

## Terms and Conditions of Sales & Service

All Goods and Services sold or supplied to a Customer by APS are supplied on these Terms.

### 1. Interpretation

In these Terms:

**Agreement** means the agreement between APS and the Customer for APS to provide Goods and/or Services to the Customer subject to these Terms, and any Orders, as defined in clause 3.4;

**APS** means Air Powered Services Pty Ltd ABN 63 070 186 159.

**Customer** means the customer specified in the Quotation or ATP to whom APS will supply the Goods and/or Services;

**Goods** means any goods to be supplied by APS to the Customer as specified in the Quotation or ATP;

**Non-Excludable Rights** means any rights under the Australian Consumer Law or other laws which may not be excluded by these Terms.

**Order** means an order issued by the Customer pursuant to clauses 2.3 and 2.4;

**Party and Parties** means APS and/or the Customer as the context requires;

**PPSA** means the *Personal Properties Securities Act 2009*;

**PPSR** means the Personal Property Securities Register;

**Purchase Order** means a written authority to purchase the Goods and/or Services given by APS to the Customer;

**Quotation** means any quotation, email, or proposal document given by APS to the Customer;

**Services** means any services to be supplied by APS to the Customer as specified in the Quotation or ATP;

**Terms** means these terms and conditions of sales & service.

### 2. Quotations and Orders

2.1. APS may provide a Quotation to the Customer.

2.2. Unless stated otherwise on a Quotation, Quotations are only valid for a period of 30 days.

2.3. Quotations do not constitute an offer. Quotations are an invitation by APS to the Customer to make an offer to buy the Goods and/or Services for the price specified in the Quotation, subject to these Terms, by placing an Order pursuant to clause 2.4.

2.4. The Customer may place an Order by:

- a. signing the Quotation and returning the signed Quotation to APS;
- b. issuing a Purchase Order to APS

- c. advising APS that it accepts the Quotation either orally, in writing or electronically (including via email or website);
  - d. paying any amount or deposit set out in the Quotation (if any); or
- 2.5. Quotations may be withdrawn, extended or changed by APS by written notice to the Customer at any time before a Quotation is accepted by the Customer.

### **3. Applicability of Terms**

- 3.1. APS shall only supply Goods and/or Services to the Customer on these Terms and APS shall not be bound by any further or different terms and conditions, including without limitation any purchase order terms of the Customer.
- 3.2. When the Customer issues an Order, a binding contract shall be created between the Parties for the supply of the Goods and/or Services on these Terms notwithstanding the purported inclusion of other terms and conditions by the Customer, which terms and conditions shall have no effect.
- 3.3. These Terms (or future versions amended by APS) shall apply to all Orders placed by the Customer with APS.

### **4. Prices**

- 4.1. The prices for Goods and/or Services quoted by APS in the Quotation (**Prices**) are based upon the cost of materials, labour, transportation, manufacture, packing, storage, transaction duty, import duty, insurance and other ancillary costs and charges (**Costs**) as at the relevant date.
- 4.2. Where the Goods identified in a Quotation are being imported by APS, prices are also based on the relevant exchange rate as at the date of the Quotation.
- 4.3. If there is a variation in any such Costs and/or the relevant exchange rate (based upon the buying rate of the foreign currency as quoted by the financial institution used by APS on the date of the relevant invoice of APS) such that the cost to APS of the Goods and/or Services increases prior to APS issuing the relevant invoice to the Customer, APS shall have the right to increase the Prices so as to pass on the effect of the increase in Costs and/or the impact of the change in exchange rate to the Customer in full.
- 4.4. Unless otherwise stated, the Prices are exclusive of GST and the Customer must pay on demand to APS all GST in respect of the supply of the Goods and/or Services to the Customer.

### **5. Cancellation**

- 5.1. The Customer may, after placing an Order, cancel an Order, reduce quantities, revise specifications or extend delivery schedules only with the prior written consent of APS (in its absolute discretion) and subject to such conditions which APS may impose (in its absolute discretion) including as to reasonable charges to be paid by the Customer to reimburse APS for any costs and expenses incurred by APS as a result. The Customer shall indemnify APS against all such costs and expenses.
- 5.2. The foregoing provisions shall not affect APS's rights against the Customer arising out of any breach or default of the Agreement by the Customer.
- 5.3. APS may, in its absolute discretion, immediately upon notice to the Customer cancel or modify an Order notwithstanding that it has accepted the Order where APS has reasonable cause to believe that the Customer cannot or may not be able to fulfil its obligations under this Agreement, and APS shall not incur any liability to the Customer in doing so.

## **6. Goods, Services & Specifications**

- 6.1. All Goods and/or Services to be supplied by APS to the Customer are as described or referred to in the Quotation or Order or as otherwise notified by APS to the Customer, subject to clause 2.6, and such descriptions prevail over all other descriptions including any specifications or enquiry of the Customer.
- 6.2. APS will use reasonable efforts to ensure that specifications, drawings and other information in correspondence, catalogues etc. are correct and accurate, however no warranty is given in respect of them and APS shall not be liable for any error therein.

## **7. Payment Terms**

- 7.1. APS may issue an invoice (**Invoice**) for the Goods and/or Services at any time after the Customer has placed an Order, including prior to delivery of the Goods or supply of the Services.
- 7.2. The Customer will comply with any special terms of payment specified by APS in the Quotation or ATP (for example, deposits or progress payments). Subject to any special terms of payment specified by APS to the Customer in the Quotation or ATP, the Customer shall pay any Invoice in full within 30 days from the date of the Invoice.
- 7.3. If payment is not made pursuant to any special terms of payment or within 30 days from date of the Invoice (as applicable) APS may:
  - a. charge interest on any overdue amount at the rate which is 5% per annum above the standard variable overdraft interest rate charged by APS's bank, calculated and payable daily from the due date until the Invoice is paid in full; and/or
  - b. terminate the Agreement for the supply of the Goods and/or Services by notice to the Customer and/or recover the outstanding balance of the Invoice plus interest and all associated costs as a debt owing to APS by the Customer (Debt).
- 7.4. If the Customer fails to pay any Invoice in full by the due date for payment the Customer shall reimburse APS all of the costs and expenses (including legal costs and debt collection fees) incurred by APS in the recovery of the overdue amounts.
- 7.5. APS reserves the right to withhold Goods or cease supplying Services if any payments (including progress payments) are overdue to APS from the Customer.
- 7.6. For the avoidance of doubt, the Customer must pay for any Services provided by APS even if the Customer disagrees with any advice provided or work performed by APS as part of such Services.
- 7.7. APS may offer credit to the Customer on such terms (including as to a credit limit) as APS sees fit. APS may vary such credit terms (and any credit limit) at any time as APS sees fit.
- 7.8. The Customer authorises APS to collect, retain and use any information about the Customer, for the purpose of assessing the Customer's creditworthiness or enforcing any right under the Agreement.
- 7.9. Notwithstanding anything to the contrary in the Agreement, APS may withhold delivery of any Goods or supply of any Service if such delivery or supply will cause the Customer to breach its credit terms and/or to cause the Customer's credit exposure (represented by the total of all unpaid Invoices) to APS to extend beyond such credit limit.
- 7.10. APS may, at any time on notice to the Customer, require the Customer to obtain and supply to APS an appropriate bank guarantee or other form of security prior to and as a condition of APS delivering Goods to the Customer.
- 7.11. Where payment is made by credit card, which APS may accept or reject at its absolute discretion, APS will process the receipt as per the Invoice plus a reasonable credit card surcharge fee.

## **8. Risk, Title & Delivery**

- 8.1. APS will deliver, or arrange for the delivery of, the Goods to an address provided by the Customer (**Delivery**). Partial Delivery of an accepted Order may be made by APS and the Price will become due in accordance with these Terms as Invoices are presented.
- 8.2. Any date or time quoted for delivery of Goods and/or Services is an estimate only. While APS shall endeavour to effect Delivery at the times and/or dates times specified in the Quotation, time will not be of the essence and APS cannot guarantee any quoted time or date.
- 8.3. All delivery and transportation charges shall be paid by the Customer unless otherwise agreed.
- 8.4. Notwithstanding anything to the contrary in the Agreement, APS may, in its absolute discretion, by at least 48 hours' notice given to the Customer, make it a condition of delivery that delivery will only be made on cash on delivery terms.
- 8.5. The risk in the Goods shall pass to the Customer upon Delivery.
- 8.6. If the Goods are ready for delivery but the Customer does not take delivery, the Goods shall then be entirely at the risk of the Customer and APS shall be entitled to impose upon the Customer a reasonable charge for storage of the Goods from the delivery date specified in the Quotation.
- 8.7. Legal and equitable title, property and ownership in any Goods sold or supplied by APS under this Contract only passes on receipt of payment by APS of the Price in full, cleared funds and without any deduction or set off.
- 8.8. Prior to title passing, APS may register a security interest under the PPSA in relation to the Goods and any proceeds arising in respect of any dealing in the Goods.
- 8.9. To the extent permitted by law, each party waives its rights or entitlements to any verification statements or other notices or communications that may be necessary, required or desirable under the PPSA.
- 8.10. Subject to these Terms, reasonable endeavours will be made by APS to have the Goods ready for Delivery on or before the delivery date specified in the Quotation, however this is not guaranteed and a failure to have Goods ready for Delivery by such date shall not give the Customer the right to refuse payment, or terminate the Agreement, or render APS liable for any delays, inconvenience, loss or damage of any kind/whatsoever suffered by the Customer or its customers.
- 8.11. APS shall not be liable for any delay, and the Customer shall not be relieved of any obligation to pay, arising from circumstances beyond APS control, including without limitation, acts of God, significant weather events, pandemic, quarantine restrictions, strikes, lock-outs, accidents, shortage of materials or labour, shipping delays, wars, or any delay in APS taking delivery from its suppliers.

## **9. Rights in Relation to Goods**

- 9.1. Until all amounts invoiced to the Customer by APS for Goods and/or Services are fully paid, APS will retain full and unfettered ownership and title of all Goods. All Goods are to be kept separate and marked as owned by APS and APS reserves all of the following rights in relation to all Goods ordered by the Customer:
  - a. to enter the Customer's premises (or the premises of any associated company, agent or contractor where the Goods are located) without notice or liability for trespass or any resulting damage and retake possession of the Goods; and
  - b. to keep or re-sell any Goods repossessed.
- 9.2. If any Goods which have not been fully paid for are sold, or any products manufactured using the Goods are sold, by the Customer, the Customer shall hold such part of the proceeds of any such sale as represents the outstanding Invoice price of the Goods sold or used in the manufacture of products

sold in a separate identifiable account as the beneficial property of APS and shall pay such amount to APS upon request.

- 9.3. Notwithstanding the provisions above APS shall be entitled to maintain an action against the Customer for the Invoice price, and the risk of the Goods shall pass to the Customer as set out in clause 9.

#### **10. Limited Warranty for Goods**

APS warrants and the Customer agrees that:

- 10.1. in relation to new Goods, that the benefits and obligations of the manufacturer's warranty apply in all respects and is, subject to Non-Excludable Rights, the sole and exclusive remedy for those Goods;
- 10.2. In relation to used or second-hand Goods supplied by APS, except to the extent that a manufacturer's warranty applies (such as for remanufactured components), or there are Non-Excludable Rights:
- all used or second-hand Goods are sold on an "as is where is" basis with all existing or future inadequacies, faults or defects, if any, whether known or unknown;
  - APS does not warrant used or second-hand goods to any extent or that they are fit for any purpose or free from any defects;
  - APS provides a 6 month warranty on major components supplied for second-hand compressors;
  - APS does not warrant the accuracy of machine meter readings, SMU hours or the service and repair history; and
  - to the extent permitted by law, the Customer releases APS from all liability arising from or in connection with any defects, faults or inadequacies in such Goods.
- 10.3. Subject to the inclusions and exclusions as provided by the manufacturer's warranty, any warranty under this Agreement excludes liability for costs in connection with:
- labour (including overtime labour) other than is reasonable or customary to rectify the defect;
  - the removal or re-installation of parts and components, unless APS carried out the original installation, and does the removal and installation of the replacements; and
  - standby, freight, transportation, travel, travel time, packaging and handling, demobilisation and re-mobilisation, commissioning and testing.

#### **11. Consumer Provisions**

- 11.1. This clause only applies to Customers that are Consumers. A Customer is a Consumer (**Consumer**) if, and only if:
- the Price of the Goods or Services is less than the amount prescribed under the Australian Consumer Law; or
  - the Goods or Services are of a kind ordinarily acquired for personal, domestic or household use or consumption (irrespective of the Price).
- 11.2. The Goods and Services under this Agreement come with guarantees that cannot be excluded under the Australian Consumer Law. For major failures with the Services, you are entitled:
- to cancel your Services Agreement with us; and
  - to a refund for the unused portion, or to compensation for its reduced value.
- 11.3. You are also entitled to choose a refund or replacement for major failures with Goods. If a failure with the Goods or Services does not amount to a major failure, you are entitled to have the failure rectified in a reasonable time. If this is not done you are entitled to a refund for the Goods and to cancel the Agreement for the Services and obtain a refund of any unused portion. You are also entitled to be compensated for any other reasonably foreseeable loss or damage from a failure in the Goods or Services.

- 11.4. Nothing in this Agreement is intended to have the effect of excluding any Non-Excludable Rights.
- 11.5. Where clause 11.1(b) does not apply, to the maximum extent permitted by law, the liability of APS in respect of any breach or failure to comply with a Non-Excludable Right is limited to, at the election of APS:
- a. In the case of Goods:
    - (i) the replacement of the Goods or the supply of equivalent goods;
    - (ii) the repair of the Goods;
    - (iii) the payment of the cost of replacing the Goods or of acquiring equivalent Goods; and
    - (iv) the payment of the cost of having the Goods repaired.
  - b. In the case of Services:
    - (i) supplying the Services again; and
    - (ii) paying the cost of having the Services supplied again.

## 12. Limitation of Liability

- 12.1. Subject to the Non-Excludable Rights, and to the maximum extent permitted by law, APS shall not be liable for, and excludes liability for, any loss, damage or injury of any kind whatsoever caused to the Customer or its customers arising from or in connection with the Goods and/or Services whether such loss or damage was caused by an act, default, omission or negligence by APS or otherwise.
- 12.2. APS shall not be liable for any indirect, special, incidental or consequential loss, damage, costs or expenses of any kind whatsoever to the Customer or its customers and howsoever caused, and whether arising under contract, tort (including negligence) or otherwise, including for loss of profits or revenue even if APS has been advised by the Customer of the possibility of such loss.
- 12.3. To the extent that clause 11 (Consumer Provisions) does not apply, and to the extent permitted by law, APS's maximum aggregate liability to the Customer or a third party under this Agreement, whether in contract, tort (including negligence) or otherwise arising from or in connection with the Goods and/or Services for any costs, losses, claims, damages, expenses or proceedings incurred or suffered by the Customer or its customers will be limited in aggregate to the portion of the Price specified in the Quotation or ATP relating to only those Goods and/or Services from which the liability has arisen.
- 12.4. Any claim that the Customer seeks to make against APS for breach of agreement or otherwise, must be made in writing within 30 days of the date of delivery of the Goods and/or Services. However, where the non-compliance or defect was reasonably capable of being identified by the Customer on inspection and examination of the Goods upon Delivery, then any notice or claim in relation to the Goods must be noted, on any Delivery docket or consignment note, and otherwise must be made within 7 days of the date of Delivery.

## 13. Intellectual Property

- 13.1. All intellectual property rights in any subject matter developed or supplied by or on behalf of APS in the course of supplying the Goods and/or Services is owned by APS.
- 13.2. In ordering Goods or Services to its own design, the Customer guarantees that in the making or performing of them, APS will not be liable for any infringement of the Customer's or any third party's intellectual property rights (including but not limited to patent, design, copyright or trade mark rights) and the Customer agrees to indemnify APS against any action, loss or damage that may be brought against or suffered by APS in relation to such works.

**14. Miscellaneous**

- 14.1. This Agreement is the entire agreement between the Parties. It supersedes all prior communications, negotiations, arrangements and agreements, either oral or written between the Parties in relation to its subject matter.
- 14.2. Any changes to this Agreement must be agreed to in writing between the Parties.
- 14.3. If any part of the Contract is void or unenforceable, that part is severable from the Contract and the balance remains enforceable.
- 14.4. A waiver by one Party of a breach by the other Party of any term of this Agreement does not operate as a waiver of another term or a continuing breach by the other of the same or any other term of this Agreement.
- 14.5. The rights and remedies in this Agreement are cumulative and not exclusive of any rights or remedies provided by law.
- 14.6. Each person signing this Agreement as an authorised officer or agent of any Party warrants to the other Party that, as at the date of signing, that person has full authority to sign this Agreement on behalf of that Party.
- 14.7. If the Customer comprises more than one person, the obligations of those persons as the Customer are joint and several.
- 14.8. The Customer shall not assign its rights or transfer its obligations under this Agreement without the Owner's prior written consent.
- 14.9. Where there is any inconsistency between these Terms and the Quotation, these Terms shall prevail to the extent of the inconsistency.
- 14.10. This Agreement is governed by the laws of Victoria and each party submits to the exclusive jurisdiction of the courts of Victoria.