



David Stewart Holdings

DAVID STEWART HOLDINGS PTY LTD

ABN: 56 120 230 266

Terms and Conditions of Sale

1. Interpretation

In these Terms and Conditions and in any contract to which these conditions apply, unless inconsistent with the context:

- a) The Act means the *Competition & Consumer Act 2010*.
- b) Claim means any claim, demand, action or proceeding.
- c) Collateral has the meaning given under the PPSA and in particular for the purposes of this Contract, the personal property that is not used predominately for personal, domestic or household purposes as identified in clause 6 hereof to which the Security Interest has attached.
- d) Contract means the contract between David Stewart Holdings Pty Ltd, or its approved Agent, Contractor or Reseller, and the Purchaser for or in relation to the sale and purchase of goods.
- e) Goods means any item of whatsoever nature which is sold or to be sold by David Stewart Holdings Pty Ltd, or its approved Agent, Contractor or Reseller, to the Purchaser.
- f) PPSA means the Personal Property Securities Act 2009 as amended.
- g) PPS Register means the personal property securities registered under section 146 of the PPSA.
- h) Prescribed Terms means any terms, conditions, guarantees and warranties which the Act and any other law expressly provides may not in respect of the Contract be excluded, restricted or modified, or may be excluded, restricted or modified only to a limited extent.
- i) Purchaser means the person or corporation who buys or has agreed to buy the goods from David Stewart Holdings Pty Ltd, or its approved Agent, Contractor or Reseller.
- j) David Stewart Holdings Pty Ltd, ABN: 56 120 230 266, or its approved Agent, Contractor or Reseller, which accepts the Purchaser's order by the issue of a signed Sales Confirmation.
- k) Sales Confirmation means the document so titled and issued by DSH that formally accepts the order for goods from the Purchaser.
- l) Security Interest has the meaning given under the PPSA.
- m) Standard Specifications means DSH's standard specification for the goods current at the time the goods are delivered to the Purchaser. Copies of the Standard Specifications are available on request from DSH.
- n) Words importing the singular number shall be deemed to include the plural and vice versa. Words importing the male gender shall be deemed to include the female and neuter gender and vice versa.
- o) The headings in these Terms and Conditions are provided for convenience only and do not affect the interpretation thereof.
- p) David Stewart Holdings Pty Ltd, ABN: 56 120 230 266 or its approved Agent, Contractor or Reseller herein is indicated and shown as DSH.

2. General

- a) Subject to any Prescribed Terms, this document together with the relevant Sales Confirmation embodies the sole Terms and Conditions of the Contract between DSH and the Purchaser and supersedes all other conditions and agreements between the parties, unless expressly amended in writing by DSH.
- b) These Terms and Conditions shall without further notice apply to all future transactions between DSH and the Purchaser in relation to the sale and purchase of goods, whether or not this document is delivered or executed in the course of the transaction.

- c) For the avoidance of doubt, none of the Terms and Conditions contained in any document or other instrument supplied by or on behalf of the Purchaser (including without limiting the foregoing those included in any purchase order or like document from the Purchaser) shall apply to or form part of the Contract, except and to the extent otherwise agreed in writing by DSH.
- d) All purchase orders supplied by the Purchaser are subject to acceptance by DSH and no Contract between DSH and the Purchaser comes into existence until DSH issues a Sales Confirmation in relation to the order.
- e) No variation or abrogation of these Terms and Conditions shall be effective unless it is evidenced in writing signed on behalf of DSH.

3. **Payment**

- a) Unless otherwise stated and agreed by the parties in writing, payment shall be made as indicated in the written quotation and order confirmation or within 30 days from the end of the month in which the invoice is dated. Payment is to be made directly to the David Stewart Holdings Pty Ltd bank account details as shown at the end of this document.
- b) Time for payment of the price of the goods shall be of the essence of the Contract and if the Purchaser fails to pay the price when due DSH may treat the Contract as repudiated by the Purchaser or may, unless payment in full is made, suspend delivery of the goods the subject of the Contract and any goods the subject of any other Contract with the Purchaser without incurring any liability whatsoever to the Purchaser in respect thereof. In addition, without prejudice to such rights of DSH, the Purchaser shall (if so required by DSH) pay interest to DSH on the outstanding amount of the price at the rate of 18% per annum until the price is paid in full.
- c) Notwithstanding any rights of lien to which DSH may otherwise be entitled, DSH shall have a specific lien (including a right of sale) over the goods the subject of the Contract and any goods the subject of any other contract with the Purchaser until the price of the goods has been paid in full. The Purchaser shall not be entitled to make any deduction from the price of the goods in respect of any off-set or counter claims.
- d) Goods and Services Tax (GST) will be charged on those products that attract GST at the applicable rate.

4. **Delivery**

- a) Any time or date named and accepted by DSH for completion, delivery, despatch, shipment or arrival of the goods or for tender of any documents is an estimate only and does not constitute a condition of the Contract or part of the description of the goods and is not of the essence of the Contract.
- b) Unless otherwise stated in writing DSH may make partial deliveries or deliveries by instalments in any amount it may determine and each such partial delivery or delivery by instalments shall be deemed to be a separate Contract and these conditions shall apply to each partial delivery or delivery by instalments.
- c) The Company may deliver up to 5% more or less of the amount specified for delivery, subject only to an appropriate adjustment to the price payable, in full satisfaction of DSH's obligations pursuant to the Contract.
- d) The Purchaser shall notify DSH upon the day of delivery of any short fall in or loss or damage to goods delivered. Failure to so notify shall, subject to the requirements of any Prescribed Terms, disentitle the Purchaser to any remedy in respect to the shortage, loss or damage.

5. **Risk and Title**

- a) Except as otherwise provided herein, the goods supplied by DSH to the Purchaser shall be at the Purchaser's sole risk immediately on their delivery to the Purchaser.



- b) Property and title in the goods supplied by DSH to the Purchaser will not pass to the Purchaser until such time as the goods the subject of the Contract and all other goods supplied by DSH to the Purchaser have been paid for in full. Until that time, the Purchaser shall store the goods, including goods into which the supplied goods have been mixed, in such a manner as to show clearly that they are the property of DSH and shall upon DSH's demand deliver up such goods to DSH. In default of such delivery DSH may by its servants and agents enter the Purchaser's premises at any time without notice to repossess the goods.
- c) Subject to the PPSA, until such time as the goods have been paid for in full the Purchaser is at liberty to sell the goods, including goods into which DSH's goods have been mixed, in the ordinary course of its business, and the Purchaser shall hold the proceeds thereof in trust for DSH and promptly account to DSH for those proceeds in payment of the purchase price for the goods.
- d) The Purchaser and DSH agree that the provisions of this clause apply notwithstanding any agreement between the parties under which DSH grants the Purchaser credit.

6. *Personal Property Securities Act 2009*

- a) The terms "Collateral", "Debtor", "Financing Change Statement", "Financing Statement", "Grantor", "Proceeds", "Secured Party", "Security Agreement" and "Security Interest" have the meanings given in the PPSA.
- b) The Purchaser acknowledges and agrees that by accepting these Terms and Conditions which form part of the Contract and constitute a Security Agreement that covers the Collateral for the purposes of the PPSA:
 - i) DSH holds (as Secured Party) a Security Interest over all of the present and after acquired goods supplied by DSH to the Purchaser and any Proceeds of the sale of those goods ("Collateral");
 - ii) That any purchase by the Purchaser on credit terms from DSH or retention of title supply pursuant to clause 5 hereof will constitute a purchase money security interest as defined under section 14 of the PPSA ("PMSI");
 - iii) The PMSI granted herein will continue to apply to any goods coming into existence or proceeds of sale of goods coming into existence;
 - iv) DSH will continue to hold a Security Interest in the goods in accordance with and subject to the PPSA, notwithstanding that the goods may be processed, commingled or become an accession with other goods.
 - v) Any DSH Security Interest will be a continuing and subsisting interest in the Collateral with priority to the fullest extent permitted by law over all over registered or unregistered Security Interest;
 - vi) Until title in the goods pass to the Purchaser, it will keep all goods supplied by DSH free and ensure all such goods are kept free of any charge, lien or Security Interest and not otherwise deal with the goods in a way that will or may prejudice any rights of DSH under the Contract or the PPSA; and
 - vii) in addition to any other rights under these Terms and Conditions or otherwise arising, DSH may exercise any and all remedies afforded to it as a Secured Party under Chapter 4 of the PPSA including, without limitation, entry into any building or premises owned, occupied or used by the Buyer, to search for and seize, dispose of or retain those goods in respect to which the Purchaser has granted a Security Interest to DSH.
- c) The Purchaser undertakes to:
 - i) Sign any further documents and provide such information which DSH may reasonably require to register, amend or update a Financing Statement or Financing Change Statement in relation to a Security Interest on the PPS Register;
 - ii) Indemnify and upon demand reimburse DSH for all expenses incurred in registering a Financing Statement or Financing Change Statement on the PPS Register or releasing any Security Interests;
 - iii) Not register or permit to be registered a Financing Change Statement in the Collateral without the prior written consent of DSH; and
 - iv) Provide DSH not less than 7 days prior written notice of any proposed change in the Purchaser's name, address, contact numbers, business practice or such other change in the Purchaser's details registered on the PPS Register to enable DSH to register a Financing Change Statement if required.



- d) DSH and the Purchaser agree that sections 96, 125 and 132(3)(d) and 132(4) of the PPSA do not apply to the Security Agreement created under this Contract.
- e) The Purchaser hereby waives its rights to received notices under sections 95, 118, 121(4), 130, 132(3)(d) and 132(4) of the PPSA.
- f) The Purchaser waives its rights as a Grantor and/or a Debtor under sections 142 and 143 of the PPSA.
- g) Unless otherwise agreed in writing by DSH, the Purchaser waives its right to receive a verification statement in accordance with section 157 of the PPSA.
- h) The Purchaser shall unconditionally ratify any actions taken by DSH under this clause 6.
- i) This clause 6 will survive the termination of the Contract to the extent permitted by law.

7. Warranties and Exclusions of Liability

- a) The Company warrants that the goods when delivered to the Purchaser will comply with any description for the goods contained in the relevant Sales Confirmation (if any) and with the Standard Specification for the goods. DSH is not required to supply goods with any specification or characteristics that are outside any such description for the goods (if any) or the Standard Specifications.
- c) The Purchaser will store, handle and dispense the goods only in equipment that is approved and recommended by the Company. The Purchaser will ensure that this equipment is regularly maintained and cleaned and is exclusively used for the storage, handling and dispensing of the goods to avoid any cross contamination from other materials, products and sources.
- b) The Purchaser acknowledges, agrees, represents and warrants that:
 - i) As the use of the goods is outside the control of DSH the Purchaser is satisfied that the goods when supplied in accordance with clause 7a) will have the condition, characteristics, quality and attributes that will make them suitable or fit for any ordinary or special purpose required for those goods, even if that purpose is made known to DSH at any time;
 - ii) The Purchaser has or will in a timely manner conduct all mandatory or prudent tests and apply all mandatory or prudent quality control checks and procedures to ensure the goods and any product that is produced from them will be without defect and suitable or fit for any purpose required for them; and
 - iii) The Purchaser has not relied upon any statement, representation, warranty, guarantee, condition, advice, recommendation, information, assistance or service provided or given by DSH or anyone on its behalf in respect of the goods, other than those that are expressly contained in the Contract.
- c) The Purchaser releases and indemnifies DSH and its officers, employees, consultants and agents from and against all actions, claims, proceedings and demands (including those brought by third parties) which may be brought against it or them, whether on their own or jointly with the Purchaser and whether at common law, under tort (including negligence), in equity, pursuant to statute or otherwise, in respect of any loss, death, injury, illness, cost or damage arising out of any breach by the Purchaser of any warranty provided by it under paragraph (b) of this clause.
- d) Except as expressly set out in the Contract and except for liability under any Prescribed Terms, to the full extent permitted by law:
 - i) All conditions, warranties, guarantees, terms and obligations expressed or implied by law or otherwise relating to the Contract or the performance of DSH's obligations under the Contract or to any goods or services supplied or to be supplied by DSH under the Contract are excluded, except for those conditions and warranties as to title in the goods; and
 - ii) Without limiting the generality of the foregoing, DSH gives no condition, warranty or guarantee whatsoever as to the suitability, performance or fitness of the goods for their ordinary or any special use or purpose, and the description of the goods in any Contract or any other document shall not import any such condition, warranty or guarantee on the part of DSH.



e) Notwithstanding anything to the contrary herein contained but subject to the provisions of any Prescribed Terms, DSH's liability in respect of any Claim arising in any way out of the Contract or its performance or from any failure to perform the Contract including (without limiting the generality of the foregoing) for breach of any condition, warranty or guarantee contained in the Contract or in any Prescribed Term implied into or applying to the Contract and whether that liability arises under contract, tort (including negligence), breach of statutory duty or otherwise, is limited as follows:

i) If any guarantee under the Act is applicable to any good or service supplied by DSH and DSH's liability is due to a failure to comply with the guarantee and such failure cannot be remedied or is a major failure as defined in the Act (each such failure hereafter referred to as a Relevant Failure), DSH's liability is as stated in the Act in respect of that Relevant Failure;

ii) If the liability is due to a failure to comply with any condition, warranty or guarantee in respect of any good or service supplied by DSH under the Contract and such failure is not a Relevant Failure, DSH's liability is limited as follows in respect of such failure:

(A) If the failure is in respect of goods, DSH's liability is limited to replacement of the goods or the supply of equivalent goods, the repair of the goods, payment of the cost of replacing the goods or of acquiring equivalent goods, or payment of the cost of having the goods repaired, as determined by DSH in its sole discretion; and

(B) If the failure is in respect of services, DSH's liability is limited to the supply of or payment of the cost of the services supplied again, as determined by DSH in its sole discretion;

iii) In respect of all other liability, DSH's liability is limited in the aggregate to the amount of \$10,000.

f) To the extent permitted by law, DSH will have no liability to the Purchaser, however arising and under any cause of action or theory of liability, in respect of special, indirect or consequential damages, loss of profit (whether direct or indirect) or loss of business opportunity arising out of or in connection with the Product, the Contract or its performance.

8. Return of Goods

a) Goods supplied to the Purchaser are not returnable except as provided in clause 7 above.

b) If the goods are in accordance with clause 7a) and all Prescribed Terms and Conditions are otherwise in compliance with the provisions of the Contract, DSH may from time to time under exceptional circumstances choose to accept the return of the goods from the Purchaser. A cancellation fee will apply and the Purchaser will also reimburse DSH for all costs associated with the delivery and return of the goods.

9. Indemnity

The Purchaser shall keep DSH indemnified against all costs, claims, demands, expenses and liabilities of whatsoever nature, including, without prejudice to the generality of the foregoing, claims of death, personal injury, damage to property and consequential loss (including loss of profit) which may be made against the Purchaser or which the Purchaser may sustain, pay or incur as a result of or in connection with the manufacture, sale, export, import or use of the goods unless such costs, claim, demand, expense or liability shall be directly and solely attributable to any breach of contract or guarantee by, or negligence of, DSH or its duly authorised employee or agent.

10. Licenses, Duties, etc.

The payment of any taxes and the obtaining and maintenance in full force and effect of any necessary export or import licenses, authorisations or consent in respect of the goods is the sole responsibility of the Purchaser and DSH shall be under no liability whatsoever in respect of goods exported or imported without any necessary licenses, authorisations or consent.

11. Health and Safety

It is the Purchaser's responsibility to ensure that all applicable health and safety regulations are observed and other appropriate steps taken in relation to the storage, handling and the use of the goods and, where information is supplied to the Purchaser on potential hazards relating to the goods, to bring such information to the attention of its employees, agents, sub-contractors, visitors and customers. Without prejudice to the foregoing, it is also the Purchaser's responsibility to provide safe facilities for the reception of goods into storage.

12. Industrial Property Rights

The Purchaser shall not alter, remove or in any way tamper with any of the trade or other marks or numbers which DSH attached to or placed upon the goods.

13. Force Majeure

DSH shall not be under any liability whatsoever for the consequences of any failure on its part to perform or delay in performing any obligation under the Contract when due, whilst and to the extent that such failure or delay is due directly or indirectly to any event of force majeure. Without limiting the generality of the foregoing, this includes any liability whatsoever for any delay in completion, delivery, despatch, shipment or arrival of the goods or in the tender of any documents or the like. "event of force majeure" includes any acts of God, war, riots, strikes, lock outs, trade disputes, fires, break downs, mechanical failures, interruptions of transport, Government action or any other cause whatsoever, whether or not of a like nature to those specified above, outside the reasonable control of DSH. If there is an event of force majeure, DSH will notify the Purchaser of the event and the likely impact on its performance under the Contract. If the event affect the capacity of DSH to complete its material obligations under the Contract in a timely manner, DSH may by notice to the Purchaser terminate the Contract without any liability whatsoever on its part arising from such termination.

14. Notices

Any notice to be given to the Purchaser shall be deemed to be given upon its being posted or sent by email to the address set out in the Contract or to the Purchaser's registered office or last known address.

15. Assignment

The Purchaser may not assign or transfer or purport to assign or transfer any of its rights or obligations under or in connection with the Contract to any other person or corporation whatsoever.



David Stewart Holdings

16. ***Sub-contract***

DSH reserves the right to sub-contract the performance of any Contract or part thereof to any other party or person or corporation it may determine.

17. ***Proper Law and Jurisdiction***

All Contracts made between DSH and the Purchaser shall be governed by and construed in accordance with the laws of New South Wales, Australia. The Purchaser agrees to submit to the non-exclusive jurisdiction of the NSW Courts and courts of appeal there from for all purposes of or in connection with such Contracts.

18. ***Cost Recovery***

Any expenses, costs or disbursements incurred by DSH in recovering any outstanding monies owing by the Purchaser including debt collection fees and solicitors costs shall be paid by the Purchaser, providing that those fees do not exceed the scale charges as charged by that debt collection agency or solicitor plus any out of pocket expenses.