

TERMS AND CONDITIONS OF SALE

Flyscreen Pty Ltd ACN 165 284 284



1. Definitions and Interpretation

Australian Consumer Law means Schedules 1 and 2 of the *Competition and Consumer Act 2010* (Cth) and any other relevant provisions contained in that Act.

Customer means the customer named on the Supplier's quotation or invoice, and if no customer is named, the customer to whom the Goods and Services are supplied.

Consequential Loss means loss of expected savings, loss of use, loss of opportunity, loss of profit, loss of revenue, increased financing costs, loss arising from delay, or any consequential, special or indirect loss or damage, whether or not the possibility or potential extent of the loss or damage was known or foreseeable, and whether arising from a claim under indemnity, contract, tort (including negligence), statute or otherwise.

Consumer has the meaning in the Australian Consumer Law.

Goods means any goods supplied by the Supplier.

Includes or **Including** means includes or including without limitation.

Insolvency Event means, for the Customer, as applicable, being in liquidation or provisional liquidation, bankruptcy or under administration, having a controller (as defined in the Corporations Act 2001) or analogous person appointed to the Customer or any of the Customer's property, being taken under section 459F(1) of the Corporations Act to have failed to comply with a statutory demand, being unable to pay the Customer's debts, dying, ceasing to be of full legal capacity or otherwise becoming incapable of managing the Customer's own affairs for any reason, taking any step that could result in the Customer becoming an insolvent under administration (as defined in section 9 of the Corporations Act 2001), entering into a compromise or arrangement with, or assignment for the benefit of, any of the Customer's members or creditors, or any analogous event.

Loss means any liability, expense, cost or damage of any kind and includes any claim, damage, demand, injury or death and a fine or penalty imposed by a statutory or other authority.

Real Property means all real property interests held by the Customer now or in the future.

Services means any services provided by the Supplier.

Site means the location for supply of any Goods or performance of any Services specified on the Supplier's quotation or invoice.

Supplier means, in connection with the supply of any Goods and/or Services, Flyscreen making the supply to the Customer.

Terms means these terms and conditions.

2. Agreement

- (a) Except to the extent otherwise explicitly agreed in writing between the parties, these Terms (and, if applicable, any credit application completed by the Customer and any personal guarantee securing the performance of the Customer's obligations) govern the entire relationship between the Supplier and the Customer in connection with the Goods and Services and will prevail over any other document. To the extent of any inconsistency between the credit application, personal guarantee and these Terms, these Terms prevail.
- (b) The Customer acknowledges that it has not relied on any representation, inducement, warranty or promise which is not set out below.
- (c) These Terms may only be varied by both parties agreement in writing.

3. Payment

- (a) The Customer will pay for the Goods and Services at the price specified on the Supplier's invoice or delivery docket at the delivery date, subject to these Terms.
- (b) The Customer acknowledges that the Goods and Services will be paid for in full without any retention or set-off and, for the avoidance of doubt, the Supplier is under no obligation to accept any products ordered in excess of the Customer's requirements (and supplied as part of the Goods and Services) for return or credit.
- (c) The Customer must pay for the Goods and Services in immediately available funds prior to delivery, unless the Supplier agrees otherwise in writing.

- (d) Payment is only received by the Supplier when it receives cash or when the proceeds of other methods of payment are credited and cleared to the Supplier's bank account.

4. GST

If the Supplier has any liability to pay Goods and Services Tax ("GST") on the supply of any Goods and Services to the Customer, the Customer must pay to the Supplier an amount equivalent to the GST liability of the Supplier at the same time as the consideration is paid for the Goods and Services (unless the consideration for that supply is expressed specifically to be GST inclusive).

5. Credit

- (a) Any agreement by the Supplier to grant the Customer credit upon the Supplier's Credit Account Terms and Conditions has been or will be made on the basis of a credit application and such other documents and information as may be required by the Supplier.
- (b) Until the Supplier grants the Customer credit by notice in writing, or if having granted credit the Supplier exercises its discretion to refuse or suspend credit, the Supplier will only supply Goods and Services to the Customer on the basis of cash in advance.
- (c) The granting of credit does not oblige the Supplier to extend any particular amount of credit to the Customer and the Supplier may withdraw, refuse, suspend or limit credit to the Customer at any time, in its absolute discretion, without notice or providing any reason.
- (d) The Customer must notify the Supplier in writing within two (2) business days if there is any material change in the Customer's financial position.

6. Delivery

- (a) The Supplier will use reasonable endeavours to supply the Goods and Services to the Customer or its designated agent as agreed between the parties (or if there is no specific agreement then at the Supplier's reasonable discretion) in accordance with the Customer's schedule.
- (b) If supply of the Goods and Services is early or delayed for any reason beyond the control of the Supplier, or as a result of any cause which the Customer is or should reasonably have been aware of, then all Loss arising will be the Customer's responsibility and the Customer shall indemnify the Supplier in respect of such Loss.

7. Limitation of Liability

If the Customer is not a Consumer, the Supplier shall not be liable in any circumstances:

- (a) for any damage to any property of whatsoever kind situated in, on or adjacent to the Site resulting from Goods and Services supplied or performed in accordance with these Terms;
- (b) for any defects in the Goods and Services unless the Customer notifies the Supplier in writing within seven (7) days of the date of delivery of the materials or the supply of the services specifying the defect, which notice shall be a condition precedent to any right to recover by the Customer;
- (c) for any Loss arising from delay;
- (d) for any Consequential Loss,
- (e) for any Loss arising from materials supplied by the Supplier being placed or installed by others,

and, the Supplier's total aggregate liability in all circumstances is limited (to the extent permitted by law) to the amount paid by the Customer for the Goods and Services.

8. Indemnity

To the maximum extent permitted by law, the Customer hereby indemnifies and forever holds harmless the Supplier from all Losses:

- (a) caused or contributed to by any negligent and/or wilful act or omission or any breach of these Terms by the Customer; or
- (b) incurred or suffered by the Supplier arising from supplying the Goods and Services in accordance with these Terms.

9. Australian Consumer Law Guarantees

Unless the Customer indicates otherwise below, the Customer acknowledges that the Goods and Services it will acquire from the Supplier will be obtained for either the purpose of re-supply (in an altered form or condition or to be incorporated into other goods) or

for the purpose of using them up or transforming them in trade or commerce in the course of a process of production or manufacture or in the course of repairing or treating other goods or fixtures on land.

By ticking this box, the Customer notifies the Supplier that it is acquiring the Goods for a purpose other than that stated immediately above, in which event the provisions below may apply.

If the Customer is a Consumer and any of the Goods supplied by the Supplier are not goods of a kind ordinarily acquired for personal, domestic or household use or consumption, the Customer agrees that the Supplier's liability for a failure to comply with a consumer guarantee under the Australian Consumer Law in relation to those Goods (other than a guarantee under sections 51(title), 52(undisturbed possession) and 53(undisclosed securities) of the Australian Consumer Law), is limited to, at the option of the Supplier, one or more of the following:

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

If the Customer is a Consumer and any of the Work services supplied by the Supplier are not services of a kind ordinarily acquired for personal, domestic or household use or consumption, the Supplier's liability for a failure to comply with a consumer guarantee under the Australian Consumer Law in relation to those Work services is limited to, at the option of the Supplier:

- (e) the supply of the Work services again; or
- (f) the payment of the cost of having the Work services supplied again.

10. Site Access

- (a) The Supplier will deliver and the Customer will receive the Goods and Services at the location stated on the face of the Supplier's quotation or invoice in a timely manner.
- (b) Entry upon the Site remains at the sole discretion of the Supplier and if, at the Customer's request, the Supplier agrees to enter upon the Site for the supply of the Goods and Services, the Customer will be responsible for providing adequate, and timely access to the Site for the Supplier's material, personnel and equipment and the Customer will indemnify the Supplier for all Loss (including delay and establishment costs) incurred by the Supplier as a result of failure to provide such access.
- (c) If the Supplier or its agents enter the Site for the purposes of delivering the Goods, the Customer shall indemnify the Supplier for any Loss incurred by the Supplier arising out of or in connection with such entry upon the Site.
- (d) Where the Supplier leaves equipment on the Site in connection with the supply of the Goods and Services, the Customer shall take all reasonable precautions to secure the Site to prevent loss or damage to the equipment or any injury to persons entering upon the Site.

11. Variations

- (a) The Supplier is not obliged to carry out any variation which is outside the scope of the Goods and Services.
- (b) Any variation that the Supplier does carry out shall be subject to these Terms and shall be charged to and paid for by the Customer at an agreed rate or, failing agreement, at a reasonable rate determined by the Supplier.

12. Force Majeure

The Supplier shall not be liable in any way for any delay in the supply of Goods or performance of Services where such delay occurs by reason of any cause whatsoever beyond the reasonable control of the Supplier, including without limiting the generality thereof, restrictions of Government or other statutory authorities, wars, fires, epidemics, failure or fluctuation in any electrical power supply, storm, flood, earthquake, accident, labour dispute, plant breakdown, materials or labour shortage, the change or introduction of any law or regulation or an act or omission of any supplier or other third party or any failure of any equipment owned or operated by them.

13. Risk

- (a) Upon delivery of any Goods and Services to the Site, all risk in relation to those materials shall pass to the Customer. Where the Customer collects any Goods, risk passes to the Customer when the Goods are loaded on the Customer's vehicle.
- (b) Legal and equitable title to the Goods shall not pass to the Customer until the Supplier has been paid in full.

- (c) Until the Supplier has been paid in full, the Customer:
 - i) holds the Goods as bailee for the Supplier and a fiduciary relationship exists between the Customer and the Supplier;
 - ii) shall store the Goods separately from any other goods and in a manner which clearly identifies them as goods of the Supplier and shall maintain the state and condition in which they were received;
 - iii) shall, if required by the Supplier, deliver the Goods to the Supplier; and
 - iv) is under an obligation to account to the Supplier for the proceeds of the sale of any Goods and Services.

Nothing in these Terms shall prevent the Supplier from taking action for recovery of the sale price of the Goods and Services.

14. Default

- (a) If the Customer fails to comply with any of these Terms, suffers an Insolvency Event or makes any misrepresentation to the Supplier, the balance of the Customer's account to the Supplier will become due and payable immediately.
- (b) The Customer agrees that it must advise the Supplier in writing of the occurrence of any Insolvency Event, any change in its name ownership or control, any change in its shareholding structure or directors, any step being taken to sell an asset or assets (separately or together having a value being greater than 20% in value of its gross assets) as soon as practicable and not later than within two (2) business days of such event, change or step occurring. The Customer acknowledges that, despite any such event, change, or step the Customer remains liable to pay the price for all Goods and Services supplied.
- (c) The Customer agrees that it must promptly notify the Supplier in writing of any change to its registered address or other contact details provided to the Supplier.

15. Overdue amounts and security

- (a) Any amount not paid by the due date will incur interest at a rate of 2% above the rate for the time being fixed by section 2 of the *Penalty Interest Rates Act 1983* (Vic) calculated daily and compounded monthly.
- (b) The Customer agrees to pay all costs and expenses (including legal costs, commissions paid by the Supplier to any commercial or mercantile agent and dishonour fees) incurred by the Supplier in connection with the recovery of overdue amounts and enforcing the charge in clause 15(c).
- (c) As security for any amounts due to the Supplier from time to time, the Customer charges all of its legal and equitable interest (both present and future) of whatsoever nature held in any and all Real Property to the Supplier.
- (d) Without limiting the generality of the charge in clause 15(c), the Customer agrees, on request by the Supplier, to execute any documents and do all things reasonably required by the Supplier, to perfect the charge given in clause 15(c) including registering a mortgage security over any Real Property. The Customer appoints the Supplier to be the Customer's lawful attorney for the purposes of executing and registering such documents and taking all such steps in that regard.
- (e) The Customer consents unconditionally to the Supplier lodging a caveat or caveats noting its interest in any Real Property.
- (f) A statement in writing signed by an authorised officer of the Supplier setting out the moneys due or owing to the Supplier at the date of the statement shall be sufficient evidence of the amount so due or owing until the contrary is proven.

16. Retention of Title

- (a) The Supplier retains legal and equitable title in any Goods supplied to the Customer until the Supplier has received payment in full for or in connection with the supply of the relevant Goods and Services. Until payment in full has been received, the following terms apply.
- (b) Notwithstanding that title in the Goods remains with the Supplier until payment has been received in full, the Customer may sell such goods or use the Goods in in the ordinary course of the Customer's business. As between the Customer and the purchaser of any item of the Goods, the Customer sells as principal and not as agent of the Supplier. The Customer must hold the proceeds of sale of each item of Goods in a separate fund on trust for the Supplier and the Customer is under a duty to account to the Supplier for such proceeds. The creation of, or any failure of, any such trust shall not in any way limit the obligation of the Customer to pay an amount to the Supplier for the Goods supplied.

- (c) Until the Goods are sold or used in a manufacturing or construction process, the Customer must keep the Goods safe and free from deterioration, destruction, loss or harm, clearly designate the Goods as the property of the Supplier, store them in such a way they are clearly identified as the property of the Supplier and keep full and complete records, firstly, of the physical location of the Goods and, secondly, the ownership of the Goods by the Supplier.
- (d) The Supplier is irrevocably entitled at any time and from time to time before sale of any item of Goods by the Customer to inspect or to recover and retake possession of such Goods and otherwise exercise in relation to the Goods any of its rights whether those rights are as owner and/or unpaid seller or otherwise and whether those rights are conferred by common law, contract, statute or in any other way. In order to exercise such entitlement, the Supplier and its agents are irrevocably authorised by the Customer to enter any of the Customer's premises or vehicles or those of any third party. The Customer agrees to obtain the consent of any such third party to such entry by the Supplier and to indemnify the Supplier and its agents for any liability arising from any entry upon such third parties' premises or vehicles. The Supplier and its agents agree to take all reasonable care in removing the Goods from such premises or vehicles but, to the extent this liability may be disclaimed by law, are not liable for any damage or injury to such premises caused by the removal of the Goods.
- (e) This reservation of title and ownership is effective whether or not the Goods have been altered from their supplied form, or commingled with other goods.

17. Purchase money security interest

- (a) The retention of title arrangement described in clause 16 constitutes the grant of a purchase money security interest by the Customer in favour of the Supplier in respect of all present and after-acquired Goods supplied to the Customer by the Supplier.
- (b) The Customer must immediately, if requested by the Supplier, sign any documents, provide all necessary information and do anything else required by the Supplier to ensure that the Supplier's purchase money security interest is a perfected security interest.
- (c) The Customer will not enter into any security agreement that permits any other person to have or to register any security interest in respect of the Goods or any proceeds from the sale of the Goods until the Supplier has perfected its purchase money security interest.
- (d) For any Goods supplied that are not goods that are used predominately for personal, domestic or household purposes, the parties agree to contract out of the application of ss 95, 118, 121(4), 130, 132(4), 135, 142 or 143 of the PPSA in relation to the Goods.
- (e) The Customer hereby waives any rights the Customer may otherwise have to:
 - i) receive any notices the Customer would otherwise be entitled to receive under ss 95, 118, 121, 130, 132 or 135.
 - ii) apply to a Court for an order concerning the removal of an accession under section 97.
 - iii) object to a proposal of the Customer to purchase or retain any collateral under ss 130 and 135.
 - iv) receive a copy of a verification statement confirming registration of a financing statement, or a financing change statement, relating to any security interest the Supplier may have in Goods supplied to the Customer from time to time.
- (f) For the purposes of this clause "PPSA" means the Personal Property Securities Act 2009. The expressions "accession", "collateral", "financing statement", "financing change

statement", "security agreement", "security interest", "perfected security interest" and "verification statement" have the meanings given to them under, or in the context of the PPSA. References to sections are to sections of the PPSA.

18. Costs

The Customer agrees to pay all costs and expenses incurred by the Supplier in connection with these Terms including legal expenses (on a full indemnity basis), stamp duty (including fines and penalties) and costs incurred or payable by the Supplier in connection with registering, maintaining or releasing any security interest, charge, mortgage or caveat pursuant to these Terms, or the recovery of any amount payable by the Customer to the Supplier or in otherwise enforcing the Supplier's rights against the Customer under these Terms. The costs of registering any PPSA financing statement will be paid by the Customer and may be invoiced or debited against the Customer's credit account.

19. Safety

The Customer is responsible for ensuring safe and adequate access to the Site for delivery and all other aspects of Site safety.

20. Assignment

- (a) The Supplier may assign or novate its rights and obligations under these Terms (in whole or in part) to any person without the consent of the Customer.
- (b) The Customer may not assign or otherwise transfer its rights under these Terms without prior notice to and consent from the Supplier.

21. Severance

Any provision of these Terms which is unenforceable or partly unenforceable is, where possible, to be read down so as to be enforceable, and if it can not be read down, severed to the extent necessary to make these Terms enforceable, unless this would materially change the intended effect of these Terms.

22. Waiver

A right may only be waived in writing, signed by the party giving the waiver, and no other conduct of a party (including a failure to exercise, or delay in exercising, the right) operates as a waiver of the right or otherwise prevents the exercise of the right.

23. No Implied Terms

The Customer may have the benefit of certain statutory guarantees relating to the Goods and Services pursuant to the *Competition and Consumer Act 2010* (Cth). Otherwise, to the maximum extent permitted by law, all terms, conditions or warranties that would be implied into these Terms or in connection with the supply of the Goods and Services by law, statute, custom or international convention (including those relating to quality or fitness for purpose) are excluded.

24. Governing Law

These Terms are governed by and are to be interpreted according to the laws in force in the state of Victoria and the parties submit to the non-exclusive jurisdiction of the courts operating in that state.

25. Insurance

The Customer must take out and maintain those policies of insurance that would be held by a reasonably prudent customer in the position of the Customer.

26. No Adverse Interpretation

These Terms are not to be interpreted against the interests of a party merely because that party proposed this document or some provision in it or because that party relies on a provision of these Terms to protect itself.

Effective Date: 4 September 2015