

Custom Heat Terms & Conditions of Sale

Definitions

In these terms and conditions ("Terms and Conditions"),

"Contract" means the contract for the supply of Products resulting from the acceptance by Custom Heat of an Order in accordance with clause 2;

"Costs" include all costs of any nature including legal costs on a solicitor and own clients basis; "Customer" means any person who enters into a Contract with Custom Heat for the sale and purchase of Products and includes the Customer's permitted assigns, successors, employees, servants and agents;

"Order" means an order placed by an intending Customer with Custom Heat for the supply of Products;

"Products" means all products supplied or to be supplied by Custom Heat from time to time;

"Purchase Price" means the price for the Products ordered determined in accordance with these Terms and Conditions;

"Purchase Order" means a purchase order in the form prescribed by Custom Heat from time to time;

"Custom Heat" means Custom Heat (ABN 70573629223).

1. Formation and Scope of Contract

1.1. An Order may be made by the Customer:

1.1.1. Verbally to an authorised officer of Custom Heat;

1.1.2. By despatching to Custom Heat by mail, facsimile or email, or delivering to Custom Heat a Purchase Order form in respect of the Products duly signed by or on behalf of the Customer;
or

1.1.3. Subject to prior approval, by downloading a Purchase Order into Custom Heat's computer system.

1.2. A Contract shall be formed upon Custom Heat accepting an Order made by the Customer by despatching acceptance to the Customer either by mail, facsimile or electronically or, at Custom Heat's option, by purchasing raw materials necessary for fulfilling the Order or commencing delivery of the Products.

1.3. Upon formation of a Contract these Terms and Conditions shall apply as between Custom Heat and the Customer in relation to the supply of these Products. No variation or modification of any of the terms and conditions of the Contract shall have any effect unless it is in writing and signed by or emailed to the Customer by an authorised representative of Custom Heat.

1.4. Custom Heat shall not be concerned to enquire into the powers or authority of any officer or other person or persons purporting to act on behalf of the Customer and no objections shall be taken by the Customer with regard to the liability of the Customer for payment of the Purchase Price on the grounds that any such officer or person or persons acted outside his or her authority in ordering Products.

2. Prices

- 2.1. Unless otherwise agreed by Custom Heat in writing the Purchase Price payable for the Products will be the amount calculated by reference to Custom Heat's List price issued from time to time, or the amount individually quoted to the Customer, plus in all cases any applicable amount of goods and services tax or any government, statutory or other like charges or taxes, freight costs (if any) and, at Custom Heat's discretion, a surcharge of payment is tendered by means other than electronic funds transfer.
- 2.2. Custom Heat shall be entitled to adjust prices it has quoted or prices appearing its list price from time to time, and the customer agrees to pay such adjusted price.
- 2.3. Custom Heat may amend any document (including but not limited to any quotation, order, invoice, delivery docket or other document) issued by it to the Customer to take account of:
 - 2.3.1. Correction of errors or omissions on the part of Custom Heat or any of its representatives; and
 - 2.3.2. Any variation in the cost or rates of any government, statutory or other like charges or taxes occurring subsequently to the issue of the document which directly or indirectly impacts on the cost to Custom Heat of supplying the Products; and the Customer shall comply with Custom Heat's amended document.
- 2.4. Unless otherwise specified, prices are in Australian Dollars.

3. Payment

- 3.1. Subject to clause 3.2, the Purchase Price will be paid to Custom Heat before despatch of the Products from Custom Heat premises.
- 3.2. If Custom Heat has approved an application for commercial credit from the Customer, or has otherwise agreed in writing a statement listing all the Customer's purchases during the month will be sent to the Customer on the last business day of each month. Products must be paid for within 30 days from statement or within payments terms specifically agreed in the application for Credit.
- 3.3. If payment of the Purchase Price is not received in full by Custom Heat on or before the due date;
 - 3.3.1. interest at a rate of 10% per annum calculated daily, from the due date for payment until all outstanding monies together with an interest thereon shall be paid in full to Custom Heat; and
 - 3.3.2. the Customer will be liable for all Costs incurred in recovery, including all debt collection agency fees.
- 3.4. Custom Heat may refuse to supply Products to the Customer if this clause is not strictly adhered to by the Customer.
- 3.5. The Customer shall pay the Purchase Price free of any deduction or set-off.

4. Delivery

- 4.1. Unless otherwise agreed, Custom Heat will deliver the Products to the Customer.
- 4.2. The delivery address will be shown on the tax invoice provided by Custom Heat, and any change or correction to this address is the responsibility of the customer to notify Custom Heat prior to dispatch of the goods contained within the invoice. Custom Heat is not liable for any goods not delivered to the customer due to an incorrect address provided by or not corrected by the customer.
- 4.3. Any times given for delivery of Products are approximate and for guidance only. In stock items are generally dispatched within 48 hours. Custom Heat will not be liable for any loss occasioned to the Customer (including any consequential loss or loss of profits), nor shall the Customer be entitled to cancel an order consequent on any delay in supply of Products howsoever caused.
- 4.4. Custom Heat will be entitled to charge for and recover from the customer on demand all Costs or losses occasioned by failure of the Customer to take delivery of the Products. Minimum Order Value
- 4.5. Orders less than the minimum order value specified by Custom Heat from time to time will be subject to a handling charge.

5. Title and Risk

- 5.1. Risk in the Products will pass to the Customer on the earlier of;
 - 5.1.1. when the Customer collects the Products from Custom Heat's premises; or
 - 5.1.2. when Custom Heat presents the Products to the carrier nominated by the Customer for loading; or
 - 5.1.3. when Custom Heat presents the Products at the Customer's premises for unloading.
- 5.2. Irrespective of the time when risk in the Products passes:
 - 5.2.1. property and title in the Products remains with Custom Heat until the Customer has paid the Purchase Price in full and the Purchase Price of all other Products supplied by Custom Heat to the Customer has been paid in full or until the Customer has used the Products in the ordinary course of business or sold them on a bona fide arms length basis;
 - 5.2.2. until property and title passes to the Customer, the Customer shall retain and store the Products as its premises in a manner which clearly identifies the Products as Custom Heat's property and shall not mix the Products with any other Products;
 - 5.2.3. if the Customer defaults in payment of any part of the Purchase Price or is otherwise in default under any other contract with Custom Heat, Custom Heat and its employees and agents have the right to enter the Customer's premises, or any other premises where the Products are known or suspected to be stored, to repossess the Products, and for this purpose the Customer shall grant or procure all necessary access for Custom Heat and Custom Heat will be entitled to do all things required to secure repossession. Upon repossession of any of the Products, Custom Heat will be entitled to resell the Products to any third party. Custom Heat will not be liable to the Customer for any loss occasioned by repossession or resale of the Products; and
 - 5.2.4. if the Customer sells or otherwise disposes of the Products prior to making full payment of the Purchase Price, the Customer will hold so much of the proceeds of the sale (or if the proceeds of the sale are unpaid, the debt representing the proceeds of the sale), as is equivalent to the amount of the Purchase Price remaining owing to Custom Heat on trust for Custom Heat.
- 5.3. Custom Heat will be entitled to charge for and recover from the Customer on demand all Costs or losses incurred by Custom Heat in exercising any of its rights under clause 6.2.

6. Force Majeure

- 6.1. Custom Heat will not be deemed to be in breach of a Contract, or otherwise liable to the Customer, by reason of delay in performance or non-performance due to any circumstances beyond the reasonable control of Custom Heat including, without limiting the generality of the foregoing, any international disturbances, war, strikes, lockouts, fire, riot, flood, and any inability to produce raw materials except on uncommercial terms. Default of Customer
- 6.2. If the Customer:
 - 6.2.1. fails to make payment under a Contract or commits any other breach of any of the Customer's obligations under a Contract;
 - 6.2.2. suffers execution under any judgment;
 - 6.2.3. commits an act of bankruptcy;
 - 6.2.4. makes any composition or arrangement with any creditor; or
 - 6.2.5. being a company, passes a resolution for winding up or has a receiver, mortgagee in possession or provisional liquidator, or administrator appointed over any of its property or have a winding up petition presented against it or be placed under official management, Custom Heat (in addition to any other remedies hereby or by statute conferred) may treat any Contract as terminated and any part of the Purchase Price then unpaid, together with any other monies owing hereunder, whether or not due under the terms of the Contract shall forthwith become due and payable.
- 6.3. Any such termination in clause 8.1 shall be without prejudice to any claim or rights Custom Heat may otherwise possess.
- 6.4. Custom Heat is entitled to recover from the Customer all Costs incurred by it arising from a breach by the Customer of these Terms and Conditions.

7. Defects and Returns

- 7.1. The Customer must inspect the Goods on delivery and notify Custom Heat in writing within 7 days of delivery of any alleged defect, damage or failure of the Goods. If no notice is given within 7 days of delivery, the Customer will be deemed to have accepted the Goods.
- 7.2. If a notice of defect or damage is given the Customer must allow Custom Heat access to inspect the Goods and determine whether or not that notice is valid. If Custom Heat accepts that Goods are defective or damaged the parties acknowledge that the Customer has remedies available to it as a consumer under the Australian Consumer Law.
- 7.3. Custom Heat will not be liable for any defects, damage or failure of Goods which have not been stored or used in a proper manner.
- 7.4. Custom Heat may, at its sole discretion, accept the return of non-defective Goods for credit subject to a handling fee of 20% of the value of the returned Goods plus freight costs.
- 7.5. Any Goods that have been manufactured or supplied specifically to the Customer's instructions or specifications (including bespoke items or Goods with custom finishes) will not be accepted for return in any circumstances other than those specified in this clause 7 or required by law.

8. Custom Heat's Representations

- 8.1. Custom Heat warrants that any Product sold by it will meet the specifications for that Product published by Custom Heat. In absence of an express written representation made by an authorised officer of Custom Heat and to the extent permitted by law, Custom Heat does not warrant the fitness for purpose of any Product for any particular use or application.

9. Customer's Representations and Acknowledgements

- 9.1. The Customer acknowledges that it must specifically request in writing any alteration the Customer requires to Custom Heat's standard specifications for Products at the time an Order is made. Any failure by the Customer to so inform Custom Heat of any such alterations will not in any way entitle the Customer to refuse to accept the Products or pay the Purchase Price.
- 9.2. The Customer represents that it has exercised its own skill and judgement when placing an Order and has not relied on any statements or conduct of Custom Heat other than the specifications for the Product purchased published by Custom Heat.
- 9.3. The Customer warrants that:
 - 9.3.1. it is able to pay all debts as and when they become due and payable;
 - 9.3.2. it will observe all applicable health and safety regulations in relation to the storage, handling, use and sale of Products;
 - 9.3.3. it will comply with all applicable laws and regulations if it re-sells Products.

10. Liabilities and Indemnities

- 10.1. To the extent permitted by law the Customer agrees that Custom Heat is not liable under any Contract, law of tort (including negligence), statute, in equity or otherwise for any kind of indirect or consequential loss or damage of profits arising out of or incidental to any Contract.
- 10.2. To the extent permitted by the Competition and Consumer Act 2010 (Cth) Custom Heat's liability for breach of a condition or warranty whether expressed or implied, including any Terms & Conditions of Sale consequential loss which the Customer may sustain or incur, shall be limited to one of the following at the election of Custom Heat:
 - 10.2.1. replacement of the Products or supply of equivalent Products;
 - 10.2.2. payment of the cost of replacing the Products or acquiring equivalent Products; or
 - 10.2.3. refund of the Purchase Price.
- 10.3. The Customer will indemnify Custom Heat against and hold Custom Heat harmless from any and all claims, actions, proceedings, liabilities, expenses, losses, or damages including, without limitation, claims by way of subrogation by any insurer, for personal injury, death or property damage arising out of or in connection with the negligent acts or omissions of the Customer in the handling, use and/or sale of the Products or any of them.
- 10.4. Custom Heat will in no way be liable for costs or losses caused to the Customer including and indirect or consequential loss or damage or loss of profits arising from any failure to supply Products or alterations to the specifications of the Products howsoever caused between the time the Products were ordered and delivered.
- 10.5. Save for the express conditions and warranties herein contained or referred to, all other conditions and warranties (whether as to quality, fitness for purpose or any other matter) expressed or implied by statute, the common law, equity, trade custom or usage, international convention or otherwise howsoever are hereby expressly excluded provided that nothing in these Term and Conditions shall exclude or limit the liability of Custom Heat or the right and remedies of the Customer for any breach of term or condition implied by any law, the exclusion or limitation of which is not permitted by law.

11. Trademarks

- 11.1. The Customer agrees not to publish or cause to be published any Custom Heat trade marks in any advertising, marketing or other material, whether in paper or electronic form, without the prior written consent of Custom Heat. Any licence to use Custom Heat trademarks implied by the sale of Products by Custom Heat to the Customer is hereby revoked. The Customer must not alter, remove or conceal any trademarks, usage warnings or batch numbers affixed to any Products it has purchased for re-sale.

12. Exclusive Dealing

- 12.1. Without derogation from its obligations under Competition and Consumer Act 2010 (Cth), Custom Heat may, in its absolute discretion, engage in practice of exclusive dealing as that practice is described in sub-sections 47(2) and (3) of the Competition and Consumers Act 2010 (Cth), and may discriminate between customers on the basis of price, Products supplied, contractual benefits and terms of supply, and may withhold or refuse supply of Products.
- 12.2. The Customer will not advertise the Products for resale through mail order and/or the internet without the prior written consent of Custom Heat.

13. Suspension or Withdrawal of Purchase Order

- 13.1. Where the Customer suspends or withdraws an Order, Custom Heat will be entitled to charge the Customer for work done to the time of cessation including the cost of materials purchased by Custom Heat to fulfil the Purchase Order.

14. Activity Threshold

- 14.1. Custom Heat may stop supplying Products to the Customer if the Customer does not purchase any Products over a twelve-month period.

15. GST

15.1. GST Definitions

- 15.1.1. For the Purpose of this clause 17 “GST” means GST within the meaning of GST Act. “GST Act” means the A New Tax System (Goods and Services Tax) Act 1999 (as amended). Expressions set out in italics in this clause bear the same meaning as those expressions in the GST Act.

16. Unfair Preferences

- 16.1. The Customer warrants that any payment made by it to Custom Heat, either under the terms and conditions herein or otherwise, is made in good faith and does not constitute an unfair preference within the meaning of the Corporation Act. Custom Heat may vary the terms of payment and to do so will not indicate that any payment by the Customer is preference.

17. Personal Property Securities Act 2009 (Cth) (“the Act”)

- 17.1. Where a Commercial Credit Account has been approved, the Customer grants that the Seller may register, on the Personal Property Security Register, a security interest in all and any sale of Goods under this agreement including all present and after-acquired property.
- 17.2. The Customer and the Seller agree to contract-out of the PPSA in accordance with section 115 to the extent that the section applies for the benefit of, and does not impose a burden on, the Seller. The Customer waives its right to receive a copy of any Financing Statement or any Financing Charge Statement registered by the Seller in respect of the security interest created by these Terms and Conditions of Sale & Security Agreement.

- 17.3. The Customer agrees to execute any documents, provide all relevant information and co-operate fully with the Seller to ensure that the Seller has a perfect security interest in the personal property charged and, if applicable, a Purchase Money Security Interest (PMSI).
- 17.4. The Customer waives its right to receive notice of a verification statement in relation to a registration by the Seller on the register.
- 17.5. If Chapter 4 of the PPSA would otherwise apply to the enforcement of a security interest arising in connection with these terms, the Customer agrees that the following provisions of the PPSA will not apply to the enforcement of these terms: section 95: Notice of removal of accession – to the extent that it requires the Seller to give notice to the Customer; section 96: When a person with an interest in the whole may retain an accession; section 121(4): Enforcement of liquid assets – notice to grantor; section 125: Obligation not dispose of or retain collateral; section 130: Notice of disposal to the extent that it requires the Seller to give notice to the Customer; section 132(3)(d): Contents of statement of account after disposal; section 132(4): Statement of account if no disposal; section 134(1): Retention of collateral; section 135: Notice of retention; section 142: Redemption of collateral; and section 143: Reinstatement of security agreement.
- 17.6. The Seller agrees with the Customer not to disclose information of the kind mentioned in section 275(1) of the PPSA except in circumstances required by section 275(b)-(e).
- 17.7. The Customer agrees that, until all monies owing to the Seller are paid in full, it shall not sell or grant any other security interest in the Collateral.
- 17.8. The Customer agrees not to register a financing change statement in respect of the security interest without the Seller's prior written consent.
- 17.9. The Customer agrees that the Seller may, at its absolute discretion, apply any amounts received from the Customer towards amounts owing to the Seller in such order as the Seller may determine. Notices or documents required or permitted to be given to the Seller for the purposes of the PPSA must be given in accordance with the PPSA. If the Seller receives any notice in relation to the Customer under section 64 of the PPSA, all outstanding amounts may, at the Seller's discretion, become immediately due and payable.
- 17.10. The Customer agrees to reimburse the Seller, upon demand, for all costs and/or expenses incurred or payable by the Seller in relation to registering or maintaining any financing statement, releasing in whole or in part the Seller's security interest or any other document in respect of any security interest.
- 17.11. In these terms the following words have the respective meanings given to them in the PPSA: commingled, financing statement, financing change statement, perfected, proceeds, register, registration, security interest and verification statement.

18. Notice

- 18.1. Any notice to be given hereunder shall be in writing and may be given by sending same by pre-paid post addressed to:
- 18.1.1. The Customer either at the address shown on the Order or at the address on the Customer's application for commercial credit account; and
- 18.1.2. Custom Heat at Custom Heat's registered office in Sydney and shall unless otherwise herein provided be deemed to have been duly given on the day following the date of posting.

19. Alleged Disputes

- 19.1. In the event that any charges, including the Purchase Price, by Custom Heat are alleged to be in dispute the Customer agrees that it shall first pay for all charges in relation to the Contract before referring the dispute for resolution by negotiation, investigation, arbitration, mediation, litigation or any other forum for dispute resolution.

20. Waiver

- 20.1. Failure by Custom Heat to insist upon strict performance of any term, warranty or condition of the Contract shall not be deemed a waiver thereof of any rights Custom Heat may have and no express waiver shall be deemed a waiver of any subsequent breach of any term, warranty or condition.
- 20.2. If any provision contained is found to be invalid, illegal or otherwise unenforceable then all other provisions which are self-sustaining and capable of separate enforcement without regard to the invalid, illegal or unenforceable provisions, shall be and continue to be valid and enforceable.

21. Terms and Conditions of Sale Prevail

- 21.1. Unless agreed in writing to the contrary, these Terms and Conditions of Sale shall be the only terms and conditions binding in relation to any sale of Products by Custom Heat, with the exception of those terms and conditions that cannot be excluded by law. This clause applies notwithstanding any terms appearing in documentation provided by or on behalf of the Customer to Custom Heat and such terms shall have no effect in relation to any agreement by Custom Heat to supply Products to the Customer. Custom Heat may vary these terms and conditions from time to time and the terms and conditions as varied will apply to any Orders made after the date of the variation.

22. Governing law and Jurisdiction

- 22.1. The proper law of the contract between Custom Heat and the Customer is the law of State of New South Wales. The Customer submits to the non-exclusive jurisdiction of the courts of the State of New South Wales.