

1. Definitions

In these Terms:

ACL means the Australian Consumer Law being Schedule 2 of the *Competition and Consumer Act 2010* (Cth);

Business Day means any day other than a Saturday, Sunday or public holiday in Victoria;

Customer means a person who orders Products from Nilian;

Delivery Location means the location for delivery of the Products as agreed by the parties;

GST means the Goods and Services tax as defined in *A New Tax System (Goods and Services Tax) Act 1999* (Cth);

Nilian means Nilian Pty Ltd (ACN 627 716 161) of Unit 3, 28 -30 Kembla Street, Cheltenham Vic 3192;

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

Price means the price quoted for the Products by Nilian and any additional fees or charges or as otherwise agreed in writing;

Price List means a list (if any) of Prices for Nilian's range of Products as amended by Nilian from time to time or a Price as otherwise quoted by Nilian;

Products means the range of parts and component products including any incidental services as set out in the Price List or otherwise made available for supply by Nilian at any time; and

Quote means Nilian's quote to the Customer to supply the Products for the Price based on these Terms and on other terms stated in the quote which may include a deposit or instalment payments and in accordance with these Terms unless stated otherwise by Nilian.

2. Engagement

- 2.1 These Terms and Nilian's Quote are the only terms that apply to any agreement between Nilian and the Customer for the order and supply of Products, unless Nilian expressly agrees otherwise in writing.
- 2.2 Any order for Products placed by, or delivery to or acceptance of Products by, a Customer constitutes acknowledgement and acceptance of these Terms by the Customer.
- 2.3 Nilian's Quote may contain terms that differ from these Terms, and the terms in the Quote will apply to the extent of any inconsistency.
- 2.4 Nilian may reject any offer or order for Products.
- 2.5 Nilian may vary these Terms, including the Price List, effective 7 days after the Terms (as varied) are notified to the Customer or published on Nilian's

website. The Terms (as varied) will apply to Quotes accepted after that date.

3. Pricing

- 3.1 Unless otherwise indicated, the Price excludes GST and any other taxes or duties imposed on or in relation to the Products.
- 3.2 If the supply of Products is a *taxable supply* then, subject to Nilian providing a valid *tax invoice*, the Customer will pay any GST payable for the *taxable supply*. Any rebates, discounts or other reductions in the Price will be calculated on the GST exclusive price. Any costs to be reimbursed or indemnified exclude any amount of GST for which an *input tax credit* can be claimed. Words in italics in this clause 3.2 have the same meaning as given in the *A New Tax System (Products and Services Tax) Act 1999* (Cth).

4. Orders

- 4.1 The Customer orders Products by accepting Nilian's Quote in writing or by accepting supply of the Products in, or engaging in other conduct indicating acceptance of, Nilian's Quote.
- 4.2 If Nilian cannot deliver the Products, it may cancel the Customer's order (even if it has been accepted) by written notice to the Customer.
- 4.3 Orders placed by the Customer with Nilian must not be cancelled without the written approval of Nilian.
- 4.4 If Nilian accepts a request from a Customer to cancel an order, Nilian will may charge a reasonable fee for any work done or obligations incurred by or at the request of Nilian prior to cancellation including processing the Customer's order and request for cancellation.

5. Payment terms

- 5.1 Unless the Customer has been granted credit terms, the Customer must pay to Nilian the Price in full, or by progress instalments specified by Nilian, in accordance with the Quote within 30 days of the date of invoice.
- 5.2 Payment by cheque is not deemed made until the proceeds of the cheque have cleared in Nilian's bank account.
- 5.3 Credit terms may be amended or revoked at the sole discretion of Nilian on notice to the Customer. Subject to clause 6, any amendment or revocation of the credit terms will apply to orders placed after notice of the revocation or amendment.
- 5.4 Time for payment is of the essence.

6. Payment default

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

- (a) charge the Customer interest on the overdue amount at the annual rate prescribed from time to time under the *Penalty Interest Rates Act 1983* (Vic) plus 2 per cent calculated daily;
- (b) retain any deposit and charge the Customer for, and the Customer must indemnify Nilian from, all costs and expenses (including all legal costs and expenses) incurred by it resulting from the default or in enforcing compliance with these Terms or to recover any Products; and
- (c) suspend supply of any Products to the Customer.

7. Passing of Title

7.1 Until Nilian receives full payment in cleared funds for all Products supplied by it to the Customer, and all other amounts owing to Nilian by the Customer:

- (a) title in the Products remains with Nilian and does not pass to the Customer;
- (b) the Customer must hold the Products as fiduciary bailee and agent for Nilian;
- (c) the Customer must keep the Products separate from its Products and maintain all Nilian labelling and packaging;
- (d) the Customer must hold any proceeds of sale of the Products on trust for Nilian in a separate account with a bank to whom the Customer has not given security however failure to do so will not affect the Customer's obligation as trustee;
- (e) in addition to its rights under the PPSA, Nilian may without notice, enter any premises where it suspects the Products are and remove them, notwithstanding that they may have been attached to other Products not the property of Nilian, and for this purpose the Customer irrevocably licences Nilian to enter such premises and also indemnifies Nilian against all costs, claims, demands or actions by any party arising from such action.

7.2 Nothing in these Terms prevents the Customer from selling the Products to any third party provided that the proceeds of any such sale are deemed to be held in trust by the Customer for Nilian until Nilian has received payment in full for the Products.

8. Personal Property Securities Act

8.1 The PPSA applies to these Terms.

8.2 For the PPSA:

- (a) terms used in clause 8 that are defined in the PPSA have the same meaning as in the PPSA;
- (b) these Terms are a security agreement and Nilian has a Purchase Money Security Interest in all present and future Products or other goods supplied by Nilian to the Customer under these Terms and the proceeds of the Products or other goods;
- (c) the security interest is a continuing interest irrespective of whether there are monies or obligations owing by the Customer; and
- (d) the Customer must do whatever is necessary to give a valid security interest over the Products or other goods supplied under these Terms which can be registered by Nilian on the Personal Property Securities Register.

8.3 The security interest arising under this clause 8 attaches to the Products and other goods when the Products and other goods are collected or dispatched from Nilian's premises and not at any later time.

8.4 Where permitted by the PPSA, the Customer waives any rights to receive the notifications, verifications, disclosures or other documentation specified under sections 95, 118, 121(4), 130, 132(3)(d), 132(4), 135 and 157 of the PPSA.

8.5 Nilian and the Customer agree to contract out of and nothing in sections 96, 125, 129, 142 and 143 of the PPSA will apply to these Terms.

8.6 To the extent permitted by the PPSA, the Customer agrees that:

- (a) the provisions of Chapter 4 of the PPSA which are for the benefit of the Customer or which place obligations on Nilian will apply only to the extent that they are mandatory or Nilian agrees to their application in writing; and
- (b) where Nilian has rights in addition to those in Chapter 4 of the PPSA, those rights will continue to apply.

8.7 The Customer must immediately upon request from Nilian:

- (a) do all things and execute all documents to give effect to the security interest created under these Terms; and
- (b) procure from any person considered by Nilian to be relevant to its security position such agreements and waivers (including as equivalent to those above) as Nilian may require.

8.8 Nilian may allocate amounts received from the Customer in any manner Nilian determines, including in any manner required to preserve any Purchase Money Security Interest it has in Products supplied by Nilian.

8.9 For section 275(6) of the PPSA, the parties agree and undertake these Terms and any information pertaining to the sale of Products and details of the

Products must be kept confidential. The Customer must not disclose any information pertaining to these Terms or the sale of the Products, except as otherwise required by law or as already in the public domain.

9. Risk and insurance

- 9.1 Risk in the Products, including all insurance responsibility for theft, damage or other loss in the Products passes to the Customer immediately on the Products being passed to the transport carrier for delivery to the Delivery Location.
- 9.2 The Products are sold to the Customer on the basis that the Customer will obtain all necessary licenses or permits under, and comply with, all laws and regulations in relation to the Products.
- 9.3 To the extent permitted by law, the Customer assumes all risk and liability for loss, damage or injury to persons or to property of the Customer, or third parties arising out of the use, installation or possession of any of the Products sold by Nilian.
- 9.4 The Customer must mitigate any loss or damage it suffers or may suffer arising in connection with these Terms.

10. Intellectual Property

- 10.1 Nilian will retain ownership of all its intellectual property rights in existence as at the date of each agreement or which come into existence after the date of each agreement in connection with any Products to be supplied, otherwise than in connection with an agreement.
- 10.2 The Customer must not seek to reverse engineer, copy or modify any of the Products in breach of the intellectual property rights of Nilian, the manufacturer or any other person.
- 10.3 If the Customer provides any design or specification for the supply of a Product, the Customer:
 - (a) is fully responsible to ensure that the design of the Product is fit for the intended purpose;
 - (b) grants Nilian and the manufacturer an irrevocable royalty-free perpetual licence for such purpose (including right to sublicense);
 - (c) warrants that use of the design or specification does not infringe the intellectual property rights of any other person; and
 - (d) is responsible for the cost of any test or inspection additional to the manufacturer's standard practice.

11. Performance and Delivery

- 11.1 The Customer must promptly provide any information or perform any other act required by the Quote or as otherwise agreed between the parties.
- 11.2 Any period or date for delivery of Products stated by Nilian is an estimate only and not a contractual commitment.

- 11.3 Nilian will use its reasonable endeavours to meet any estimated dates for delivery of the Products but will not be liable for any loss or damage suffered by the Customer or any third party for failure to meet any estimated date.
- 11.4 Unless the Quote states otherwise, the Price includes packaging and crating that Nilian considers appropriate. The Customer is responsible for the cost of additional packaging or crating that it requests.
- 11.5 The Customer must arrange and take responsibility for delivery of the Products to the Delivery Location.
- 11.6 Nilian may arrange for the delivery of the Products to the Customer at the Delivery Location.
- 11.7 Products must be delivered on a 'free on board basis'. The Customer is responsible for all costs associated with delivery of the Products to the Delivery Location, including freight, insurance and other charges.
- 11.8 If delivery is attempted and cannot be completed, the Customer is deemed to have taken delivery of the Products. The Customer is liable for storage charges which are payable on demand.

12. The Products

- 12.1 Subject to clauses 12.2 and 13.5, Nilian will not be liable for any shortages, damage or non-compliance of the Products with these Terms unless the Customer notifies Nilian with full details within 3 days of delivery otherwise the Customer is deemed to have accepted the Products. Any such non-compliance of the Product that is reasonably ascertainable on delivery must be notified promptly once ascertained or reasonably ascertainable.
- 12.2 If a claim for damaged or non-compliant Products is accepted by Nilian, Nilian may, at its option, replace the Products, or refund the Price paid for the Products.
- 12.3 Subject to clause 13.5, Nilian will not under any circumstances accept Products for return that:
 - (a) have been specifically produced, imported or acquired to fulfil these Terms;
 - (b) are discontinued Products or no longer stocked by Nilian;
 - (c) have been altered in any way by the Customer or others;
 - (d) have been damaged or misused by the Customer or others; or
 - (e) are not in their original condition and packaging;

however if Nilian at its discretion allows the Customer to return any Product where the Customer is not entitled to do so, Nilian may charge the Customer a restocking fee of 20% of the Price invoiced by Nilian plus any freight, insurance and other charges for return of the Product to Nilian.

12.4 The Customer must comply with any specifications or guidelines for a Product of Nilian or the manufacturer regarding:

- (a) installation (including in-use testing), use and operation;
- (b) repair and maintenance (including regular replacement for wear parts);
- (c) alteration (only to the extent permitted by the specifications).

12.5 The Customer acknowledges that the Products are intended to be manufactured in accordance with mandatory Standards applicable in the country of residence of the manufacturer supplying to Nilian, unless stated otherwise in writing by the manufacturer or Nilian. The Customer is responsible to ensure compliance with any other Standards (mandatory or otherwise) applicable to the Products.

12.6 The Customer accepts that any details describing the Products in the Price List, catalogues or marketing information is intended as general description only and does not form part of the specification or manufacturer's tolerances for the Product.

12.7 Subject to clause 13.5, Nilian will not be liable for freight, insurance and other charges on Products returned to it by the Customer.

13. Nilian liability

13.1 Except as specifically provided for in these Terms, these Terms do not include by implication any other term, condition or warranty regarding the quality, merchantability, acceptability, fitness for purpose, condition, description, assembly, manufacture, design or performance of the Products or any contractual remedy for any failure of the Products to comply with any such term.

13.2 Nilian is not liable for:

- (a) any indirect or consequential losses or expenses suffered by the Customer or any third party, including loss of revenue, profit, business or goodwill, or any liability to any other party;
- (b) any loss or claim arising from the Customer failing to mitigate its loss or damage in connection with any breach of agreement or other default by Nilian.

13.3 Subject to clauses 12.4 and 13.2, Nilian will extend to the Customer the benefit of any warranty provided by the relevant manufacturer of the Product subject to the same terms including limitations of the manufacturer's warranty, and the Customer is liable for reasonable costs incurred by Nilian to take reasonable steps to enforce the warranty.

13.4 The Customer acknowledges that:

- (a) it has not relied on any service involving skill and judgement or on any advice, recommendation, information or assistance

provided by Nilian in relation to the Products or their use or application.

- (b) it has not made known, either expressly or by implication, to Nilian any purpose for which it requires the Products and it must satisfy itself that the Products are suitable for the Customer.

13.5 Nothing in these Terms excludes, restricts or modifies the application of any state or federal legislation which cannot be excluded, restricted or modified, including under the ACL if it applies.

14. Customer warranties and indemnities

14.1 The Customer represents and warrants to Nilian:

- (a) it has full corporate power to enter and give effect to these Terms and the transactions contemplated by these Terms;
- (b) it has taken all necessary action to authorise the performance of these Terms;
- (c) at the date of these Terms, the performance of these Terms does not contravene any contractual, legal or other obligations that apply to it; and
- (d) its obligations under these Terms will be valid, binding and enforceable.

14.2 The Customer warrants and represents that all information, representations, warranties and undertakings made or given by it to Nilian before these Terms are true, complete and accurate.

14.3 The Customer will immediately notify Nilian of the details of any change of majority ownership, or control, of the Customer's business.

14.4 To the extent permitted by law, the Customer indemnifies Nilian against any loss or damage suffered by Nilian, its employees, subcontractors or agents as a result of a breach by the Customer of these Terms or resale of any Product by the Customer.

15. Termination

15.1 Nilian may, without prejudice to its other rights or remedies, immediately terminate any agreement between the parties pursuant to these Terms by written notice to the Customer if the Customer commits a breach of any essential term of the agreement and fails to remedy that breach within a period of 7 days after Nilian gives written notice of the breach.

15.2 The Customer may, without prejudice to its rights or remedies, immediately terminate any agreement between the parties pursuant to these Terms by written notice to Nilian if Nilian commits a breach of any essential term of the agreement and fails to remedy that breach within a period of 30 days after the Customer gives written notice of the breach.

15.3 A party may, without prejudice to its rights or remedies, terminate any agreement between the

parties pursuant to these Terms by written notice effective immediately:

- (a) if the other party is a natural person and becomes bankrupt or enters any scheme of arrangement or any assignment or composition with or for the benefit of the Customer's creditors or any class of creditors; or
- (b) if the other party is a corporation and, it enters any scheme of arrangement or any assignment or composition with or for the benefit of its creditors or any class of its creditors or has a liquidator, administrator, receiver or manager or similar functionary appointed to it or assets, or any action is taken for, or with the view to, the liquidation (including provisional liquidation), winding up or dissolution without winding up of the Customer.

15.4 On termination or other ending of any such agreement for any reason:

- (a) each party retains its rights and remedies in respect of any breach by the other party;
- (b) Nilian reserves the right to cancel orders received prior to termination; and
- (c) any provisions of these Terms intended to survive termination including clauses 6 to 10, 12 to 14 and 17 will continue to apply.

16. Force majeure

Nilian is not liable under these Terms if it is prevented from performing its obligations by events beyond its reasonable control including any industrial dispute, strike, lockout, accident, breakdown, import or export restrictions, act of god, pandemic, act or threat of terrorism or war. If an event of force majeure occurs, Nilian may suspend or terminate any agreement between the parties by written notice to the Customer for a reasonable period including the duration of the event.

17. Confidentiality

The Customer must, and must ensure its employees and representatives, keep confidential and secure, and not use, any of Nilian confidential information provided by, Nilian commercially sensitive or confidential, including any information disclosed to the Customer by Nilian under any agreement between the parties or in connection with these Terms (including the Price, information about the manufacturing of any Product), whether orally or in writing and whether or not it is stated to be commercially sensitive or confidential, except if the information is already in the public domain other than because of a breach by the Customer of these Terms.

18. Miscellaneous

- 18.1 The laws of Victoria, Australia govern these Terms. The parties submit to the non-exclusive jurisdiction of the courts of Victoria, the Federal Court of Australia, and of courts entitled to hear appeals from those courts.
- 18.2 Nilian may subcontract the supply of Products.
- 18.3 Nilian may by notice to the Customer assign or novate any agreement with the Customer, or part of such agreement, in which case the Customer agrees to execute all such documents as Nilian may reasonably require to formalise such assignment or novation.
- 18.4 The Customer must not assign, novate or otherwise transfer its rights or obligations under these Terms without the prior written consent of Nilian.
- 18.5 If the Customer comprises two or more persons, these Terms applies to those persons jointly and each individually.
- 18.6 Nilian may set off any amount it owes the Customer against any amount that the Customer owes Nilian.
- 18.7 A failure by Nilian to enforce any power or right must not be construed as a waiver of that power or right.
- 18.8 If a clause is unenforceable it must be read down to be enforceable or, if it cannot be read down, the term must be severed from these Terms, without affecting the enforceability of the remaining terms.
- 18.9 If an act must be done on a specified day which is not a Business Day, it must be done instead on the next Business Day;
- 18.10 A notice must be in writing and handed personally or sent by email or prepaid mail to the last known address of the addressee. Notices sent by pre-paid post are deemed given 4 days after posting. Notices sent by email are deemed given on successful transmission.
- 18.11 The Customer must comply with the Australian Privacy Principles for any personal information supplied to it for these Terms.
- 18.12 In these Terms, unless the context indicates otherwise:
 - (a) no rule of construction or interpretation of these Terms or the Quote shall apply to the disadvantage of one party, on the basis that such party put forward any relevant part;
 - (b) words importing the singular include the plural and vice versa;
 - (c) including and similar expressions are not words of limitation a reference to legislation includes any statutory modification or replacement and any subordinate or delegated legislation issued under such legislation; and
 - (d) money is in Australian dollars, unless otherwise stated.