

# TERMS AND CONDITIONS OF TRADE

## 1. Definitions

- 1.1 "Seller" shall mean Polyaire Pty Ltd and its successors and assigns.
- 1.2 "Buyer" shall mean the Buyer or any person acting on behalf of and with the authority of the Buyer.
- 1.3 "Guarantor" means that person (or persons), or entity who agrees herein to be liable for the debts of the Buyer on a principal debtor basis.
- 1.4 "Goods" shall mean Goods supplied by the Seller to the Buyer (and where the context so permits shall include any supply of Services as hereinafter defined).
- 1.5 "Services" shall mean all services supplied by the Seller to the Buyer and includes any advice or recommendations (and where the context so permits shall include any supply of Goods as defined supra).
- 1.6 "Price" shall mean the cost of the Goods as agreed between the Seller and the Buyer subject to clause 4 of this contract.

## 2. Acceptance

- 2.1 Any instructions received by the Seller from the Buyer for the supply of Goods and/or the Buyer's acceptance. Goods supplied by the Seller shall constitute acceptance of the terms and conditions contained herein.
- 2.2 Where more than one Buyer has entered into this agreement, the Buyer's shall be jointly and severally liable for all payments of the Price.
- 2.3 Upon acceptance of these terms and conditions by the Buyer the terms and conditions are irrevocable and can only be rescinded in accordance with these terms and conditions or with the written consent of the manager of the Seller.
- 2.4 None of the Seller's agents or representatives are authorised to make any representations, statements, conditions or agreements not expressed by the manager of the Seller in writing nor is the Seller bound by any such unauthorised statements.
- 2.5 The Buyer undertakes to give the Seller not less than fourteen (14) days prior written notice of any proposed change in the Buyer's name and/or any other change in the Buyer's details (including but not limited to, changes in the Buyer's address, facsimile number, or business practice).

## 3. Goods

- 3.1 The Goods are as described on the invoices, quotation, work authorisation or any other work commencement forms as provided by the Seller to the Buyer.

## 4. Price And Payment

- 4.1 At the Seller's sole discretion:
  - (a) The Price shall be as indicated on invoices provided by the Seller to the Buyer in respect of Goods supplied;
  - or
  - (b) The Price shall be the Seller's current Price, at the date of delivery of the Goods, according to the Seller's current Price list; or
  - (c) The Price of the Goods shall (subject to clause 4.2) be the Seller's quoted price which shall be binding upon the Seller provided that the Buyer shall accept in writing the Seller's quotation within thirty (30) days.
- 4.2 Any variation from the plan of scheduled works or specifications will be charged for on the basis of the Seller's quotation and will be shown as variations on the invoice. Payment for all variations must be made in full at their time of completion.
- 4.3 Time for payment for the Goods shall be of the essence and will be stated on the invoice, quotation or any other order forms. If no time is stated then payment shall be on delivery of the Goods.
- 4.4 At the Seller's sole discretion, payment for approved Buyers shall be due on 30<sup>th</sup> day of each month following the end of month in which the Goods/services are purchased or as per contracted trading terms.
- 4.5 Payment will be made by cash on delivery, or by cheque, or by bank cheque, or by credit card, or by direct credit, or by any other method as agreed to between the Buyer and the Seller.
- 4.6 The Price shall be increased by the amount of any GST and other taxes and duties which may be applicable, except to the extent that such taxes are expressly included in any quotation given by the Seller.

## 5. Delivery Of Goods / Services

- 5.1 Delivery of the Goods shall be made to the Buyer's address. The Buyer shall make all arrangements necessary to take delivery of the Goods whenever they are tendered for delivery, or delivery of the Goods shall be made to the Buyer at the Seller's address.
- 5.2 Delivery of the Goods to a carrier, either named by the Buyer or failing such naming to a carrier at the discretion of the Seller for the purpose of transmission to the Buyer, is deemed to be a delivery of the Goods to the Buyer.
- 5.3 Where there is no agreement that the Seller shall send the Goods to the Buyer, delivery to a carrier at limited carrier's risk at the expense of the Buyer is deemed to be delivery to the Buyer.
- 5.4 Goods delivered to site shall be at the Buyer's risk and will be deemed to be delivered upon appearing on a

delivery schedule.

- 5.5 The Buyer shall take delivery of the Goods tendered not withstanding that the quantity so delivered shall be either greater or less than the quantity purchased provided that:
  - (a) such discrepancy in quantity shall not exceed 5%, and
  - (b) the Price shall be adjusted pro rata to the discrepancy.
- 5.6 The failure of the Seller to deliver shall not entitle either party to treat this contract as repudiated.
- 5.7 The Seller shall not be liable for any loss or damage whatever due to failure by the Seller to deliver the Goods (or any of them) promptly or at all.

## 6. Risk

- 6.1 If the Seller retains property in the Goods nonetheless, all risk for the Goods passes to the Buyer on delivery.
- 6.2 If any of the Goods are damaged or destroyed prior to property in them passing to the Buyer, the Seller is entitled, without prejudice to any of its other rights or remedies under these Terms and Conditions of Trade (including the right to receive payment of the balance of the Price for the Goods), to receive all insurance proceeds payable for the Goods. This applies whether or not the Price has become payable under the Contract. The production of these terms and conditions by the Seller is sufficient evidence of the Seller's rights to receive the insurance proceeds without the need for any person dealing with the Seller to make further enquiries.

## 7. Buyer's Disclaimer

- 7.1 The Buyer hereby disclaims any right to rescind, or cancel the contract or to sue for damages or to claim restitution arising out of any misrepresentation made to him by any servant or agent of the Seller and the Buyer acknowledges that he buys the Goods relying solely upon his own skill and judgement and that the Seller shall not be bound by nor responsible for any term, condition, representation or warranty other than the warranty given by the Manufacturer which warranty shall be personal to the Buyer and shall not be transferable to any subsequent Buyer.

## 8. Defect/Returns

- 8.1 The Buyer shall inspect the Goods on delivery and shall within twenty four (24) hours of delivery notify the Seller of any alleged defect, shortage in quantity, damage or failure to comply with the description or quote. The Buyer shall afford the Seller an opportunity to inspect the Goods within a reasonable time following delivery if the Buyer believes the Goods are defective in any way. If the Buyer shall fail to comply with these provisions, the Goods shall be conclusively presumed to be in accordance with the terms and conditions and free from any defect or damage.
- 8.2 For defective Goods, which the Seller has agreed in writing that the Buyer is entitled to reject, the Seller's liability is limited to either (at the Seller's discretion) replacing the Goods or repairing the Goods provided that:
  - (a) the Buyer has complied with the provisions of clause 8.1;
  - (b) the Goods are returned at the Buyer's cost within fourteen (14) days of the delivery date;
  - (c) the Seller will not be liable for Goods which have not been stored or used in a proper manner;
  - (d) the Goods are returned in the condition in which they were delivered and with all packaging material, brochures and instruction material in as new condition as is reasonable possible in the circumstances.
- 8.3 The Seller may (in its discretion) accept the Goods for credit but this may incur a handling fee of 10% of the value of the returned Goods plus any freight.
- 8.4 Goods made to special order, Buyer specification or non-catalogue items are under no circumstances acceptable for credit or return. Cancellation of orders for special or non-catalogue items will definitely not be accepted, once these orders are in production.

## 9. Warranty

- 9.1 Subject to the conditions of warranty set out in Clause 9.2 the Seller warrants that if any defect in any workmanship manufactured by the Seller becomes apparent and is reported to the Seller within twelve (12) months of the date of delivery (time being of the essence) then the Seller will either (at the Seller's sole discretion) repair the defect or replace the workmanship.
- 9.2 The conditions applicable to the warranty given by Clause 9.1 are:
  - (a) The warranty shall not cover any defect or damage which may be caused or partly caused by or arise through:
    - i) Failure on the part of the Buyer to properly

maintain any Goods; or

- ii) Failure on the part of the Buyer to follow any instructions or guidelines provided by the Seller; or
  - iii) Any use of any Goods otherwise than for any application specified on a quote or order form; or
  - iv) The continued use of any Goods after any defect becomes apparent or would have become apparent to a reasonably prudent operator or user; or
  - v) Fair wear and tear, any accident or act of God.
- (b) The warranty shall cease and the Seller shall thereafter in no circumstances be liable under the terms of the warranty if the workmanship is repaired, altered or overhauled without the Seller's consent.
- (c) In respect of all claims the Seller shall not be liable to compensate the Buyer for any delay in either replacing or repairing the workmanship/Goods or in properly assessing the Buyer's claim.
- 9.3 For Goods not manufactured by the Seller, the warranty shall be the current warranty provided by the manufacturer of the Goods. The Seller shall be under no liability whatsoever, except for the express conditions as detailed and stipulated in the manufacturers warranty.

## 10. The Commonwealth Trade Practices Act 1974 and Fair Trading Acts

- 10.1 Nothing in this agreement is intended to have the effect of contracting out of any applicable provisions of the Commonwealth Trade Practices Act 1974 or the Fair Trading Acts in each of the States and Territories of Australia, except to the extent permitted by those Acts where applicable.

## 11. Intellectual Property

- 11.1 Where the Seller has designed or drawn Goods for the Buyer, then the copyright in those designs and drawings shall remain vested in the Seller, and shall only be used by the Buyer at the Seller's discretion.
- 11.2 Conversely, in such a situation, where the Buyer has supplied drawings, the Seller in its sale conditions may look for an indemnity (the specifications and design of the Goods (including the copyright, design right or other intellectual property in them) shall as between the parties be the property of the Seller).
- 11.3 Where any designs or specifications have been supplied by the Buyer for manufacture, by or to the order of the Seller then the Buyer warrants that the use of those designs or specifications for the manufacture, processing, assembly or supply of the Goods shall not infringe the rights of any third party.
- 11.4 The Buyer warrants that all designs or instructions to the Seller will not cause the Seller to infringe any patent, registered design or trademark in the execution of the Buyer's order.

## 12. Default & Consequences Of Default

- 12.1 Interest on overdue invoices shall accrue from the date when payment becomes due daily until the date of payment at a rate of 2.5% per calendar month and shall accrue at such a rate after as well as before any judgement.
- 12.2 If the Buyer defaults in payment of any invoice when due, the Buyer shall indemnify the Seller from and against all the Seller's costs and disbursements including on a solicitor and own client basis and in addition all of the Seller's nominees costs of collection.
- 12.3 Without prejudice to any other remedies the Seller may have, if at any time the Buyer is in breach of any obligation (including those relating to payment), the Seller may suspend or terminate the supply of Goods to the Buyer and any of its other obligations under the terms and conditions. The Seller will not be liable to the Buyer for any loss or damage the Buyer suffers because the Seller exercised its rights under this clause.
- 12.4 In the event that:
  - (a) any money payable to the Seller becomes overdue, or in the Seller's opinion the Buyer will be unable to meet its payments as they fall due; or
  - (b) the Buyer becomes insolvent, convenes a meeting with its creditors or proposes or enters into an arrangement with creditors, or makes an assignment for the benefit of its creditors; or
  - (c) a receiver, manager, liquidator (provisional or otherwise) or similar person is appointed in respect of the Buyer or any asset of the Buyer; then without prejudice to the Seller's other remedies at law
    - (i) the Seller shall be entitled to cancel all or any part of any order of the Buyer which remains unperformed in addition to and without prejudice to any other remedies; and
    - (ii) all amounts owing to the Seller shall, whether or not due for payment, immediately become payable.

**13. Title**

- 13.1 It is the intention of the seller and agreed by the Buyer that property in the Goods shall not pass until:
- The Buyer has paid all amounts owing for the particular Goods, and
  - The Buyer has met all other obligations due by the Buyer to the Seller in respect of all contracts between the Seller and the Buyer, and that the Goods shall be kept separate until the Seller shall have received payment and all other obligations of the Buyer are met.
- 13.2 It is further agreed that:
- Until such time as ownership of the Goods shall pass from the Seller to the Buyer the Seller may give notice in writing to the Buyer to return the Goods or any of them to the Seller. Upon such notice the rights of the Buyer to obtain ownership or any other interest in the Goods shall cease.
  - If the Buyer fails to return the Goods to the Seller then the Seller or the Seller's agent may enter upon and into land and premises owned, occupied or used by the Buyer, or any premises as the invitee of the Buyer, where the Goods are situated and take possession of the Goods, without being responsible for any damage thereby caused.
  - The Buyer is only a bailee of the Goods and until such time as the Seller has received payment in full for the Goods then the Buyer shall hold any proceeds from the sale or disposal of the Goods on trust for the Seller.
  - The Buyer shall not deal with the money of the Seller in any way which may be adverse to the Seller.
  - Receipt by the Seller of any form of payment other than cash shall not be deemed to be payment until that form of payment has been honoured, cleared or recognised and until then the Seller's ownership of rights in respect of the Goods shall continue.
  - The Buyer shall not charge the Goods in any way nor grant nor otherwise give any interest in the Goods while they remain the property of the Seller.
  - The Seller may require payment of the Price or the balance of the Price due together with any other amounts due from the Buyer to the Seller arising out of these terms and conditions, and the Seller may take any lawful steps to require payment of the amounts due and the Price.
  - The Seller can issue proceedings to recover the Price of the Goods sold notwithstanding that ownership of the Goods may not have passed to the Buyer.
  - Until such time the Buyer has the Seller's authority to convert the goods into other products and if the goods are so converted, the parties agree that the Seller will be the owner of the end products.

**14. Security And Charge**

- 14.1 Notwithstanding anything to the contrary contained herein or any other rights which the Seller may have howsoever:
- Where the Buyer and/or the Guarantor (if any) is the owner of land, realty or any other asset capable of being charged, both the Buyer and/or the Guarantor agree to mortgage and/or charge all of their joint and/or several interest in the said land, realty or any other asset to the Seller or the Seller's nominee to secure all amounts and other monetary obligations payable under the terms and conditions. The Buyer and/or the Guarantor acknowledge and agree that the Seller (or the Seller's nominee) shall be entitled to lodge where appropriate a caveat, which caveat shall be released once all payments and other monetary obligations payable hereunder have been met.
  - Should the Seller elect to proceed in any manner in accordance with this clause and/or its sub-clauses, the Buyer and/or Guarantor shall indemnify the seller from and against all the Seller's costs and disbursements including legal costs on a solicitor and own client basis.
  - To give effect to the provisions of clause [14.1 (a) and (b)] inclusive hereof the Buyer and/or the Guarantor (if any) do hereby irrevocably nominate constitute and appoint the Seller or the Seller's nominee as the Buyer's and/or Guarantor's true and lawful attorney to execute mortgages and charges (whether registerable or not) including such other terms and conditions as the Seller and/or the Seller's nominee shall think fit in his/ her/its/their absolute discretion against the joint and/or several interest of the Buyer and/or the Guarantor in any land, realty or asset in favour of the Seller and in the Buyer's and/or Guarantor's name as may be necessary to secure the said Buyer's and/or Guarantor's obligations and indebtedness to the Seller and further to do and perform all necessary and other acts including

instituting any necessary legal proceedings, and further to execute all or any documents in the Seller's absolute discretion which may be necessary or advantageous to give effect to the provisions of this clause.

**15. Cancellation**

- 15.1 The Seller may cancel these terms and conditions or cancel delivery of Goods at any time before the Goods are delivered by giving written notice. The Seller shall not be liable for any loss or damage whatever arising from such cancellation.

**16. Privacy Act 1988**

- 16.1 The Buyer and/or the Guarantor/s agree to the Seller to obtain from a credit-reporting agency a credit report containing personal credit information about the Buyer and Guarantor/s in relation to credit provided by the Seller.
- 16.2 The Buyer and/or the Guarantor/s agree that the Seller may exchange information about Buyer and Guarantor/s with those credit providers named in the Application for Credit account or named in a consumer credit report issued by a reporting agency for the following purposes:
- To assess an application by Buyer;
  - To notify other credit providers of a default by the Buyer;
  - To exchange information with other credit providers as to the status of this credit account, where the Buyer is in default with other credit providers; and
  - To assess the credit worthiness of Buyer and/or Guarantor/s.
- 16.3 The Buyer consents to the Seller being given a consumer credit report to collect overdue payment on commercial credit (Section 18K(1)(h) Privacy Act 1988).
- 16.4 The Buyer agrees that Personal Data provided may be used and retained by the Seller for the following purposes and for other purposes as shall be agreed between the Buyer and Seller or required by law from time to time:
- provision of Services & Goods;
  - marketing of Services and or Goods by the Seller, its agents or distributors in relation to the Services and Goods;
  - analysing, verifying and/or checking the Buyer's credit, payment and/or status in relation to provision of Services/Goods;
  - processing of any payment instructions, direct debit facilities and/or credit facilities requested by Buyer; and (e) enabling the daily operation of Buyer's account and/or the collection of amounts outstanding in the Buyer's account in relation to the Services and Goods.
- 16.5 The Seller may give, information about the Buyer to a credit reporting agency for the following purposes:
- to obtain a consumer credit report about the Buyer; and or
  - allow the credit reporting agency to create or maintain a credit information file containing information about the Buyer.

**17. Unpaid Seller's Rights To Dispose Of Goods**

- 17.1 In the event that:
- the Seller retains possession or control of the Goods; and
  - payment of the Price is due to the Seller; and
  - the Seller has made demand in writing of the Buyer for payment of the Price in terms of this contract; and
  - the Seller has not received the Price of the Goods, then, whether the property in the Goods has passed to the Buyer or has remained with the Seller, the Seller may dispose of the Goods and may claim from the Buyer the loss to the Seller on such disposal.

**18. Lien**

- 18.1 Where the Seller has not received or been tendered the whole of the price, or the payment has been dishonoured, the Seller shall have:
- a lien on the goods;
  - the right to retain them for the price while the Seller is in possession of them;
  - a right of stopping the goods in transit whether or not delivery has been made or ownership has passed; and
  - a right of resale,
  - the foregoing right of disposal, provided that the lien of the Seller shall continue despite the commencement of proceedings or judgement for the price having been obtained.

**19. Display Stands**

- 19.1 Display stands and associated equipment ("Equipment") shall at all times remain the property of the Seller and are returnable on demand by the Seller. In the event that the Equipment are not

returned to the Seller in the condition in which they were delivered the Seller retains the right to charge the Price of repair or replacement of the Equipment.

19.2 The Buyer acknowledges that the Equipment is to only be utilised for the display of Goods provided by the Seller or any of the Seller's associated companies.

19.3 The Buyer shall;

- keep the Equipment in their own possession and control and shall not assign the benefit of the Equipment nor be entitled to lien over the Equipment and the Buyer accepts full responsibility for the safekeeping of the Equipment and indemnifies the Seller for all loss theft or damage to the Equipment howsoever caused and without limiting the generality of the foregoing whether or not such loss theft or damage is attributable to any negligence failure or omission of the Buyer;
  - not alter or make any additions to the Equipment including but without limitation altering, make any additions to, defacing or erasing any identifying mark, plate or number on or in the Equipment or in any other manner interfere with the Equipment;
  - comply with all occupational health and safety laws relating to the Equipment and its operation;
- 19.4 The Buyer acknowledges and agrees that it loans the Plant at its own risk and the Buyer is responsible for theft or damage to the Plant whilst on loan.

**20. General**

- 20.1 If any provision of these terms and conditions shall be invalid, void or illegal or unenforceable the validity existence, legality and enforceability of the remaining provisions shall not be affected, prejudiced or impaired.
- 20.2 All Goods supplied by the Seller are subject to the laws of South Australia and the Seller takes no responsibility for changes in the law which affect the Goods supplied.
- 20.3 The Seller shall be under no liability whatever to the Buyer for any indirect loss and/or expense (including loss of profit) suffered by the Buyer arising out of a breach by the Seller of these terms and conditions.
- 20.4 In the event of any breach of this contract by the Seller the remedies of the Buyer shall be limited to damages. Under no circumstances shall the liability of the Seller exceed the Price of the Services.
- 20.5 The Buyer shall not set off against the Price amounts due from the Seller.
- 20.6 The Seller may license or sub-contract all or any part of its rights and obligations without the Buyer's consent.
- 20.7 The Seller reserves the right to review these terms and conditions at any time and from time to time. If, following any such review, there is to be any change in such terms and conditions, that change will take effect from the date on which the seller notifies the Buyer of such change.
- 20.8 Neither party shall be liable for any default due to any act of God, war, terrorism, strike, lock out, industrial action, fire, flood, drought, storm or other event beyond the reasonable control of either party.