Product or anything done under it; and
 - (b) any liability for any indirect, special, consequential or economic loss or damage whether or not arising from default or negligence by the Company or its employees or agents.
- 10.2 For goods other than those of a kind ordinarily acquired for personal, domestic or household use

or consumption, the Company limits its liability, as permitted by the ACL, at its option to:

- (a) the replacement of the goods or the supply of equivalent goods;
- (b) the cost of replacing the goods or the cost of acquiring equivalent goods;
- (c) the repair of the goods or payment of the cost of repair of the goods.

10.3 For services other than those of a kind ordinarily acquired for personal, domestic or household use or consumption the Company limits its liability, as permitted by the ACL, at its option, to the re-supply of the services or the payment of the cost of having the services supplied again.

10.4 Subject to this clause 10, the Customer acknowledges and agrees that in entering into an agreement the subject of the Ts&Cs it has not relied in any way on the Company's representations and that it has satisfied itself as to the suitability of the Product for the Customer's purposes.

11. Force Majeure

11.1 The Company will have no liability to the Customer in relation to any loss, damage or expense caused by the Company's failure to complete an Order or delivery or contract as a result of fire, flood, tempest, earthquake, riot, civil disturbance, theft, crime, strike, lock-out, war, Government Intervention or the inability of the Company's suppliers to supply necessary materials or any other matter beyond the Company's control.

12. Privacy consent

12.1 The Company may give information to third parties about the Customer, its guarantors, directors or proprietors for the following purposes:

- (a) to obtain a consumer credit report about the Customer, its guarantors, directors or proprietors;
- (b) to allow the credit reporting agency to create or maintain a credit information file containing information about the Customer, its guarantors, directors or proprietors;
- (c) for registration on the PPSR or other public records or registers; and
- (d) to obtain commercial credit information about the Customer, its guarantors, directors or proprietors from a credit reporting agency.

13. Waiver of terms of agreement

13.1 The failure or indulgences by the Company to exercise, or delay in exercising, any right, power or privilege available to it under an agreement the subject of the Ts&Cs will not operate as a waiver thereof or preclude any other or further exercise thereof or the exercise of any right or power and the Company shall be entitled to require strict compliance at all times.

14. Miscellaneous

14.1 An agreement the subject of the Ts&Cs is governed by and will be construed in accordance with the laws of the State of Queensland, Australia.

14.2 This document represents the entire agreement between the parties and no agreement or understanding varying or extending the terms of these Ts&Cs shall be legally binding upon either party unless in writing and signed by both Parties or allowed by these Ts&Cs.

14.3 If any term of an agreement the subject of the Ts&Cs shall be invalid, void, illegal or unenforceable, they shall be severed from the agreement and the remaining provisions shall not be affected, prejudiced or impaired by such severance.

14.4 The Company may assign or licence or subcontract all or any parts of its rights and obligations hereunder without the Customer's agreement or consent.

14.5 The Company may serve any notice or Court document on the Customer by hand or by forwarding it by post to the address of the Customer last known to the Company, or

where a fax number or an email address has been supplied by the Customer, by sending it to that number or address. Such notices shall be deemed to be given:

- (a) where delivered by hand, on the day of delivery;
- (b) where sent by post, two (2) business days after the day of posting; and
- (c) where sent by facsimile or email on the day of dispatch, unless a transmission report showing failure of the recipient to receive, is obtained.

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