

TRADING TERMS

1. Definitions

a) In these Trading Terms:

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

"CCA" means the *Competition and Consumer Act 2010 (Cth)*;

"Company" means Struts n More Pty Ltd (ABN 87 648 613 343).

"Consumer" means a person acquiring Goods:

- i) of a kind ordinarily acquired for personal, domestic or household use or consumption; or
- ii) at a price not exceeding \$40,000; or
- iii) of a kind ordinarily acquired for personal, domestic or household use or consumption; or
- iv) that consist of a vehicle or trailer acquired for use principally in the transport of goods on public roads, but excludes a person acquiring the Goods, or holding himself or herself out as acquiring the Goods for the purpose of:
 - a) re-supply; or
 - b) using them up or transforming them, in trade or commerce, in the course of a process of production or manufacture or in the course of repairing or treating other goods or fixtures on land.

"Consumer Goods" means 'goods of a kind ordinarily acquired for personal, household or domestic use or consumption', as that expression is used in section 3 of the Australian Consumer Law.

"Consumer Guarantee" means a consumer guarantee applicable to this contract under the Australian Consumer Law, including any Express Warranty.

"Consumer Services" means 'services of a kind ordinarily acquired for personal, household or domestic use or consumption', as that expression is used in section 3 of the Australian Consumer Law.

"Customer" means the person described in the accompanying application for a trading account as the person in whose name an account is maintained by the Company and/or the person or entity that purchases Goods from the Company.

'Express Warranty' has the same meaning as in section 2(1) of the Australian Consumer Law.

"Fair or Reasonable" means 'fair or reasonable' for the purposes of section 64A of the Australian Consumer Law.

"Force Majeure Event" is defined in clause 15.

"Financing Statement" and **"Financing change statement"** means a "financing statement" and a "financing change statement" within the meaning of s.10 of the PPSA.

"Goods" means any goods/products supplied by the Company to the Customer under these Trading Terms.

"GST" means "GST" within the meaning of the GST Act.

"GST Act" means the *A New Tax System (Goods and Services Tax) Act 1999 (as amended)* and the following expressions bear the same meaning as in the GST Act: "tax invoice", "taxable supply" and "value".

"Insolvency Event" means, in relation to a party, that one of the events specified in clause 15 has occurred in relation to that party.

"Intellectual Property" means any intellectual property including without limitation patents, trademarks, copyright, designs, layouts, circuit boards, knowhow, software, object codes, source codes, and confidential information.

"PMSI" means a purchase money security interest as defined in section 14 of the PPSA.

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

"Proceeds" means "proceeds" within the meaning of section 31 of the PPSA.

"Register" means the Personal Property Securities Register established under the PPSA.

"Security Agreement" means a "security agreement" within the meaning of section 10 of the PPSA.

"Security Interest" means a "security interest" within the meaning of section 12 of the PPSA.

"Trading Terms" means these terms and conditions of sale that apply to and form part of the contract for the supply of Goods by the Company to the Customer.

b) Terms and expression defined in or for the purposes of the CCA or the PPSA have the same meaning when used in these Trading Terms.

2. General

a) These Trading Terms apply to:

- i) the establishment, operation and use of the account of the Customer with the Company;
- ii) all transactions effected by the Customer with the Company for the supply of goods or services on its account or on a cash basis unless otherwise expressly agreed in relation to any particular supply of goods; and
- iii) the exclusion of all others including any terms and conditions of the Customer.

b) These Trading Terms shall apply as if incorporated into each order placed by the Customer with the Company.

c) These Trading Terms may be varied only with the written agreement of the Company.

3. Acceptance and Commencement of Contract

a) Prices advised on quotations are estimates only and are subject to withdrawal, correction or change at any time prior to the Company's acceptance of the Customer's order. Prices advised on quotations are for the full order and cannot be split up and prices are subject to the Customer's order being for the whole quantity mentioned in the quotation. A quotation given by the Company is not an offer to sell. An order placed by the Customer pursuant to a quotation is not binding on the Company unless and until accepted by the Company.

b) The Customer may place and the Company may accept orders for the supply of goods upon these Trading Terms by a communication in writing (including by e-mail) or any other means that the parties agree including by telephone.

4. Payment

a) The Customer must pay the Company for goods or services supplied by the Company by the last day of the month following the month in which the goods or services are supplied.

b) If the Customer does not make payment as required by paragraph (a), the Customer must pay by way of liquidated damages for breach of contract, a default charge in relation to the unpaid amount calculated at the rate of two and a half percent (2.5%) above the National Australia Bank's (NAB) overdraft rate for prime corporate customers as applies from time to time. Interest will be charged at the said rate per calendar month on all amounts not paid within thirty days from the end of the month in which the goods were delivered up to the actual date of payment in full of the sum outstanding.

c) If the Customer fails to pay for any goods or services supplied by the Company when due, then by notice to the Customer the Company may declare any amounts actually or contingently owing by the Customer to the Company to be immediately due and payable and may, without notice and without prejudice to any other rights it may have, do any or all of the following:

- i. Withdraw any credit facilities which may have been extended to the Customer
- ii. Withhold any further deliveries of Goods or performance of services required under the contract;
- iii. In respect of Goods already delivered, enter onto the Customer's premises to recover and resell same for its own benefit;
- iv. Suspend and/or terminate performance of any other contracts that the Company has with the Customer.

d) Where payment is to be made by cash, the amount owing is due and payable immediately.

5. Credit Card Payments

a) If a Customer pays its outstanding account by a credit card, at the time the transaction is processed the Customer must pay to the Company an amount that the company determines (acting reasonably) to be equal to the merchant service fee or any similar fee payable by the Company to its transaction acquirer in connection with the transaction.

b) The Company may add any amount payable by the Customer under paragraph (a) to the sale price of the relevant goods or services supplied or to be supplied by the Company to the Customer.

6. GST

a) To the extent that a party makes a taxable supply in connection with these Trading Terms, the consideration payable by a party under these Trading Terms represents the value of the taxable supply for which payment is to be made, unless otherwise expressly agreed.

b) Subject to clause 6(c), if a party makes a taxable supply pursuant to these Trading Terms for a consideration which, under clause 6(a), represents its value, then the party liable to pay for the taxable supply must also pay, at the same time and in the same manner as the value is otherwise payable, the amount of any GST payable in respect of the taxable supply.

c) A party's obligation to make payment under clause 6(b) is subject to a valid tax invoice being delivered to the party liable to pay for the taxable supply.

7. Enforcement Expenses

If the Customer fails to pay any amounts when due, then in addition to any other amount payable under these Trading Terms, the Customer must pay to the Company upon demand any costs incurred in connection with enforcement of any of the Company's rights in connection with the supply of goods on these Trading Terms including without limitation:

- a) any legal costs (on a solicitor and own client basis) incurred by the Company;
- b) any mercantile agents fees incurred by the Company in recovering or attempting to recover any amount payable by the Customer under these Trading Terms; and
- c) any dishonour or bank fees incurred by the Company in connection with payments or remittances that are made or which should have been made by the Customer.

8. Exclusions of Warranties and Limitations of Liability

- a) The Company acknowledges that the Australian Consumer Law and similar legislation provides:
 - i) certain rights for Consumers that cannot be excluded; and
 - ii) in relation to the supply of Goods, that in some circumstances the Customer may be a Consumer.
- b) Subject to paragraph (c), the Company excludes any and all conditions, warranties, terms and consumer guarantees implied by statute, general law or custom (including without limitation the Australian Consumer Law) applicable to any supply of Goods.
- c) The Consumer Guarantees apply to any supply of Goods where the Customer is a Consumer, and the liability of the Company in connection with the Consumer Guarantees is not limited except as stated in paragraph (d).
- d) If the Customer is a Consumer in relation to the supply of Goods, and those goods are not of a kind ordinarily acquired for personal, domestic or household use or consumption, then the liability of the Company in connection with the Consumer Guarantees is limited to one of the following (as selected by the Company):
 - 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 goods equivalent to the Goods; or
 - iv) the payment of the cost of having the Goods repaired, except where it is not Fair and Reasonable to limit liability in this way.
- e) The Company:
 - i) excludes any liability in contract, tort (including negligence) or otherwise, in connection with any supply of Goods, for any indirect damages or losses, or for any special, punitive or exemplary damages;
 - ii) limits its liability in contract, tort (including negligence) or otherwise, in connection with any supply of Goods, to the price payable by the Customer for the Goods; and
 - iii) excludes any liability for or in connection a claim that the Goods are not fit for a particular purpose, except where the Company has a liability as contemplated by paragraph (a) or (d).
- f) Subject to the provisions herein contained in this clause 8, the Customer expressly acknowledges and agrees that the Company is not liable for any advice given by its agents, officers or employees in relation to the suitability for any purpose of the Goods supplied by the Company and all such advice relied upon is at the Customer's risk.
- g) Any conditions by the Customer as to the Goods or the contract for the supply of Goods are of no force and effect unless the conditions are agreed to by the Company and incorporated in the contract between the Company and the Customer.
- h) The Customer indemnifies the Company for any loss, damage or expense caused by reason of the Customer's breach of any Trading Terms or arising from or related to the use of any devices or products of the Customer.

9. Cancellations of Orders

- a) The Customer may not cancel any order that it places for supply of Goods after that order is accepted by the Company unless the Company gives it consent in writing. The Company may give or withhold its consent in its absolute discretion. The Company may give its consent subject to conditions that may include payment of money to the Company.
- b) Without prejudice to any other rights the Company may have, the Customer indemnifies the Company for any loss, damage or expense incurred by it should the Customer cancel any order or part thereof after acceptance by the Company.

10. Suspension of Credit

The Company may at any time refuse to extend credit or further credit to the Customer (and without the Company having or giving any reason for doing so).

11. Claims and Returns

- a) The Customer responsible for immediate examination of Goods on delivery and the Company is, except as may otherwise be mandatory by law, not liable for any claim to which it would otherwise be liable in respect of damaged Goods including Goods damaged in transit and the Customer is deemed to have accepted the Goods are of the description, quality and quantity ordered unless particulars of claim are notified to the Company in writing within three (3) working days (which excludes Saturdays, Sundays and Public Holidays) after arrival of the Goods at the place of delivery.
- b) No return of Goods that are allegedly defective or faulty will be accepted by the Company unless either:
 - i) the Customer is a Consumer in relation to those Goods and is entitled to return them because a Consumer Guarantee applies; or
 - ii) the Company has given prior written authorisation for the return of the Goods.
- c) If the Company consents under paragraph (b)(ii) for the return of any Goods, the Customer must:
 - i) provide to the Company a written statement setting out the reasons for return of the Goods;
 - ii) give the Company details of the original invoice number and the date of delivery of the Goods;
 - iii) provide to the Company a copy of the receipt or delivery docket relating to the Goods;
 - iv) return the Goods in their original condition as at the time of their sale;
 - v) pay to the Company an administrative handling charge of \$25.00 or a 15% restocking fee (which ever is the greater) for the Company's processing costs associated with the return of the Goods.

12. Retention of Title Arrangements

- a) Property in and title to any Goods supplied to the Customer under these Trading Terms remains with the Company until the Customer has paid in full (and in cleared funds) all amounts owing by the Customer to the Company in connection with the Goods.
- b) Despite paragraph 12 a), risk in the Goods passes to the customer upon delivery.
- c) Unless otherwise agreed by the Company, the Customer must identify and store the Goods in a manner that clearly shows that they are the property of the Company.

13. Personal Property Securities Act arrangements

- a) *Acknowledgement of security agreement and security interest.* The Customer acknowledges and agrees that:
 - i) The Trading Terms are a security agreement for the purposes of the PPSA;
 - ii) The Company has a security interest in the Goods and in any present or after acquired property that represents Proceeds of the Goods; and
 - iii) The security interest secures all amounts owing by the Customer to the Company in connection with the relevant Goods under these Trading Terms.
- b) *Acknowledgment of arrangements for financing statements.* The Customer acknowledges and agrees as follows:
 - i) Financing statements and financing change statements. The Company may at any time register a financing statement (or, if relevant, a financing change statement) on the Register in relation to its security interest in the Goods that may include terms that:
 - describe the Company as the "secured party" and the Customer as the "grantor";
 - describe the Goods supplied by the Company to the Customer from time to time pursuant to these Trading Terms as collateral in the class of "other goods" (or in such other class as the Company may reasonably determine is applicable to the Goods);
 - specifies that the security interest that the Company holds in the collateral is a PMSI in accordance with item 7 of the table in section 153(1) of the PPSA to the extent that it secures payment of the amounts owing in connection with that collateral; and
 - specifies that the security interest affects Proceeds and, in particular, all present and after acquired property that represents Proceeds of the Goods.
 - ii) Period of registration. The Company may register a financing statement or financing change statement on the PPSA Register for any period that the Company determines (in its discretion).
 - iii) Payment of fees and costs. Upon request made by the Company, the Customer must pay to the Company all fees, charges and expenses that the Company may reasonably incur in:
 - preparing, lodging or registering any financing statement or financing change statement in relation to any security interest that is granted to the Company under the Trading Terms;
 - maintaining any such registration; or
 - enforcing any security interest granted to the Company under the Trading Terms. These fees, charges and expenses may be incurred by or with an agent that acts on behalf of the Company.
 - iv) When registration to be effected. The Company may register its security interest on the Register at any time so long as the Company believes on reasonable grounds that it will become a secured party in relation to the Goods including without limitation when the Customer signs or otherwise adopts or accepts the Contract Terms in a manner proposed by the Company.
 - v) Attachment. A security interest in Goods created according to the Trading Terms will attach to the Goods at the time that the Customer obtains possession of them and not at any later time.
 - vi) Do all things necessary. The Customer must do anything reasonably required by the Company to enable the Company to register the security interest as a PMSI and to maintain that registration.
 - vii) Separate financing statement may be registered if required. If the Company considers that it has or may have a security interest that is not a PMSI in relation to any Goods, it may register a financing statement in respect of that security interest (and that financing statement may be in addition to a financing statement registered by the Company in relation to a PMSI in the same Goods).

c) *Confidential Information*

- i) The Company and the Customer agree that neither party will disclose to an interested person or to any other person, any information of the kind described in section 275 (1) of the PPSA except that the Company may disclose that information to an interested person where section 275(7) of the PPSA applies.
 - ii) The Customer agrees that it will not authorize the disclosure of any information of the kind described in section 275 (1) of the PPSA.
- d) **Enforcement**
If the Customer fails to pay an amount owing when due or if it fails to perform any of its obligations in connection with the supply of Goods, the Customer agrees that the Company shall be entitled to exercise its enforcement rights and remedies as a secured party in accordance with the provisions of the PPSA including (without limitation) the rights contained in section 123 of the PPSA to seize the Goods by any method permitted by law. For these purposes, and without limiting any other rights of the Company under the PPSA as a secured party, the Customer further agrees:
- i) upon demand made by the Company, to immediately deliver up the Goods to the Company;
 - ii) to irrevocably authorise the Company to enter any premises occupied by the Customer in order to search for, retrieve and remove those Goods to which the Company has title and which are the subject of a security interest as provided for by these Trading Terms;
 - iii) to do all things necessary to immediately facilitate the Company's access to the Customer's premises and to assist the Company to locate and identify the Goods;
 - iv) to authorize the Company to resell the Goods seized and apply the proceeds of sale in payment of any monies that the Customer owes it;
 - v) that in the event of any inconsistency with the provisions contained in section 123 of the PPSA and the provisions contained in this paragraph (d), the provisions of this paragraph (d) shall prevail.
- e) **Notices**
- i) PPSA Notices. The Customer agrees that the Company does not need to give the Customer any notice under the PPSA (including without limitation a notice of a verification statement received from the Registrar) unless the notice is required by the PPSA and that requirement cannot be excluded.
 - ii) Where default. In the event of a default by the Customer in performing of any of its obligations in connection with a supply of Goods under the Trading Terms, the Customer agrees that (as between the parties to the Contract Terms) the Company is not obliged to give notice to any other secured party with interests in the same collateral or to any other third party of any enforcement or recovery action that it takes or which it may take with respect to its security interest in any of the Goods.

14. Insolvency Events

If the Customer:

- a) becomes insolvent or bankrupt;
- b) is the subject of an application to wind up, or if a Liquidator, Provisional Liquidator, Receiver, a Receiver and Manager, or an Administrator is appointed with respect to the Customer or any of the Customer's assets;
- c) makes an arrangement or composition with the creditors of the Customer or attempts to make such an arrangement or composition;
- d) is unable to pay their debts as they fall due;
- e) fails to comply with a statutory demand made under the *Corporations Act 2001 (Cth)* for payment of a debt;
- f) ceases business;
- g) has execution levied against any of their assets; or
- h) has a mortgagee Liquidator, Provisional Liquidator, Receiver, Receiver and manager or Administrator enter or seek to enter into possession of any of its assets,

then any monies actually or contingently owing to the Company at that time under any contract formed on these Trading Terms (including any amounts which would not otherwise be payable until a later date or dates) are immediately due and payable (without the need for any demand by the Company) and the Company may, without prejudice to any of its other rights, take any of the steps set out in clause 4 c) hereof.

15. Force Majeure and Delivery

- a) The Company may suspend any or all of its obligations to the Customer that are affected by any act of God, fire, flood, storm, earthquake, strike, lockout, trade dispute, breakdown, theft, crime, delays in shipping, or the inability of the Company to procure necessary materials or articles preventing or retarding performance of the contract or any other cause not reasonably within the control of the Company (each a **Force Majeure Event**) and the Company is not responsible for any delay, default, loss or damage due to any Force Majeure Event.
- b) When a Force Majeure Event ceases to affect the performance of any of the Company's obligations, the Company must lift any suspension of those obligations that it makes under paragraph (a).
- c) Delivery dates quoted at the time of sale are estimates only. While every endeavour will be made to effect delivery by the date given, the Company is not (subject to clause 8) liable for any loss or damage (including consequential loss or damage) for failure to deliver within the time stated or failure to deliver due to circumstances beyond its reasonable control. The Customer will accept and pay for Product notwithstanding late delivery.

16. Insurance and Intellectual Property

- a) Unless otherwise agreed in writing by the Company, the Company accepts no responsibility for the insurance of the Goods or any of the Customer's property or materials.
- b) Any Intellectual Property that is presently existing or which is developed in the future by or for the Company in connection with the supply of its goods (including the Goods) vests in and is owned by the Company, and the Customer must do all things and sign all documents reasonably required by the Company to give effect to this clause.

17. Certificate

A certificate of the Customer's liability under any contract or contracts formed on these Trading Terms, signed by an officer of the Company, is prima facie evidence of the Customer's liability to the Company under these Trading Terms as at the date of the certificate.

18. Termination

- a) Either party may terminate the arrangements under these Trading Terms by not less than 30 days notice to the other or immediately by notice to the other party if the other party is subject to an Insolvency Event.
- b) Upon termination all amounts actually or contingently owing by the Customer to the Company are immediately due and payable and the Customer shall immediately on demand deliver up to the Company all goods purchased from the Company for which it has not paid.

19. Time

Time is of the essence for payment of any monies owed by the Customer to the Company pursuant to the provisions specified in these Trading Terms.

20. Jurisdiction

- a) These Trading Terms are governed by the laws of the place where the registered office of the Company is located at the time that these Trading Terms are adopted by the parties.
- b) The parties submit to the non-exclusive jurisdiction of the Courts of that State in relation to any dispute or claim arising under or in connection with the supply of Goods or otherwise concerning these Trading Terms.

21. Notices

- a) Any notice required by or contemplated by these Trading Terms must be in writing in the English language.
- b) Any notice by one party to the other shall be sufficiently served if served:
 - i) personally;
 - ii) by facsimile transmission to the number specified in the application made to the Company by the Customer to establish the arrangements under these Trading Terms or as otherwise notified to the other party, with a transmission confirmation receipt marked "OK";
 - iii) by e-mail to the address specified in the application made to the Company by the Customer to establish the arrangements under these Trading Terms or as otherwise notified to the other party, if the e-mail is acknowledged by the recipient; or
 - iv) by pre-paid post to the party to be served at the registered office of the party or to the address specified in the application made to the Company by the Customer to establish the arrangements under these Trading Terms or as otherwise notified to the other party, (in which case it is taken to be received 3 days after the date of posting).