

Terms & Conditions of Sale - Sunbather Pty Ltd.

CLAUSE 1 - DEFINITIONS

The following definitions apply unless otherwise stated:

- 'Buyer' Person or entity purchasing the Product(s) including a Reseller
- 'Order' Any purchase order, quotation accepted by the Buyer, subcontract, contract or document received by Sunbather from or on behalf of Buyer for the supply of Product(s) and/or Services;
- 'Sunbather' Sunbather Pty Ltd (ABN 81 004 898 631);
- 'Sunbather warehouse' Sunbather's warehouse and main place of business at 2174 Frankston-Flinders Road, Hastings, Victoria 3915, or such other address as notified by Sunbather;
- 'Product(s)' Good(s) and/or Service(s) described in an Order;
- 'Reseller' A person who purchases Products solely for resale to a third party end user and/or provides Services, and/or provides Services to a third party;
- 'Services' Installation of Products and maintenance and repairs to Products described and/or requested in an Order;
- 'Terms and Conditions' These terms and conditions of sale as varied or modified from time to time.

CLAUSE 2 - ACCEPTANCE OF ORDER

- 2.1 Sunbather reserves the right to accept or reject an Order it receives from a prospective Buyer at its sole discretion, including the right to propose alternative Products or delivery dates.
- 2.2 Order shall be deemed accepted upon receipt by Sunbather.
- 2.3 Each Order must specify the Buyer's name, delivery address, invoicing address, description of Products, purchase order number, Sunbather's part number (if known/relevant), quantity, requested delivery date of Product and/or performance date of Services, and preferred method and carrier for delivery of goods.
- 2.4 These Terms and Conditions shall be part of each Order Sunbather accepts. No other terms and conditions shall be accepted without the written express approval of Sunbather. In case of conflict between these Terms and Conditions and the terms of any Orders or delivery notes these Terms and Conditions shall prevail to the extent of any inconsistency.
- 2.5 Sunbather reserves the right to modify the specification, design and/or components of the Products at any time during fulfilment of an Order or in relation to future open Orders. Sunbather shall not be obligated to retroactively upgrade previously fulfilled Orders. Any modifications shall not adversely affect the performance or capacity of the Product.

CLAUSE 3 - TITLE AND PROPERTY IN GOODS

- 3.1 Title to the Products shall be retained by Sunbather and shall not pass to the Buyer until payment in clear funds of the full purchase price (including any retention sums) and any freight charges, taxes and interest or other monies due to Sunbather. Until title to the Products passes to the Buyer, the Buyer holds the Products on trust for Sunbather in accordance with these Terms and Conditions and the Buyer shall store or keep the Products in a manner which clearly identifies the Products as the property of Sunbather.

- 3.2 Unless agreed otherwise in writing by Sunbather, Products are sold "ex works" and the risk of any loss or damage to the Products from whatever cause shall be borne by the Buyer from the time the Products are collected by the Buyer from Sunbather warehouse or are dispatched by Sunbather to the Buyer at the Buyer's cost.
- 3.3 Until the Buyer pays all amounts it owes to Sunbather for an Order:
 - (i) the Buyer must keep all Products insured against theft, damage and destruction on behalf of Sunbather (and if the Buyer fails to insure the Products, Sunbather may do so and the Buyer must pay the cost of insurance invoiced to the Buyer by Sunbather);
 - (ii) Sunbather may enter premises where the Products are stored to inspect them on reasonable notice; and
 - (iii) the Buyer acknowledges that it holds the Products as Sunbather's bailee.
- 3.4 The Buyer may on-sell the Products prior to payment in full of the purchase price as agent for Sunbather provided that the proceeds received from the on-sale are held in trust for Sunbather until payment in full of the purchase price and are not mixed with other funds of the Buyer until the purchase price is paid to Sunbather.
- 3.5 If the Buyer does not pay for any Products on the due date, Sunbather is irrevocably authorised by the Buyer to enter the Buyer's premises (or any premises under the control of the Buyer or as agent of the Buyer if the goods are stored at such premises) and use reasonable force to take possession of the Products without liability for the tort of trespass, negligence or payment of any compensation to the Buyer or anyone claiming through the Buyer whatsoever.

CLAUSE 4 - PERSONAL PROPERTY SECURITIES ACT

PPSA means Personal Property Securities Act 2009 (Cth) (as amended or replaced from time to time).

- 4.1 The Buyer acknowledges and agrees that Sunbather may have a security interest for the purposes of the PPSA in:
 - (i) all Products and any proceeds previously supplied by the Supplier to the Buyer;
 - (ii) all Products and any proceeds that will be supplied in the future by the Supplier to the Buyer created under these Terms (as the accepted and adopted security agreement between the Parties); and
 - (iii) this security interest secures all moneys owing by the Buyer to the Supplier under these Terms and Conditions or otherwise.
- 4.2 The Buyer acknowledges and agrees the security interest is a continuing and subsisting interest in the Products with priority over any registered or unregistered general (or other) security interest and any unsecured creditor.
- 4.3 The Buyer acknowledges that the security interest over Products or their proceeds arising under this clause is a 'purchase money security interest' under the PPSA to the extent that it secures payment of the amounts owing in relation to the Products.
- 4.4 For the avoidance of doubt and without prejudice to the Supplier's rights under the PPSA, the Buyer may not accession or commingle the Products supplied by the Supplier with other property
- 4.5 The Buyer will do everything reasonably required of it by the Supplier to enable the Supplier to register its security interests with the priority the Supplier requires and to maintain those registrations including:
 - (i) signing any documents and/or providing any information which the Supplier may require to register a financing statement or a financing change statement; or
 - (ii) to correct a defect in a financing statement.
- 4.6 Any security interest arising under this clause will be perfected by the Supplier prior to the Buyer obtaining possession on delivery of the Products and the parties confirm they have not agreed that any security interest arising under this clause attaches at any later time.

- 4.7 The Supplier does not need to give the Buyer any notice under the PPSA (including notice of the single financing statement or verification statement) unless the notice is required by the PPSA and that requirement cannot be excluded.
- 4.8 If Chapter 4 of the PPSA would otherwise apply to the enforcement of the security interests created under these Terms and Conditions, the Buyer agrees that sections 95, 120, 121(4), 125, 128, 129, 130, 132(3)(d), 132(4), 134(1), 135, 142 and 143 of the PPSA will not apply to the enforcement of those security interests.
- 4.9 The Buyer agrees not to disclose to an 'Interested person' (as defined in section 275(9) of the PPSA) or any other person, any Information of the kind described in section 275(1) of the PPSA including the security agreement between the Buyer and the Supplier.
- 4.10 The Buyer will notify the Supplier immediately in writing if the Buyer changes its name and address for service, contact details or if there are any changes to data required to register a financing statement under the PPSA in respect of these Terms and Conditions.
- 4.11 The Buyer agrees to keep and maintain all Products free of any charge, lien, or security interest except as created under these Terms and Conditions and not otherwise to deal with Products in a way that will, or may, prejudice the rights of the Supplier under these Terms or the PPSA.
- 4.12 The Buyer irrevocably grants to the Supplier the right to enter any premises or property of the Buyer without notice, and without being in any way liable to the Buyer or any other person, if the Supplier has cause to exercise any of its rights under the PPSA (in particular section 123 of the PPSA) and the Buyer agrees to indemnify the Supplier against any such liability. If you do anything that incurs additional charges, we will seek your approval. If you do not agree, we are not obliged to provide the goods or services relating to the additional charges.

CLAUSE 5 - RESALE

- 5.1 Reseller must not advertise for sale on Reseller's website, or any other website any Products purchased from Sunbather, unless Reseller first obtains written permission from Sunbather who may at its absolute discretion, refuse, amend the terms of permission or withdraw permission at any time.
- 5.2 Reseller must not represent that Sunbather gives any warranty in relation to Products other than the warranties contained in these Terms and Conditions as amended from time to time or as otherwise specified in writing by Sunbather.
- 5.3 Subject to written approval from Sunbather as to the scope and manner of use, Reseller may use Sunbather's trade-marks or other intellectual property of Sunbather for the sole purpose of promoting the resale of Products. Sunbather may approve such usage rights on terms, may amend the terms of an approval and may revoke an approval at any time at its absolute discretion.
- 5.4 Reseller warrants that:
 - (i) Reseller has, and at all times will, maintain adequate financial, physical and personnel resources, including personnel with appropriate skills, experience and qualifications in the resale of Products and the provision of Services; and
 - (ii) Reseller will ensure that its personnel will perform Services and other work promptly and diligently to a high standard and in accordance with all instructions, guidelines, manuals or specifications provided by Sunbather in relation to the Products or the Services from time to time. If we determine (at our absolute discretion) that an end user warranty claim is due to an incorrect installation, failure to adhere to our installation manuals and specifications or any other act or omission by you, you must pay our labour, inspection and travel costs at the prevailing SPASA rates for pool servicemen or such other rate as we reasonably determine.

CLAUSE 6 - WARRANTY

- 6.1 Sunbather warrants that each Product delivered and/or the Services provided under an Order meets the intended design and performance criteria as stated in the Order specifications, are executed with appropriate skill and diligence and free from defective workmanship and materials.
- 6.2 Sunbather assigns to the original Buyer or original Buyer's customer any warranty received from the original manufacturer of the Product so far as Sunbather is permitted to do so.
- 6.3 Unless a manufacturer's warranty assigned to the Buyer provides otherwise, these warranties shall be enforceable solely by the Buyer or the Buyer's customers and shall be valid in accordance with Sunbather's warranty documentation, which can be found on their website www.sunbather.com.au.
- 6.4 Sunbather will invoice any replacement Product at full price until such a time as the original Product is returned to Sunbather. The Buyer shall be responsible for all handling, storage fees, freight, duty or other related charges for the return of the original Product to Sunbather's selected point.
- 6.5 No claim shall be deemed accepted by Sunbather until proof of purchase has been provided, and Sunbather has carried out a full evaluation and issued a written warranty claim approval. Sunbather's warranty is valid if the following conditions are met:
 - (i) the failure occurred within the period stated in Clause 6.4 above;
 - (ii) the warranty claim is made within thirty (30) calendar days from the alleged defect occurrence;
 - (iii) the Product(s) is/are used for the purpose and within the specification it/they were designed and intended for and within any limitation as stated in the manufacturers or Sunbather's specifications. Any modification or any other change to Sunbather Products made by the Buyer or the Buyer's customers will automatically nullify the warranty; and
 - (iv) the Buyer or the Buyer's customer using the Products has followed, and is capable of demonstrating that it has performed/carried out, all required inspection and maintenance requirements as specified by the manufacturer or by Sunbather.

CLAUSE 7 - BUYER'S RESPONSIBILITY

- 7.1 It is the Buyer's responsibility to satisfy itself that the Products are of a description, quality and character suitable for the purpose for which they are purchased and, to the extent permitted by law, Sunbather shall not be liable in any way for any loss or damage (including direct, indirect, or consequential) arising from the failure of the Buyer to so satisfy itself. The Buyer acknowledges that all samples, drawings, descriptive matter and specifications issued by Sunbather are issued or published for illustration only and do not form part of Sunbather's quotation or the Buyer's order.
- 7.2 The Buyer must ensure that effective access is given to Sunbather at all times in respect of the nominated site at which Products are to be delivered or performed. Without limitation, effective access includes access during business hours to a site that is free from physical obstructions or materials, damage, faults, ground movement, structural or foundational weakness so that Sunbather can efficiently and promptly provide the Products.
- 7.3 In the event that the Buyer fails to provide effective access, Sunbather may, at its discretion:
 - (i) defer, delay or discontinue delivery of the Products until effective access is provided; or

- (ii) notify the Buyer of additional costs and expenses reasonably related to delivery of the Products at the site and seek agreement of the Buyer to pay such additional costs and expenses in full; or
- (iii) cancel the Order if effective access or agreement to pay additional costs is not provided within 14 days of Sunbather first attending the site.
- (iv) where clause 7.4 (iii) applies, the Buyer must pay in full for all Products delivered up to the date of cancellation of an Order.

CLAUSE 8 – RETURN POLICY

- 8.1 Excluding any valid and accepted warranty claim, no return of any Product is allowed once the Product is shipped from Sunbather warehouse, without the express written approval of Sunbather.
- 8.2 If Sunbather approves a return of a Product, it may do so at its discretion on terms and conditions acceptable to it. Those conditions may include, but are not limited to, the higher of a 20% handling re-stocking fee and a fee based on the Product price on the Order assessed on factors including but not limited to whether the Product is in its original state at time of delivery from Sunbather, is defective, has damaged or missing components, or the hours of operation exceed two (2) hours.
- 8.3 Sunbather will not make any cash payment to the Buyer and any refund to the Buyer will only be made via credits on future Orders.
- 8.4 The Buyer is responsible for all handling, storage fees, freight, duty, or other charges incurred or payable to return the Product to Sunbather's notified delivery point.

CLAUSE 9 – LIMITATION OF LIABILITY

- 9.1 Sunbather's liability for a breach of a condition or warranty implied by Part 3-2, Division 1 of Schedule 2 of the Competition and Consumer Act 2010 (Cth) is hereby limited to the lowest of:
 - (i) the replacement of the Goods;
 - (ii) the supply of equivalent Goods;
 - (iii) the payment of the cost of replacing the Goods or of acquiring equivalent Goods; or the payment of the cost of having the Goods repaired.
- 9.2 To the extent permitted by law, except as set out in clause 5, Sunbather excludes all statutory or implied conditions and warranties and any other liability it may have to the Buyer (including liability for indirect or consequential loss) that may arise under statute or at law including without limitation for breach of contract, in tort (including negligence) or under any other cause of action.

CLAUSE 10 – INTELLECTUAL PROPERTY RIGHTS

- 10.1 The Buyer agrees to protect all confidential information and intellectual property rights (including, but not limited to patents, trademarks, trade secrets, know-how and any other proprietary data) of Sunbather or the manufacturers. The Buyer shall not:
 - (i) copy, modify, infringe or misappropriate such intellectual property; nor
 - (ii) disclose any Sunbather confidential information other than to its employees and agents on a need to know basis and if required for normal use and maintenance of the Products.
- 10.2 Failure to comply with this clause will result in a default under these Terms and Conditions and may result in legal action taken by Sunbather.

CLAUSE 11 – PRICE, PAYMENT, DISCOUNT AND QUOTATION

- 11.1 Unless Sunbather has otherwise agreed credit terms in writing with the Buyer, payment by the Buyer will be made before delivery from Sunbather's warehouse on the following terms. In respect of Products where no Services are provided, the Buyer will pay a deposit amount as agreed with Sunbather for the Products on acceptance of Order and the balance upon notification that Products are available for collection/dispatch from Sunbather's warehouse.

- 11.2 In respect of Services, unless otherwise agreed in writing with Sunbather, the Buyer will pay a service call out fee upfront to secure their booking, with the balance of the service invoiced and payable on the day of the service. In respect of Installations, unless otherwise agreed in writing with Sunbather, the Buyer will pay a deposit amount as agreed with Sunbather for the Products on acceptance of Order and the balance on the day of the installation.
- 11.3 In the event that any order is cancelled, Sunbather reserves the right, at their discretion, to withhold all or a portion of the monies paid to recover any costs associated with Sunbather time and production materials.
- 11.4 Unless otherwise stated, all prices are in Australian dollars and exclude any applicable taxes and other imposts, including but not limited to, goods and services tax and duties. Sunbather will issue a tax invoice and the Buyer must reimburse Sunbather for any GST payable by it on each taxable supply it makes to the Buyer at the same time and in the same manner as the invoice price of the Products is payable.
- 11.5 Unless otherwise stated in writing on the quotation by Sunbather, all Sunbather quotations made to existing or potential the Buyers are firm for thirty (30) days from the date of issue. Where there is any delay in delivery of Products or supply of Services for reasons beyond the control of Sunbather for a period of 90 days from date of acceptance of an Order, Sunbather may adjust the price to reflect the increase to Sunbather in the cost of materials, labour or equipment occasioned by such delay and the Buyer agrees to pay such increased price. Sunbather's standard price list is subject to change at any time at Sunbather's discretion. Verbal quotations are subject to written confirmation.

CLAUSE 12 - DEFAULT

- 12.1 The Buyer is in default if:
 - (i) it fails to make a payment to Sunbather by its due date;
 - (ii) being a natural person it commits an act of bankruptcy;
 - (iii) being a corporation it has an administrator, receiver, receiver and manager, provisional liquidator, liquidator or controller appointed over its assets or any resolution to wind up the company is passed; or
 - (iv) it has any execution levied against its property.
- 12.2 In the event of a default, Sunbather will be entitled, without the obligation to give any notice to the Buyer and in addition to any other rights, to:
 - (i) payment of interest on all overdue accounts at the rate of 2% above the prevailing rate imposed by the Penalty Interest Rates Act 1983;
 - (ii) the commission it may have to pay to any recovery agent arising from such default or in recovering overdue amounts;
 - (iii) its actual legal costs on an indemnity basis incurred in relation to such default or in recovering overdue amounts or in otherwise seeking compliance with these Terms and Conditions;
 - (iv) immediate payment for Products, the payment which would otherwise not have been then due and payable;
 - (v) disallow any discounts, rebates or commissions otherwise claimable by the Buyer.
 - (vi) Sunbather may recover any monies owed to it by the Applicant by setting off such amounts (together with interests and costs of collection) against any sum owed to the Applicant by Sunbather.
 - (vii) terminate or suspend delivery of any Order which is the subject of any other sale between Sunbather and the Buyer; and
 - (viii) treat the Buyer's default as repudiation of any existing contract for the purchase of Products and recover any unpaid sum plus the interest, recovery agent's, and legal costs referred to in (a), (b) and (c) above from the Buyer by way of liquidated damages.

CLAUSE 13 – PACKING AND SHIPPING

- 13.1 Sunbather shall prepare the Products in accordance with its standard practice, ready for delivery.
- 13.2 Unless otherwise stated in any Order accepted by Sunbather, delivery terms shall be ex works Sunbather's warehouse.
- 13.3 The Buyer must notify Sunbather of any damaged Product or short delivery of Product by email or facsimile within two business days after delivery to the Buyer. The Buyer must also provide full and complete particulars of the damage or short delivery within that period. If the Buyer fails to observe these requirements the Buyer will not be entitled to make any claim in relation to damage or short delivery of Products.

CLAUSE 14 – ASSIGNMENT

- 14.1 The Buyer may not assign the Order, any interest therein, or any claim in relation to an Order either voluntarily or by operation of law without the prior written consent of Sunbather. An assignment without Sunbather's written consent is ineffective and void. Sunbather has an absolute right to withhold consent to any assignment in Sunbather's sole discretion. No such consent shall be deemed to relieve the Buyer of its obligations to comply fully with the requirements of these Terms and Conditions.
- 14.2 The Terms and Conditions of any Order assigned by the Buyer with consent of Sunbather shall be identical to those applicable to an assigned Order and shall be and remain binding on the assignee.
- 14.3 Sunbather reserves the right to sub contract with any other Sunbather approved person for the performance of any part of this contract.

CLAUSE 15 – APPLICABLE LAW AND VENUE

- 15.1 These Terms and Conditions and any Order to which these Terms and Conditions apply are governed by and construed exclusively under the laws of Victoria, Australia. The Buyer and Sunbather hereby submit to the sole and exclusive jurisdiction and venue of the courts of Victoria, Australia in any legal action related to or arising under this Order governed by these Terms and Conditions, including the Order to which these Terms and Conditions apply. The Buyer and Sunbather hereby agree that the above sets forth the sole and exclusive jurisdiction and venue in which any legal proceeding involving these Terms and Conditions including the Order to which they apply may be instituted and conducted
- 15.2 In the event of a dispute arising between the Buyer and Sunbather concerning an Order or the Products and/or Services covered by an Order, the parties agree to use good faith endeavours to resolve the dispute in a period of not more than 14 days after the aggrieved party gives written notice with full particulars of the dispute to the other party. During the period of good faith discussions neither party may institute legal proceedings against the other, except only in respect of urgent interlocutory relief. If the dispute is not resolved by agreement in that period or such longer period as the parties may agree in writing, either party is thereafter at liberty to institute legal proceedings for resolution pursuant to clause 15.1 hereof.

CLAUSE 16 – ORDER OF PRECEDENCE

In the event of any inconsistency in relation to the terms of an Order, such inconsistency shall be resolved by giving precedence in the following sequence:

- provisions accepted or as modified by Sunbather in the Order;
 - (i) Sunbather specifications for the Product(s) and/or those of any relevant manufacturer; and
 - (ii) these Terms and Conditions.

CLAUSE 17 – INDEMNIFICATION

The Buyer shall indemnify and hold Sunbather harmless to the full extent of any loss, damage, or expense, including lost profit, legal fees and court costs on a solicitor own client basis, for any failure or alleged failure of the Buyer to comply with these Terms and Conditions. With respect to the Products and/or Services delivered under an Order, the Buyer agrees to indemnify and save harmless Sunbather, its agents and employees, from and against all loss, expenses, costs, damages and liability incurred, directly or indirectly, as a result of or in connection with handling, installation, use by the Buyer, its agents, employees or customers of the Products that is inconsistent with usage instructions or directions provided by Sunbather, by the original manufacturer, or is contrary to recognised or accepted usage or standards

As a result, the Buyer agrees and at its own expense, to defend all claims, suits and actions against Sunbather, its agents and employees in such an instance.

CLAUSE 18 – SUPERIOR FORCE

Sunbather shall not be responsible for any default or delay in the performance of any of its obligations hereunder, if such performance is prevented or delayed, in part or in whole, by reason of force majeure, or acts of government, or the consequence thereof included but not limited to, fire, flood, typhoon, earthquakes or by reason of riots, wars, hostilities, government restrictions, trade embargos, strikes, lockouts, labour disputes, boycotting of goods, ship shortage, manufacturer's bankruptcy, delays or damage in transportation or any other cause beyond Sunbather's control. Sunbather may, at its discretion, fulfil the Order within a reasonable time from the removal of the cause preventing or delaying the performance of any of its obligations hereunder or under an Order or rescind unconditionally and without liability, such Order in whole or a portion thereof.

CLAUSE 19 – ENTIRE AGREEMENT

- 19.1 These Terms and Conditions, including any accepted Order to which these Terms and Conditions apply, and any attachments hereto, constitute the entire understanding and agreement between the parties with respect to the subject matter hereof and supersede all prior representations and understandings, whether oral or written. However, nothing herein shall be construed as a limitation or exclusion of any right or remedy available to Sunbather by law. Sunbather and the Buyer agree that the U.N. Convention on contracts for the international sale of goods shall not apply to any purchase and sale of Products governed by these Terms and Conditions.
- 19.2 To avoid doubt, any terms and conditions accompanying an Order provided by a the Buyer shall not apply to the Order and shall not vary these Terms and Conditions unless Sunbather expressly agrees in writing to any such variation.

CLAUSE 20 – HOURS OF OPERATION

- 20.1 Sunbather conducts business at its various business premises between 8.30 AM and 5.00 PM (according to the time zone in which each of its relevant business premises is located) Monday to Friday excluding gazetted public holidays and any other closures at Sunbather's discretion.
- 20.2 All services, other repairs, maintenance and warranty work are carried out exclusively at the various premises of Sunbather during these hours unless an alternative or on-site location is agreed in advance by Sunbather on such terms and conditions as it may decide.