

# TERMS AND CONDITIONS

## 1 General

The whole of the Agreement between Clearwater Lakes & Ponds Pty Ltd (ACN 135 133 925) ("Clearwater") and the Applicant referred to in the Credit Application or the Purchaser of the goods and services ("Customer") are those set out in these Terms and Conditions as amended from time to time and those, if any, which are implied and which cannot be excluded by law ("Terms"). Any other contractual terms of the Customer (whether upon the Customer's order or elsewhere) which are contrary to or inconsistent with these Terms shall not apply nor shall they constitute a counter-offer. By receiving delivery and/or supply of all or a portion of the goods, materials and/or parts and/or labour and/or services supplied by Clearwater under these Terms ("Goods and Services"), the Customer shall be deemed to have accepted these Terms and to have agreed that they shall apply to the exclusion of all others.

## 2 Credit Terms

- 2.1 Payment is due on or prior to thirty (30) days from the date of invoice rendered in respect of the supply of the Goods and Services unless otherwise stated in writing by Clearwater. Clearwater may charge liquidated damages at a rate equivalent to two percent (2%) in excess of the rate of interest for the time being fixed under Section 2 of the Penalty Interest Rates Act 1983 if payment is not received by the due date.
- 2.2 Clearwater's express or implied approval for extending credit to credit account customers may be revoked or withdrawn by Clearwater at any time.
- 2.3 Clearwater is entitled to set-off against any money owing to the Customer amounts owed to Clearwater by the Customer on any account whatsoever.
- 2.4 Any payments received from the Customer on overdue accounts will be applied first to satisfy interest which may have accrued, second to reasonable expenses and legal costs referred to in Clause 2.5, and then to principal.
- 2.5 The Customer is liable for all reasonable expenses (including contingent expenses such as debt collection commission) and legal costs (on a full indemnity basis) incurred by Clearwater for enforcement of obligations and recovery of monies due from the Customer to Clearwater.

## 3 Quotations and Pricing

- 3.1 Prices charged for Goods and Services will be according to a current quotation for those Goods and Services. Otherwise, they will be determined by Clearwater by reference to its standard prices in effect at the date of delivery (whether notified to the Customer or not and regardless of any prices contained in the order). Clearwater will use its best endeavours to notify the Customer of price changes but bears no liability in respect of this.
- 3.2 Any quotation by Clearwater shall not constitute an offer. Quotations will remain valid for fourteen (14) days from the date of the quotation.
- 3.3 Any quotation, acceptance of quotation, purchase order or other document which requires signature may be signed in electronic form, and such signature shall be binding upon the person affixing that signature.
- 3.4 Unless otherwise specified by Clearwater, the prices exclude:-
  - 3.4.1 Any statutory tax, including any GST, duty or impost levied in respect of the Goods and Services and which has not been allowed for by Clearwater in calculating the price.
  - 3.4.2 Costs and charges in relation to insurance, packing (other than the standard packing of Clearwater), crating, delivery (whether by road, rail, ship or air) and export of the Goods and Services.
- 3.5 Clearwater endeavours to be as accurate as possible with any product descriptions, but does not warrant that the product description on their website or otherwise is accurate, complete, reliable, current or error-free.

## 4 Delivery and Supply

- 4.1 Any times quoted for delivery and/or supply are estimates only and Clearwater shall not be liable for failure to deliver/supply, or for delay in delivery/supply. The Customer shall not be relieved of any obligation to accept or pay for Goods and Services, by reason of any delay in delivery/supply or dispatch. Clearwater reserves the right to stop supply at any time if the Customer fails to comply with the Terms.
- 4.2 Clearwater may refuse to supply any order by the Customer for Goods and Services in its absolute discretion and may make acceptance of an order conditional upon it receiving a satisfactory credit assessment of the Customer.
- 4.3 If the Customer directs that delivery of the Goods and Services be staggered over different times or to different addresses from those specified in the Credit Application, then the Customer:-
  - 4.3.1 Shall be liable for any additional cost, charge and expense incurred by Clearwater in complying with the Customer's direction.
  - 4.3.2 Shall pay for the whole of the invoiced value of the Goods and Services notwithstanding the staggered deliveries
  - 4.3.3 Such action shall be deemed to be delivery to the Customer.
- 4.4 The Customer is deemed to accept delivery of the Goods where it is either delivered to the Customer's premises or when Clearwater notifies the Customer that the Goods are available for collection.
- 4.5 If the Customer is unable or fails to accept delivery of the Goods, Clearwater may deliver it to a place of storage nominated by the Customer and, failing such nomination, to a place determined by Clearwater. Such action shall be deemed to be delivery to the Customer. The Customer shall be liable for all cost, charge and expense incurred by Clearwater on account of storage, detention, double cartage/delivery or similar causes.

## 5 Property

- 5.1 Until full payment has been made for all Goods and Services, and any other sums in any way outstanding from the Customer to Clearwater from time to time:-
  - 5.1.1 All sums outstanding become immediately due and payable by the Customer to Clearwater if the Customer makes default in paying any other sums due to Clearwater, becomes bankrupt, or commits any act of bankruptcy, compounds with its creditors, has judgment entered against it in any court or, being a company, has a provisional liquidator, liquidator, receiver, receiver manager or administrator appointed, notwithstanding the provisions of any other clause in these Terms.
  - 5.1.2 The property in the Goods shall not pass to the Customer and the Customer shall hold the Goods as bailee for Clearwater (returning the same to Clearwater on request). The Goods shall nevertheless be at the risk of the Customer from the time of delivery/supply and the Customer must insure the Goods from the time of delivery/supply.
  - 5.1.3 The Customer is only authorised to sell the Goods (or any portion of them) to third parties as the fiduciary agent of Clearwater provided that there shall be no right to bind Clearwater to any liability to such third party by contract or otherwise. All payments (direct or indirect) received from such third parties by the Customer for the Goods (or any portion of them) shall be held on trust for Clearwater pursuant to the fiduciary relationship.
  - 5.1.4 In the event that the Customer incorporates or transforms the Goods (or any portion of them) into any other goods or products produced by the Customer (or a third party), then the Customer must hold a proportion of any payment ("relevant proportion") received by the Customer for such

goods or products on trust for Clearwater. The Customer expressly acknowledges that the relevant proportion shall be equal to the dollar value of the Goods incorporated or transformed and the Customer further acknowledges that any part payment (not exceeding the relevant proportion) received by the Customer for such goods or products is received as payment first of the relevant proportion.

5.1.5 Clearwater is irrevocably authorised to enter any premises where the Goods are kept, and to use the name of the Customer and to act on its behalf, if necessary, to recover possession of the Goods without liability for trespass or any resulting damage.

5.2 In addition to any lien to which Clearwater may, by statute or otherwise, be entitled, Clearwater shall in the event of the Customer's insolvency, bankruptcy or winding up, be entitled to a general lien over all property or goods belonging to the Customer in Clearwater's possession (although all or some of such property or goods may have been paid) for the unpaid price of any Goods and Services sold or delivered to the Customer under this or any other contract.

## 6 Availability of Stock

Any order that cannot be fulfilled on its receipt will automatically be back ordered and processed when stock becomes available unless it is the Customer's stated standard policy not to accept back orders or the Customer specifically marks its order, "Do Not Back Order". Deliveries at any time are subject to availability of stock and Clearwater will not be liable for any charges due to product unavailability.

## 7 Returns, Cancellations and Claims

7.1 The Customer shall not return any Goods to Clearwater without obtaining prior authorisation from Clearwater. No returns will be accepted unless a copy of the relevant invoice is enclosed with the returned Goods. A list of the Goods returned including product descriptions, quantity, date of return and the Customer's name and address must also be enclosed. Freight charges must be paid by the Customer. All Goods must be returned in the original packaging and the Customer shall be responsible for all damage incurred during return shipment. A credit note will be issued by Clearwater only after Goods returned are either collected by Clearwater's authorised representative or agent or returned to it by the Customer as set out above. The Customer shall not deduct the amount of any anticipated credit from any payment due to Clearwater but must await receipt of a credit note.

7.2 If Clearwater accepts the return of any Goods that have been ordered, Clearwater may charge the Customer up to fifty per cent (50%) of the invoice price as a handling fee with freight costs and risk remaining the responsibility of the Customer.

7.3 No cancellations or partial cancellation of an order by the Customer shall be accepted by Clearwater unless it has first consented in writing to such cancellation or partial cancellation and unless a cancellation charge has been paid which, as determined by Clearwater, will indemnify Clearwater against all loss, without limitation. Cancellation will not be accepted on goods that are not regular stock which are in the process of manufacture or ready for shipment.

7.4 All complaints, claims, or notification of lost Goods, incomplete Goods and Services, Goods damaged in transit or Goods and Services that do not comply with the Customer's purchase order must be submitted by the Customer to Clearwater in writing within forty-eight (48) hours of the date of delivery of the Goods and Services. Otherwise, the Customer shall be deemed to have accepted the Goods and Services and shall not refuse to pay for the Goods and Services on the basis that they were lost, incomplete, damaged in transit, or do not comply with the Customer's purchase order.

## 8 Personal Property Security Interest

8.1 The Customer grants Clearwater a Security Interest in the goods supplied as Commercial Property, more particularly described as Other Goods (a relevant sub-classification of collateral described in the regulations pursuant to section 20(4) of the PPSA) and

their Proceeds to secure the obligation of the Customer to pay the purchase price of the goods and any other obligations of the Customer to Clearwater under this contract (together the "Indebtedness") and, where the goods and/or Proceeds are not readily identifiable and/or traceable or their recoverable value is insufficient to pay the Indebtedness, the security interest shall also extend to all the Goods and Services present and after acquired by the Customer, of which the goods form part, to the extent required to secured the Indebtedness.

8.2 As and when required by Clearwater the Customer shall, at its own expense, provide all reasonable assistance and relevant information to enable Clearwater to register a Financing Statement or a Financing Change Statement and generally to obtain, maintain, register and enforce Clearwater's Security Interest in respect of the goods supplied, in accordance with the Personal Property Securities Act 2009 ("PPSA").

8.3 The Customer shall not change its name without first notifying Clearwater of the new name not less than 7 days before the change takes effect.

8.4 Notwithstanding any reference to a particular invoice/order, where any sum remains outstanding by the Customer on more than one invoice/order, any payments received from the Customer shall be deemed to be made by the Customer and applied by Clearwater in the following order:

8.4.1 To any obligation owed by the Customer to Clearwater which is unsecured, in the order in which the obligations were incurred;

8.4.2 To any obligations that are secured, but not by a Purchase Money Security Interest, in the order in which those obligations were incurred;

8.4.3 To obligations that are secured by a Purchase Money Security Interest, in the order in which those obligations were incurred.

8.5 Until the Customer has paid all money owing to Clearwater the Customer shall at all times ensure that:

8.5.1 All goods supplied by Clearwater, while in the Customer's possession, can be readily identified and distinguished, and/or

8.5.2 All Proceeds (in whatever form) that the Customer received from the sale of any of the goods are readily identifiable and traceable.

8.6 Where the goods are purchased by the Customer and held as Inventory, nothing in this clause shall prevent the Customer from selling or leasing and delivering the goods in the ordinary course of the Customer's business. Otherwise until the Customer has paid all money owing to Clearwater the Customer shall not sell or grant a Security Interest in the goods without Clearwater's written consent.

8.7 The parties agree to opt out of the PPSA in accordance with Section 115 of the PPSA to the extent that Section 115 applies for the benefit of, and does not impose a burden on, Clearwater. The Customer waives its right to receive a Verification Statement in respect of any Financing Statement or Financing Change Statement registered by or on behalf of Clearwater in respect of the Security Interest created by these terms and conditions.

8.8 Clearwater is irrevocably authorised to enter any premises where the goods are kept, and to use the name of the Customer and to act on its behalf, if necessary, to recover possession of the Goods and seize the Goods in accordance with the Act without liability for trespass or any resulting damage.

8.9 For the purpose of this clause words and phrases starting with a capital letter shall have the respective meanings given to them under, or in the context of the PPSA.

## 9 Privacy Act 1988 ("Privacy Act")

To enable Clearwater to assess the Customer's application for credit, the Customer authorises Clearwater:-

- 9.1 To obtain from a credit reporting agency a consumer or commercial credit report containing personal information about the Customer and its guarantors pursuant to Section 18K(1) of the *Privacy Act*; and
- 9.2 To obtain a report from a credit reporting agency and other information in relation to the Customer's commercial credit activities, and
- 9.3 To give to a credit reporting agency information including identity particulars and application details

AND in accordance with Section 18N(1) of the *Privacy Act* the Customer authorises Clearwater to give to and obtain from any credit provider named in the accompanying credit application and credit providers that may be named in a credit report issued by a credit reporting agency information about the Customer's credit arrangements. The Customer understands that this information can include any information about its credit worthiness, credit standing, credit history or credit capacity that credit providers are allowed to give or receive from each other under the *Privacy Act*.

The Customer understands that information can be used for the purposes of assessing its application for credit (Section 18L(4) *Privacy Act*), assisting it to avoid defaulting on its credit obligations, assessing its credit worthiness and notifying other credit providers and credit reporting agencies of a default by it under these Terms.

Any information collected by Clearwater will only be used in accordance with their privacy policy, and will not be given or sold to any third party.

## 10 Notification

The Customer must notify Clearwater in writing within seven (7) days of:-

- 10.1 Any alteration of the name or ownership of the Customer.
- 10.2 The issue of any legal proceedings against the Customer.
- 10.3 The appointment of any provisional liquidator, liquidator, receiver, receiver manager or administrator to the Customer.
- 10.4 Any change in the ownership of the business name of the Customer. The Customer agrees that it shall be liable to Clearwater for all Goods and Services supplied to the new owner by Clearwater until notice of any such change is received.

## 11 Warranties

- 11.1 No warranties except those implied and that by law cannot be excluded are given by Clearwater in respect of Goods and Services supplied. Where it is lawful to do so, the liability of Clearwater for a breach of a condition or warranty is limited to the repair or replacement of the Goods and Services, the supply of equivalent Goods and Services, the payment of the cost of repairing or replacing the Goods and Services or acquiring equivalent Goods and Services, as determined by Clearwater.
- 11.2 The Customer acknowledges and warrants that it has relied on its own skill and judgment or, alternatively, on the skill and judgment of tradesmen and professional advisers retained by it to provide advice and assistance on the suitability of the Goods and Services for specific purposes and procedures and, in this respect, shall indemnify Clearwater from and against any suit, claim, demand or compensation which, but for these Terms, the Customer may have had against Clearwater.
- 11.3 The Customer warrants to Clearwater that it is purchasing Goods and Services as the principal and not as an agent.

## 12 Website Terms and Conditions

All content included on Clearwater's website is copyright to Clearwater, or used under licence by Clearwater from its content providers. The website is provided by Clearwater on an "as-is" and "as-available" basis, and Clearwater makes no representations or warranties of any kind, express or implied, as to the operation of the website or the information, content, material and/or products included on the website. Customers acknowledge that the use of the website is at their sole risk.

Clearwater does not warrant that the website servers or any emails forwarded from Clearwater are free of any virus or other damaging components, and Clearwater will not be liable for any damages arising from use of the website.

## 13 Force Majeure

Clearwater shall be released from its obligations in the event of national emergency, war, prohibitive governmental regulation or if any other cause beyond the control of the parties renders provision of the Goods and Services impossible, where all money due to Clearwater shall be paid immediately and, unless prohibited by law, Clearwater may elect to terminate the Agreement.

## 14 Equitable Charge

The Customer as beneficial owner and/or registered proprietor now charges in favour of Clearwater all of the Customer's estate and interest in any real property (including but not limited to any applicable land owned by the Customer named or described as the Customer's Street Address in the Credit Application if applicable) ("Land") to secure payment of accounts rendered by Clearwater to the Customer for the delivery and/or supply of the Goods and Services including interest payable on these accounts and costs (including legal costs on a full indemnity basis) incurred by Clearwater and including the costs to prepare and lodge a Caveat against the Land and to remove the Caveat.

## 15 Failure to Act

Clearwater's failure to enforce or insist upon the timely performance of any term, condition, covenant or provision in these Terms, or Clearwater's failure to exercise any right or remedy available under these Terms or at law, or Clearwater's failure to insist upon timely payment of monies when due or to demand payment of any charges or fees which accrue or any extension of creditor forbearance under these Terms shall not constitute a waiver of any subsequent default or a waiver of Clearwater's right to demand timely payment of future obligations or strict compliance with the Terms.

## 16 Legal Construction

- 16.1 These Terms shall be governed by and interpreted according to the laws of Victoria and Clearwater and the Customer consent and submit to the jurisdiction of the Courts of Victoria.
- 16.2 Notwithstanding that any provision of the Terms may prove to be illegal or unenforceable pursuant to any statute or rule of law or for any other reason that provision is deemed omitted without affecting the legality of the remaining provisions and the remaining provisions of the Terms shall continue in full force and effect.