

**NSK AUSTRALIA PTY LTD**  
**TERMS AND CONDITIONS OF TRADE**

**1. DEFINITIONS**

In these Terms:

"ACL" means the Australian Consumer Law Schedule of the *Competition and Consumer Act 2010* (Cth) and its associated Regulations as amended;

"Agreement" means any agreement for the provision of goods or services by NSK to the Customer;

"consumer" is as defined in the ACL and in determining if the Customer is a consumer, the determination is made if Customer is a consumer under the Agreement;

"Customer" means the person, jointly and severally if more than one, acquiring goods or services from NSK;

"goods" means goods supplied by NSK to the Customer;

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

"NSK" means NSK Australia Pty Ltd (ACN 004 799 455);

"PPSA" means the *Personal Property Securities Act 2009* (Cth) and its associated Regulations as amended;

"services" means services supplied by NSK to the Customer; and

"Terms" means these Standard Terms and Conditions of Trade.

**2. GENERAL**

- (a) Unless otherwise agreed by NSK in writing, these Terms shall apply to every Agreement to the exclusion of all others, including any terms and conditions of the Customer (whether on the Customer's order form or otherwise).
- (b) NSK may vary or amend these Terms by written notice to the Customer at any time. Any variations or amendments will apply to orders placed after the notice date.
- (c) An Agreement is accepted by NSK when NSK accepts, in writing or electronic means or verbally, an offer from the Customer or provides the Customer with the goods or services.
- (d) NSK has absolute discretion to refuse to accept any offer.

**3. PAYMENT**

- (a) Unless otherwise agreed in writing:
  - (i) subject to clause (a)(ii), full payment for the goods and services must be made within 30 days of the end of the month of invoice; and
  - (ii) NSK reserves the right to require payment in full on delivery of the goods or performance of the services.
- (b) NSK's preferred payment method is electronic fund transfer.
- (c) Payment by cheque is not deemed made until the proceeds of the cheque have cleared.
- (d) Payment terms may be revoked or amended at NSK's sole discretion immediately on giving the Customer written notice.
- (e) Time is of the essence for payment.

**4. PAYMENT DEFAULT**

- (a) If a customer defaults in payment by the due date of any amount payable to NSK, then all money which would become payable by the Customer to NSK at a later date on any account becomes immediately due and payable without the requirement of any notice to the Customer, and NSK may, without prejudice to any of its other accrued or contingent rights:
  - (i) charge the Customer interest on any sum due at the prevailing rate pursuant to the *Penalty Interest Rates Act 1983* (Vic) plus 4% for the period from the due date until the date of payment in full;
  - (ii) charge the Customer for, and the Customer must indemnify NSK from, all costs and expenses (including without limitation all legal costs and expenses on an indemnity basis) incurred by it resulting from the default or in taking action to enforce compliance with the Agreement or to recover any goods;
  - (iii) cease or suspend supply of any further goods or services to the Customer;
  - (iv) by written notice to the Customer, terminate any uncompleted contract with the Customer.
- (b) Clauses 4.1(c) and 4.1(d) may also be relied on at NSK's option where the Customer:
  - (i) is a natural person and becomes bankrupt or enters into any scheme of arrangement or any assignment or composition with or for the benefit of his or her creditors or any class of his or her creditors generally; or
  - (ii) is a corporation and, it enters into any scheme of arrangement or any assignment or composition with or for the benefit of its creditors or any class of its creditors generally, or has a liquidator, administrator, receiver or manager or similar

functionary appointed in respect of its 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.

- (c) Any payment by the Customer will be credited first against the interest accrued.
- (d) The Customer hereby waives any cross-claim or right of set off against any payment due.
- (e) The date of dispatch (Dispatch) is the date on which the goods are processed from NSK's stock and released from NSK's warehouse for delivery to the Customer.

5. **RETENTION OF TITLE**

- (a) Until NSK receives full payment in cleared funds for all goods supplied by it to the Customer, as well as all other amounts owing to NSK by the Customer:
  - (i) title and property in all goods remain vested in NSK and do not pass to the Customer;
  - (ii) the Customer must hold the goods as fiduciary bailee and agent for NSK;
  - (iii) the Customer must keep the goods separate from its goods and maintain NSK's labelling and packaging;
  - (iv) the Customer must hold the proceeds of sale of the goods on trust for NSK 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; and
  - (v) in addition to its rights under the PPSA, NSK may without notice, enter any premises where it suspects the goods are and remove them, notwithstanding that they may have been attached to other goods not the property of NSK, and for this purpose the Customer irrevocably licences NSK to enter such premises and also indemnifies NSK from and against all costs, claims, demands or actions by any party arising from such action.

6. **PERSONAL PROPERTY SECURITIES ACT (PPSA)**

- (a) Notwithstanding anything to the contrary contained in these Terms, the PPSA applies to these Terms.
- (b) For the purposes of the PPSA:
  - (i) terms used in clause 6 that are defined in the PPSA have the same meaning as in the PPSA;
  - (ii) these Terms are a security agreement and NSK has a Purchase Money Security Interest in all present and future goods supplied by NSK to the Customer and the proceeds of the goods;
  - (iii) the security interest is a continuing interest irrespective of whether there are monies or obligations owing by the Customer at any particular time; and
  - (iv) the Customer must do whatever is necessary in order to give a valid security interest over the goods which is able to be registered by NSK on the Personal Property Securities Register.
- (c) The security interest arising under this clause 6 attaches to the goods when the goods are collected or dispatched from NSK's premises and not at any later time.
- (d) 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.
- (e) NSK and the Customer agree to contract out of and nothing in the provisions of sections 96, 125, 129, 142 and 143 of the PPSA will apply to these Terms.
- (f) To the extent permitted by the PPSA, the Customer agrees that:
  - (i) the provisions of Chapter 4 of the PPSA which are for the benefit of the Customer or which place obligations on NSK will apply only to the extent that they are mandatory or NSK agrees to their application in writing; and
  - (ii) where NSK has rights in addition to those in Chapter 4 of the PPSA, those rights will continue to apply.
- (g) The Customer must immediately upon NSK's request:
  - (i) do all things and execute all documents necessary to give effect to the security interest created under this Agreement; and
  - (ii) procure from any person considered by NSK to be relevant to its security position such agreements and waivers (including as equivalent to those above) as NSK may at any time require.

- (h) NSK may allocate amounts received from the Customer in any manner NSK determines, including in any manner required to preserve any Purchase Money Security Interest it has in goods supplied by NSK.
  - (i) For the purposes of section 275(6) of the PPSA, the parties agree and undertake that these Terms and any information pertaining to the sale of goods and details of the goods shall be kept confidential at all times. Neither party may disclose any information pertaining to these Terms nor the sale of the goods, except as otherwise required by law or that is already in the public domain.
7. **PRICE:**
- (a) Unless otherwise agreed by NSK in writing, price payable for goods supplied to the Customer is NSK's current price for such goods at the date of delivery. Any and all freight rates, import duties, exchange rates, GST, sales tax or any other tax, impost duty or levy included in price of goods are based on ruling rates as at date of quotation.
  - (b) Where there is any change in the costs incurred by NSK in relation to the goods and services, NSK may vary its price to take into account any such change but notifying the Customer.
8. **MINIMUM CHARGE:**
- (a) NSK reserves the right to increase the amount charged on any invoice, up to the minimum charge as established by NSK at date of invoice.
9. **GST**
- (a) Where GST is imposed, NSK and the Customer acknowledge and agree:
  - (b) Prices quoted are exclusive of GST and the Customer is liable to pay an amount equivalent to GST in addition to the purchase price of the goods.
  - (c) To the extent that a supply of goods and/or services by NSK does not attract the tax, but NSK is not entitled to a refund or credit from the taxing authority in respect of the tax borne by NSK on any inputs of NSK (which can be attributed to the making of such supplies), then the amount of such taxes borne by NSK shall be recoverable from the Customer in addition to the other monies due and payable for the goods and/or services supplied.
10. **PACKAGES**
- (a) Prices quoted include normal packing and such packing is non-returnable. If special packing is requested by the Customer it will be to the Customer's account.
11. **DELIVERY AND SHIPMENT**
- (a) Goods may be sold on a Free Into Store (FIS) basis to selected Customer destinations, in which cases the provisions in clause (d) apply. All other goods are sold on a Free On Board (FOB) basis at NSK's warehouse. NSK's standard charges as published in NSK's current price list apply, subject only to any special agreed terms in a particular contract or written quotation issued by NSK.
  - (b) Subject to NSK's rights of stoppage in transit, risk in the goods and all insurance responsibility for theft, damage or otherwise shall pass to the Customer on delivery, which is at the time the goods are placed on the delivery vehicle at NSK's warehouse. Nothing in this clause in any way diminishes or negates any of the rights or title of NSK in the goods as set out in clause 5.
  - (c) NSK insures all goods up to the point of delivery, and the Customer shall insure the goods from delivery, including for transit risk for all FIS basis sales, with NSK's interest in the goods noted.
  - (d) Where goods are sold by NSK on a FIS basis, the goods shall be transported by NSK's preferred carriers, representatives or agents, unless if at the Customers request and with prior written agreement of NSK the goods are to be transported by other means. In such circumstances all such other transportation will be at the risk of and to the cost of the Customer.
  - (e) Any period or date for delivery of goods stated by NSK is an estimate only and not a contractual commitment. NSK will use its reasonable endeavours to meet any estimated dates for delivery of the goods 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.
  - (f) If a contract is entered into for the delivery by instalments, the cancellation of any instalment shall not affect the remainder of the contract, each instalment being deemed to be a separate contract except in the case of cancellation for failure on the Customer's part to pay for goods delivered in which case NSK shall have the right to suspend or cancel deliveries or to treat such failure as a repudiation of the contract by the Customer and to terminate the contract as herein provided.
12. **LICENCES:**
- (a) Goods for delivery to export Customers may be subject to export control as well as to import control at destination. Orders therefore cannot be entered unless the Customer advises; with relevant references that any necessary import documentation has been obtained. In addition, certain documents may be required to support NSK's application for export licences and no shipment can

be processed until these documents are lodged with NSK. The Customer shall supply any such documents which are requested by NSK.

**13. DESCRIPTION AND SPECIFICATION**

- (a) Subject to the ACL, whilst every effort is made to ensure accuracy, the descriptions, illustrations and material contained in any catalogues, price lists, brochures, leaflets or other descriptive matter represent the general nature of the items described therein but do not form part of any order or contract or amount to any representation or warranty. NSK reserves the right to modify the design of goods without notice.
- (b) The Customer warrants that any of the goods manufactured, constructed or supplied by NSK which are based upon designs, drawings or specifications supplied to NSK by or on behalf of the Customer shall not infringe any letters patent, registered designs or any other intellectual property rights. The Customer shall indemnify and keep indemnified NSK, its servants and agents against any action, loss, costs (including all legal costs and expenses), claim or damage that may be brought against or suffered by NSK, its servants or agents for any breach of this warranty.
- (c) NSK does not warrant or guarantee and it shall not be a term of any agreement between NSK and the Customer that any goods manufactured, constructed or supplied by NSK which are based in whole or in part upon any designs, drawings or specifications supplied to NSK by or on behalf of the Customer will achieve any standard of performance or any capacity whatsoever.

**14. CLAIMS**

- (a) The Customer will be deemed to have accepted goods as being in accordance with its order unless it notifies NSK in writing within fourteen (14) days of receipt of goods to the contrary.
- (b) Returns of allegedly defective goods will not be accepted without prior authorisation of NSK.
- (c) Refer to front of invoice for further conditions for Returned Goods.

**15. WARRANTY**

- (a) Except as the Terms specifically state, or as contained in any express warranty provided in relation to the goods or services, the Agreement does not include by implication any other term, condition or warranty in respect of the quality, merchantability, acceptability, fitness or suitability for any purpose, condition, description, assembly, manufacture, design or performance of the goods or services or any contractual remedy for their failure.
- (b) If the Customer is a consumer, nothing in these Terms restricts, limits or modifies the Customer's rights or remedies against NSK for failure of a statutory guarantee under the ACL.
- (c) If the Customer on-supplies the goods to a consumer and:
  - (i) the goods or services are not of a kind ordinarily acquired for personal, domestic or household use or consumption, then the amount specified in section 276A(1) of the ACL is the absolute limit of NSK's liability to the Customer; or
  - (ii) the goods or services are of a kind ordinarily acquired for personal, domestic or household use or consumption, payment of any amount required under section 274 of the ACL is the absolute limit of NSK's liability to the Customer;howsoever arising under or in connection with the sale, installation, use of, storage or any other dealings with the goods or services by the Customer or any third party.
- (d) If clauses (b) and (c) do not apply, then other than as stated in the Terms or any written warranty statement NSK is not liable to the Customer in any way arising under or in connection with the sale, installation, use of, storage or any other dealings with the goods or services by the Customer or any third party.
- (e) NSK is not liable for any indirect or consequential losses or expenses suffered by the Customer or any third party, howsoever caused, including but not limited to loss of turnover, profits, business or goodwill or any liability to any other party, except to the extent of any liability imposed by the ACL.
- (f) The Customer acknowledges that:
  - (i) it has not relied on any service involving skill and judgement, or on any advice, recommendation, information or assistance provided by NSK in relation to the goods or services or their use or application.
  - (ii) it has not made known, either expressly or by implication, to NSK any purpose for which it requires the goods or services and it has the sole responsibility of satisfying itself that the goods or services are suitable for the use of the Customer.
- (g) Nothing in the Terms is to be interpreted as excluding, restricting or modifying or having the effect of excluding, restricting or modifying the application of any State or Federal legislation applicable to the sale of goods or supply of services which cannot be excluded, restricted or modified.
- (h) No officer, employee, agent or contractor of NSK has any authority to alter any items or conditions of clause 13 or this clause 15.

16. **SPECIAL MATERIAL AND PRODUCTS**

- (a) Where special material or products are required, it is a condition of sale that NSK reserves the right to deliver, and charge for, ten percent (10%) more or less than the quantity ordered. Unless otherwise agreed in writing NSK does not accept any restriction of its right to manufacture, sell or offer to any other customers, goods which may be manufactured specially for a specific customer or customers or goods of like pattern.

17. **RESALE**

- (a) Goods are sold to manufacturers of original equipment subject to the condition that they will not be resold except as part of the products manufactured by the Customer, or as spare parts for such products unless the prior written agreement of NSK has first been obtained.

18. **WAIVER**

- (a) NSK's failure to enforce any of these Terms shall not be construed as a waiver of any of NSK's rights.

19. **CHANGE OF CUSTOMER OWNERSHIP:**

- (a) The Customer agrees to indemnify NSK against any loss incurred by it due to any change in ownership of the Customer unless written advice of such is received by NSK prior to the first delivery of any goods after the change of ownership.
- (b) If there is a change in the Customer's ownership of which NSK in its absolute discretion deems to be material, NSK may suspend or withdraw all credit facilities and require the Customer to submit a new credit application form.

20. **CANCELLATION:**

- (a) NSK will not accept any cancellation and/or variation to any order placed by the Customer, except with the express prior written approval of NSK and on terms under which NSK will be indemnified against any losses resulting there from. If NSK is unable to deliver the goods or services, then it may cancel the Customer's order (even if it has been accepted) by written notice to the Customer.

21. **SHORTAGES AND EXCHANGES**

- (a) When any shortages, claim for damaged goods or non-compliance with the Agreement specifications is accepted by NSK, NSK may, at its option, replace the goods, or refund the price of the goods.
- (b) If the Customer is a consumer, nothing in this clause 21 limits any remedy available for a failure of the guarantees in sections 56 and 57 of the ACL.

22. **FORCE MAJEURE**

- (a) NSK is not liable in any way howsoever arising under the Agreement to the extent that it is prevented from acting by events beyond its reasonable control including, without limitation, industrial disputes, strikes, lockouts, accident, breakdown, import or export restrictions, acts of God, acts or threats of terrorism or war. If an event of force majeure occurs, NSK may suspend or terminate the Agreement by written notice to the Customer.

23. **SEVERABILITY**

- (a) 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.

24. **CHARGE**

- (a) In consideration of NSK entering into a credit agreement or agreeing extend credit to the Customer, the Customer agrees to charge in favour of NSK all their estate and interest in any land and in any other assets, whether tangible or intangible in which they now have any legal or beneficial interest or in which they later acquire any such interest. The Customer consents to NSK lodging a caveat or caveats which note their interest in that real property.

25. **NOTICES**

- (a) All notices must be in writing and handed personally or sent by email, facsimile or prepaid post to the last known address of the addressee. Notices sent by prepaid post are deemed to be received upon posting. Notices sent by facsimile or email are deemed to be sent on confirmation of successful transmission.

26. **LEGAL CONSTRUCTION**

- (a) These conditions and any contract to which this document relates shall in all respects be governed and construed in accordance with the law of the State of Victoria, Australia. The Customer irrevocably submits to the jurisdiction of the courts of that state.