

# ASTRALPOOL AUSTRALIA PTY LTD

## TERMS AND CONDITIONS OF TRADE

### 1. Definitions

In these terms:

**"ACL"** means the Australian Consumer Law Schedule of the *Competition and Consumer Act*;

**"Agreement"** means any agreement for the provision of goods or services by the Supplier to the Customer; "consumer" is as defined in the ACL and in determining if the Customer is a consumer, the determination is made if the Customer is a consumer under the Agreement;

**"Customer"** means the person, jointly and severally if more than one, acquiring goods or services from the Supplier;

**"Goods"** means goods supplied by the Supplier to the Customer;

**"GST"** means the goods and Services tax as defined in *A New Tax System (goods and Services Tax) Act 1999* as amended;

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

**"Retailer"** means any person or organization to whom a Customer supplies goods or services supplied to it by the Supplier that is not an end-user consumer of the goods or services.

**"Supplier"** means AstralPool Australia Pty Ltd (ABN 97 007 284 504);

**"Supplier's Intellectual Property"** includes any and all intellectual and industrial property rights throughout the world owned by the Supplier or any of its Related Bodies Corporate, whether subsisting now or in the future, including (a) rights of any kind in inventions, discoveries and novel designs, (b) literary works, and any other works or subject matter in which copyright (including future copyright and rights in the nature of or analogous to copyright) may, or may in the future, subsist, including photographic images of the goods, (c) confidential information, trade secrets and know-how, (d) registered and unregistered trade marks and service marks (including logos), and (e) internet domain names.

**"Related Bodies Corporate"** has the meaning provided in the *Corporations Act 2001 (Cth)*;

**"Services"** means services supplied by the Supplier to the Customer; and

**"Terms"** means these Terms and Conditions of Trade.

### 2. Basis of Agreement

**2.1** Unless otherwise agreed by the Supplier in writing, the Terms apply exclusively to every Agreement and cannot be varied or replaced by any other terms, including the Customer's terms and conditions of purchase (if any).

**2.2** Any quotation provided by the Supplier to the Customer for the proposed supply of goods or services is:

- (a) valid for 30 days;
- (b) an invitation to treat only; and
- (c) only valid if in writing.

**2.3** The Terms may include additional terms in the Supplier's quotation, which are not inconsistent with the Terms.

**2.4** An Agreement is accepted by the Supplier when the Supplier accepts, in writing or electronic means, an offer from the Customer or provides the Customer with the goods or services.

**2.5** The Supplier in its absolute discretion may, for any reason, refuse to accept any offer or order for goods and services by the Customer, including (without limitation), for a breach, or suspected breach of the Customer of any of the Terms.

**2.6** The Customer must provide the Supplier with its specific requirements, if any, in relation to the goods and services.

**2.7** The Customer must not offer the goods for sale over the Internet or directly through its website without express prior written consent from the Supplier.

**2.8** The Customer must not, without the prior written consent of the Supplier, use any of the Supplier Intellectual Property. If Supplier does provide written consent to the Supplier to use any of the Supplier Intellectual Property, this consent may be granted subject to whatever restrictions, limitations and guidelines imposed by the Supplier from time to time (including without limitation, the

Supplier's Product and Brand Advertising Guide), and consent may be withdrawn by the Supplier at any time at its absolute discretion. .

**2.9** The Customer acknowledges that included in the Supplier's goods are a number of goods of a highly technical nature, and the Customer warrants that it has the requisite knowledge and skill regarding their correct application, installation and operation. The Customer agrees to ensure the correct application, installation and operation of the goods for any of its customers, and to provide all necessary technical advice and information to prevent damage to the goods.:

**2.10** The Supplier may vary or amend these Terms by written notice to the Customer at any time. Any variations or amendments will apply to orders placed after the notice date.

### 3. Pricing

**3.1** Prices quoted for the supply of goods and services exclude GST and any other taxes or duties imposed on or in relation to the goods and services.

**3.2** If the Customer requests any variation to the Agreement, the Supplier may increase the price to account for the variation.

**3.3** Where there is any change in the costs incurred by the Supplier in relation to goods or services, the Supplier may vary its price for the goods or services to take account of any such change at any time without prior notice to the Customer.

### 4. Payment

**4.1** Unless otherwise agreed in writing:

- (a) Subject to 4.1(b), payment for the goods or services must be made in full within 30 days from end of month of the Supplier's invoice.
- (b) The Supplier reserves the right to require payment in full on delivery of the goods or completion of the services.

**4.2** Payment by cheque is not deemed made until the proceeds of the cheque have cleared.

**4.3** Payment terms may be revoked or amended at the Supplier's sole discretion immediately upon giving the Customer written notice.

### 5. Payment Default

**5.1** If the Customer defaults in payment by the due date of any amount payable to the Supplier, then all money which would become payable by the Customer to the Supplier at a later date on any account, becomes immediately due and payable without the requirement of any notice to the Customer, and the Supplier may, without prejudice to any of its other accrued or contingent rights:

- (a) charge the Customer interest on any sum due at the prevailing rate pursuant to the *Penalty Interest Rates Act 1983 (Vic)* plus 4 per cent for the period from the due date until the date of payment in full;
- (b) charge the Customer for, and the Customer must indemnify the Supplier from, all costs and expenses (including without limitation all legal costs and expenses) incurred by it resulting from the default or in taking action to enforce compliance with the Agreement or to recover any goods;
- (c) cease or suspend supply of any further goods or services to the Customer;
- (d) by written notice to the Customer, terminate any uncompleted contract with the Customer.

### 6. Passing of Property

**6.1** Until the Supplier receives full payment in cleared funds for all goods and services supplied by it to the Customer, as well as all other amounts owing to the Supplier by the Customer:

- (a) title and property in all goods remain vested in the Supplier and do not pass to the Customer;
- (b) the Customer must keep the goods separate from its goods and maintain the Supplier's labelling and packaging;
- (c) the Supplier 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 the Supplier, and for this purpose the Customer irrevocably licences the Supplier to enter such premises and also indemnifies

the Supplier from and against all costs, claims, demands or actions by any party arising from such action.

**6.2** Without limiting clause 6.1, all payments received from the Customer must be applied in accordance with section 14(6)(c) of the PPSA. The Customer agrees that legal title and property in the goods is retained by the Supplier until payment is received in cleared funds from the Customer of all sums owing to the Supplier, whether under this Agreement or otherwise. The Customer must keep the goods separate from other goods and store the goods so that they are readily identifiable as those supplied by the Supplier. The Customer must not sell the goods except in the ordinary course of the Customer's business. If the Customer fails to pay by the due date any amount owing to the Supplier, the Supplier may (without prejudice to any of its other rights) recover and resell any of the goods in which property has not passed to the Customer. In addition to any rights the Supplier may have under Chapter 4 of the PPSA, the Supplier may, without notice, enter any premises where it expects the goods may be located and remove them without committing a trespass, and the Customer authorises the Supplier to enter onto the premises where the goods are kept to take possession of the goods for that purpose at any time. The Customer also indemnifies the Supplier from and against all loss suffered and or incurred by the Supplier as a result of exercising its rights under this clause 6.2. If there is any inconsistency between the Supplier's rights under this clause 6.2 and its rights under Chapter 4 of the PPSA, this clause 6.2 prevails. The Customer acknowledges and warrants that the Supplier has a security interest (for the purposes of the PPSA) in the goods and any proceeds until title passes to the Customer in accordance with this clause 6.2. The Customer must do anything reasonably required by the Supplier to enable the Supplier to register its security interest with the priority the Supplier requires and to maintain that registration. The security interest arising under this clause 6.2 attaches to the goods when the Customer obtains possession of the goods and the parties confirm that they have not agreed that any security interest arising under this clause attaches at any later time. If Chapter 4 of the PPSA would otherwise apply to the enforcement of the security interest created under this Agreement, the Customer agrees that the following provisions of the PPSA will not apply; section 95 (notice of removal of accession) to the extent that it requires the Supplier to give a notice to the Customer; section 121(4) (enforcement of liquid assets – notice to grantor); section 130 (notice of disposal), to the extent that it requires the Supplier to give a notice to the Customer; paragraph 132(3)(d) contents of statement of account after disposal); subsection 132(4) (statement of account if no disposal); section 135 (notice of retention); section 142 (redemption of collateral); section 143 (reinstatement of security agreement). The Supplier does not need to give the Customer any notice under the PPSA (including a notice of verification statement) unless the notice is required by the PPSA and that requirement cannot be excluded.

## **7. Risk and Insurance**

**7.1** The risk in the goods and all insurance responsibility for theft, damage, loss or otherwise will pass to the Customer immediately on the goods being delivered to the Customer or taken from the Supplier's premises.

**7.2** The goods are sold to the Customer on the basis that the Customer has obtained all necessary licenses or permits under all relevant laws and regulations in relation to the goods.

## **8. Performance of Agreement**

**8.1** Any period or date for delivery of goods or provision of services stated by the Supplier is an estimate only and not a contractual commitment.

**8.2** The Supplier will use its reasonable endeavours to meet any estimated dates for delivery of the goods but will not be liable for any loss or damage suffered by the Customer or any third party for failure to meet any estimated date.

**8.3** If the Supplier cannot complete the services by any estimated date, it will complete the services within a reasonable time.

## **9. Delivery**

**9.1** Subject to clause 9.6, the Supplier will arrange for the delivery of the goods to the Customer.

**9.2** The Customer will be responsible for all costs associated with delivery, including freight, insurance and other charges arising from the point of dispatch of the goods to the Customer at the point of delivery.

**9.3** The Customer authorises the Supplier to subcontract delivery of goods or services in its absolute discretion.

**9.4** The Supplier may make part delivery of goods or provision of services and the Supplier may invoice the Customer for the goods or services provided..

**9.5** The Customer indemnifies the Supplier against any loss or damage suffered by the Supplier, its sub-contractors or employees as a result of delivery, except where the Customer is a consumer and the Supplier has not used due care and skill.

**9.6** If agreed the Customer may collect the goods directly from the Supplier.

## **10. Liability**

**10.1** If the Customer supplies goods or services to Retailers, it will ensure that the Retailers will comply with the Terms, and will be remain responsible for all acts, omissions, defaults and neglects of any Retailer as if they were the Customer's acts, omissions, defaults or neglects. The Customer will indemnify and hold harmless the Supplier against all loss, liability, damages, costs and all expenses, including legal fees, arising directly or indirectly out of a failure by a Retailer to whom it supplies goods or services to comply with the Terms.

**10.2** Except as the Terms specifically state, or as contained in any warranty statement provided in relation to the goods or services, the Agreement does 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 services or any contractual remedy for their failure.

**10.3** If the Customer is a consumer nothing in these Terms restricts, limits or modifies the Customer's rights or remedies against the Supplier for failure of a statutory guarantee under the ACL.

**10.4** If the Customer on-supplies the goods to a person who is a consumer:

- (a) if the goods or services 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 the Supplier's liability to the Customer;
- (b) otherwise, payment of any amount required under section 274 of the ACL is the absolute limit of the Supplier's liability to the Customer; howsoever arising under or in connection with the sale, installation, use of, storage or any other dealings with the goods or services by the Customer or any third party. 10.5 If clause 10.2 and 10.3 do not apply, then other than as stated in the Terms or any written warranty statement the Customer assumes all risk and liability for loss, damage or injury to persons or to property of the Customer, or third parties arising out of the use, installation or possession of any of the goods sold by the Supplier, whether direct, indirect or consequential ,unless recoverable from the Supplier on the failure of any statutory guarantee under {D1527500:1}Form 44-0607 the ACL.

**10.6** The Customer acknowledges that it has the sole responsibility of satisfying itself that the goods or services are suitable for the use of the Customer.

## **11. Cancellation**

**11.1** If the Supplier is unable to deliver or provide the goods or services, then it may cancel the Customer's order (even if it has been accepted) by written notice to the Customer.

**11.2** No purported cancellation or suspension of an order or any part of it by the Customer is binding on the Supplier once the order has been accepted.

**11.3** If the Customer purports to cancel an order and the Supplier agrees to the cancellation, any deposit paid by the customer will be forfeited.

## **12. Returns and Exchanges**

**12.1** Subject to clause 12.2 and 12.6, the Supplier will not be liable for any shortages, damage or non-compliance with the specifications in the Agreement unless the Customer notifies the Supplier with full details and description within 10 days of delivery otherwise the Customer is deemed to have accepted the goods.

**12.2** When any shortages, claim for damaged goods or noncompliance with the Agreement specifications is accepted by the Supplier, the Supplier may, at its option, replace the goods, or refund

the price of the goods.

**12.3** Subject to clause 12.6, the Supplier will not under any circumstances accept goods for return that:

- (a) have been specifically produced, purchased or otherwise acquired to fulfill the Agreement;
- (b) are discontinued goods or no longer stocked by the Supplier;
- (c) have been altered in any way;
- (d) have been used; or
- (e) are not in their original condition and packaging.

**12.4** If the Supplier accepts goods for return for reason other than a failure of the statutory guarantees under the ACL, the Customer will receive a credit for the returned goods equal to the price charged by the Supplier less a 15% deduction for handling and restocking charges.

**12.5** The Customer must;

- (a) obtain the Supplier's prior written approval for return of goods; and
- (b) pay all freight charges and costs associated with return of goods unless recoverable from the Supplier on the failure of any statutory guarantee under the ACL.

**12.6** If the Customer is a consumer, nothing in this clause 12 limits any remedy available for a failure of the guarantees in sections 56 and 57 of the ACL.

### **13. Customer Restructure**

**13.1** The Customer must notify the Supplier in writing of any change in its structure or management including any change in director, shareholder or management or change in partnership or trustee within 7 days of the date of any such change.

### **14. Force Majeure**

**14.1** The Supplier is not liable in any way howsoever arising under the Agreement to the extent that it is prevented from acting by events beyond its reasonable control including, without limitation, industrial disputes, strikes, lockouts, accident, breakdown, import or export restrictions, acts of God, acts or threats of terrorism, or war. If an event of force majeure occurs, the Supplier may suspend or terminate the Agreement by written notice to the Customer.

### **15. Miscellaneous**

**15.1** The law of Victoria from time to time governs the Terms. The parties agree to the non-exclusive jurisdiction of the courts of Victoria, the Federal Court of Australia, and of courts entitled to hear appeals from those Courts.

**15.2** The Supplier's failure to enforce any of these Terms shall not be construed as a waiver of any of the Supplier's rights.

**15.3** Nothing in the Terms is to be interpreted as excluding, restricting or modifying or having the effect of excluding, restricting or modifying the application of any State or Federal legislation applicable to the sale of goods or supply of services which cannot be excluded, restricted or modified

**15.4** If any Term is unenforceable it shall be read down to be enforceable or, if it cannot be read down, the term shall be severed from the Terms without affecting the enforceability of the remaining terms.

**15.5** The Customer must comply with the *Privacy Act 1988 (Cth)*, the Australian Privacy Principles and any other relevant privacy laws in connection with any personal information supplied to it or provided to the Supplier in connection with this Agreement.