

## **1. Definitions**

1.1 "Bayair" shall mean Bayair Electrics Pty Ltd its successors and assigns or any person acting on behalf of and with the authority of Bayair Electrics Pty Ltd.

1.2 "Client" shall mean the Client (or any person acting on behalf of and with the authority of the Client) as described on any quotation, work authorisation or other form as provided by Bayair Electrics Pty Ltd.

1.3 "Guarantor" means that person (or persons), or entity, who agrees to be liable for the debts of the Client on a principal debtor basis.

1.4 "Goods" shall mean Goods supplied by Bayair to the Client (and where the context so permits shall include any supply of Services as hereinafter defined) and are as described on the invoices, quotation, work authorisation or any other forms as provided by Bayair to the Client.

1.5 "Services" shall mean all Services supplied by Bayair to the Client and includes any advice or recommendations (and where the context so permits shall include any supply of Goods as defined above).

1.6 "Price" shall mean the price payable for the Goods as agreed between Bayair and the Client in accordance with clause 4 of this contract.

## **2. The Commonwealth Trade Practices Act 1974 ("TPA") and Fair Trading Acts ("FTA")**

2.1 Nothing in this agreement is intended to have the effect of contracting out of any applicable provisions of the TPA or the FTA in each of the States and Territories of Australia, except to the extent permitted by those Acts where applicable.

## **3. Acceptance**

3.1 Any instructions (including but not limited to: email, written, or verbal) received by Bayair from the Client for the supply of Goods and/or the Client's acceptance of Goods supplied by Bayair shall constitute acceptance of the terms and conditions contained herein.

3.2 Where more than one Client has entered into this agreement, the Clients shall be jointly and severally liable for all payments of the Price.

3.3 Upon acceptance of these terms and conditions by the Client the terms and conditions are binding and can only be amended with the written consent of Bayair.

3.4 The Client shall give Bayair not less than fourteen (14) days prior written notice of any proposed change of ownership of the Client or any change in the Client's name and/or any other change in the Client's details (including but not limited to, changes in the Client's address, telephone number, or business practice). The Client shall be liable for any loss incurred by Bayair as a result of the Client's failure to comply with this clause.

3.5 Goods are supplied by Bayair Electrics Pty Ltd only on the terms and conditions of trade herein to the exclusion of anything to the contrary in the terms of the Client's order notwithstanding that any such order is placed on terms that purport to override these terms and conditions of trade.

## **4. Price And Payment**

4.1 At Bayair's sole discretion the Price shall be either:

(a) as indicated on invoices provided by Bayair to the Client in respect of Goods supplied; or

(b) Bayair's quoted Price (subject to clause 4.2) which shall be binding upon Bayair provided that the Client shall accept Bayair's quotation in writing within sixty (60) days.

4.2 Bayair reserves the right to change the Price in the event of a variation to Bayair's quotation. Any variation from the plan of scheduled works or specifications (including, but not limited to, any variation due to unforeseen circumstances, or as a result of increases to Bayair in the cost of materials and labour) will be charged for on the basis of Bayair's quotation and will be shown as variations on the invoice. Payment for all variations must be made in full at their time of completion.

4.3 Bayair may submit a detailed payment claim at intervals not less than one week for work performed up to the end of each week. The value of work so performed shall include the reasonable value of authorised variations and the value of materials delivered to the site but not yet installed.

4.4 At Bayair's sole discretion a deposit may be required. The commencement of installation is dependant on Bayair receiving the deposit.

4.5 At Bayair's sole discretion payment shall be due on delivery of the Goods.

4.6 Time for payment for the Goods shall be of the essence and will be stated on the invoice or any other forms. If no time is stated then payment shall be due seven (7) days following the date of the invoice.

4.7 Payment will be made by cash, or by cheque, or by bank cheque, or by credit card (plus a surcharge of up to five percent (5%) of the Price), or by direct credit, or by any other method as agreed to between the Client and Bayair.

4.8 GST and other taxes and duties that may be applicable shall be added to the Price except when they are expressly included in the Price.

## **5. Delivery Of Goods**

5.1 At Bayair's sole discretion delivery of the Goods shall take place when:

(a) the Client takes possession of the Goods at Bayair's address; or

(b) the Client takes possession of the Goods at the Client's nominated address (in the event that the Goods are delivered by Bayair or Bayair's nominated carrier).

5.2 At Bayair's sole discretion the costs of delivery are:

(a) included in the Price; or

(b) in addition to the Price; or

(c) for the Client's account.

5.3 The Client shall make all arrangements necessary to take delivery of the Goods whenever they are tendered for delivery. In the event that the Client is unable to take delivery of the Goods as arranged then Bayair shall be entitled to charge a reasonable fee for redelivery.

5.4 The failure of Bayair to deliver shall not entitle either party to treat this contract as repudiated.

5.5 Bayair shall not be liable for any loss or damage whatsoever due to failure by Bayair to deliver the Goods (or any of them) promptly or at all, where due to circumstances beyond the control of Bayair.

## **6. Risk**

6.1 If Bayair retains ownership of the Goods nonetheless, all risk for the Goods passes to the Client on delivery.

6.2 If any of the Goods are damaged or destroyed following delivery but prior to ownership passing to the Client, Bayair is entitled to receive all insurance proceeds payable for the Goods. The production of these terms and conditions by Bayair is sufficient evidence of Bayair's rights to receive the insurance proceeds without the need for any person dealing with Bayair to make further enquiries.

6.3 Where the Client expressly requests Bayair to leave Goods outside Bayair's premises for collection or to deliver the Goods to an unattended location then such Goods shall be left at the Client's sole risk and it shall be the Client's responsibility to ensure the Goods are insured adequately or at all.

6.4 Where the Client has supplied materials for Bayair to complete the Services, or existing materials are in place, the Client acknowledges that he accepts responsibility for the suitability of purpose, quality and any faults inherent in the Materials. Bayair shall not be responsible for any defects in the works, any loss or damage to the Materials (or any part thereof), howsoever arising from the use of Materials supplied by the Client.

6.5 The Client acknowledges and agrees that pictures and photos in Bayair's advertising material may not represent the actual Goods, and the dimensions and features of the Goods may vary. Bayair shall not be liable for any loss, damages, or costs however resulting from such variations to the Goods.

6.6 In the event that the property experiences any movement that effects and causes damage to the Goods, the Client accepts and agrees that Bayair shall not be held liable for any such damage and that the Client shall be responsible for the cost of rectification.

6.7 In the event that the worksite is disturbed due to adverse weather conditions, the Client acknowledges that they shall be liable for the cost of rectification (including but not limited to roof leaks caused by storms, acts of God, earthquake, etc).

6.8 The Client agrees to indemnify Bayair from any damage caused by any other tradesman during and after the completion of the Services. If the Client instructs Bayair to rectify any damage caused by any other tradesman, this will become a variation to the original quotation and will be charged at Bayair's normal hourly rate per clause 4.2.

## **7. Access**

7.1 The Client shall ensure that Bayair has clear and free access to the work site at all times to enable them to undertake the works. Bayair shall not be liable for any loss or damage to the site (including, without limitation, damage to pathways, driveways and interior features) unless due to the negligence of Bayair. Any claims for damage to the works site must be given in to Bayair within forty eight (48) hours of the damage occurring.

## **8. Title**

8.1 Bayair and the Client agree that ownership of the Goods shall not pass until:

- (a) the Client has paid Bayair all amounts owing for the particular Goods; and
- (b) the Client has met all other obligations due by the Client to Bayair in respect of all contracts between Bayair and the Client.

8.2 Receipt by Bayair of any form of payment other than cash shall not be deemed to be payment until that form of payment has been honoured, cleared or recognised and until then Bayair's ownership or rights in respect of the Goods shall continue.

8.3 It is further agreed that:

- (a) where practicable the Goods shall be kept separate and identifiable until Bayair shall have received payment and all other obligations of the Client are met; and
- (b) until such time as ownership of the Goods shall pass from Bayair to the Client Bayair may give notice in writing to the Client to return the Goods or any of them to Bayair. Upon such notice the rights of the Client to obtain ownership or any other interest in the Goods shall cease; and
- (c) Bayair shall have the right of stopping the Goods in transit whether or not delivery has been made; and
- (d) if the Client fails to return the Goods to Bayair then Bayair or Bayair's agent may enter upon and into land and premises owned, occupied or used by the Client, or any premises as the invitee of the Client, where the Goods are situated and take possession of the Goods; and
- (e) the Client is only a bailee of the Goods and until such time as Bayair has received payment in full for the Goods then the Client shall hold any proceeds from the sale or disposal of the Goods, up to and including the amount the Client owes to Bayair for the Goods, on trust for Bayair; and
- (f) the Client shall not deal with the money of Bayair in any way which may be adverse to Bayair; and
- (g) the Client shall not charge the Goods in any way nor grant nor otherwise give any interest in the Goods while they remain the property of Bayair; and
- (h) Bayair can issue proceedings to recover the Price of the Goods sold notwithstanding that ownership of the Goods may not have passed to the Client; and
- (i) until such time that ownership in the Goods passes to the Client, if the Goods are converted into other products, the parties agree that Bayair will be the owner of the end products.

## **9. Defects**

9.1 The Client shall inspect the Goods on delivery and shall within seven (7) days of delivery (time being of the essence) notify Bayair of any alleged defect, shortage in quantity, damage or failure to comply with the

description or quote. The Client shall afford Bayair an opportunity to inspect the Goods within a reasonable time following delivery if the Client believes the Goods are defective in any way. If the Client shall fail to comply with these provisions the Goods shall be presumed to be free from any defect or damage. For defective Goods, which Bayair has agreed in writing that the Client is entitled to reject, Bayair's liability is limited to either (at Bayair's discretion) replacing the Goods or repairing the Goods except where the Client has acquired Goods as a consumer within the meaning of the Trade Practices Act 1974 (Cwlth) or the Fair Trading Acts of the relevant state or territories of Australia, and is therefore also entitled to, at the consumer's discretion either a refund of the purchase price of the Goods, or repair of the Goods, or replacement of the Goods.

#### **10. Returns**

10.1 Returns will only be accepted provided that:

- (a) the Client has complied with the provisions of clause 9.1; and
- (b) Bayair has agreed in writing to accept the return of the Goods; and
- (c) the Goods are returned at the Client's cost within seven (7) days of the delivery date; and
- (d) Bayair will not be liable for Goods which have not been stored or used in a proper manner; and
- (e) the Goods are returned in the condition in which they were delivered and with all packaging material, brochures and instruction material in as new condition as is reasonably possible in the circumstances.

10.2 Bayair may (at their sole discretion) accept the return of Goods for credit but this may incur a handling fee of up to twenty five percent (25%) of the value of the returned Goods plus any freight costs.

10.3 Non-stocklist items or Goods made to the Client's specifications are under no circumstances acceptable for credit or return.

#### **11. Warranty**

11.1 Subject to the conditions of warranty set out in clause 11.2 Bayair warrants that if any defect in any workmanship of Bayair becomes apparent and is reported to Bayair within six (6) years of the date of delivery (time being of the essence) then Bayair will either (at Bayair's sole discretion) replace or remedy the workmanship.

11.2 The conditions applicable to the warranty given by clause 11.1 are:

- (a) the warranty shall not cover any defect or damage which may be caused or partly caused by or arise through:
  - (i) failure on the part of the Client to properly maintain any Goods; or
  - (ii) failure on the part of the Client to follow any instructions or guidelines provided by Bayair; or
  - (iii) any use of any Goods otherwise than for any application specified on a quote or order form; or
  - (iv) the continued use of any Goods after any defect becomes apparent or would have become apparent to a reasonably prudent operator or user; or
  - (v) fair wear and tear, any accident or act of God.

(b) the warranty shall cease and Bayair shall thereafter in no circumstances be liable under the terms of the warranty if the workmanship is repaired, altered or overhauled without Bayair's consent.

(c) in respect of all claims Bayair shall not be liable to compensate the Client for any delay in either replacing or remedying the workmanship or in properly assessing the Client's claim.

11.3 For Goods not manufactured by Bayair, the warranty shall be the current warranty provided by the manufacturer of the Goods. Bayair shall not be bound by nor be responsible for any term, condition, representation or warranty other than that which is given by the manufacturer of the Goods.

#### **12. Costs of Collection**

The Customer shall pay Bayair Electrics for all costs incurred by the Bayair Electrics (including costs for which the Bayair Electrics may be contingently liable) in any attempt to collect any monies owed by the Customer to Bayair Electrics under this Agreement including debt collection agent costs, repossession costs, location search costs, process server costs and solicitor costs on a solicitor/client basis.

#### **13. Security And Charge**

13.1 Despite anything to the contrary contained herein or any other rights which Bayair may have howsoever:

(a) where the Client and/or the Guarantor (if any) is the owner of land, realty or any other asset capable of being charged, both the Client and/or the Guarantor agree to mortgage and/or charge all of their joint and/or several interest in the said land, realty or any other asset to Bayair or Bayair's nominee to secure all amounts and other monetary obligations payable under these terms and conditions. The Client and/or the Guarantor acknowledge and agree that Bayair (or Bayair's nominee) shall be entitled to lodge where appropriate a caveat, which caveat shall be withdrawn once all payments and other monetary obligations payable hereunder have been met.

(b) should Bayair elect to proceed in any manner in accordance with this clause and/or its sub-clauses, the Client and/or Guarantor shall indemnify Bayair from and against all Bayair's costs and disbursements including legal costs on a solicitor and own client basis.

(c) the Client and/or the Guarantor (if any) agree to irrevocably nominate constitute and appoint Bayair or Bayair's nominee as the Client's and/or Guarantor's true and lawful attorney to perform all necessary acts to give effect to the provisions of this clause 13.1.

#### **14. Cancellation**

14.1 Bayair may cancel any contract to which these terms and conditions apply or cancel delivery of Goods at any time before the Goods are delivered by giving written notice to the Client. On giving such notice Bayair shall repay to the Client any sums paid in respect of the Price. Bayair shall not be liable for any loss or damage whatsoever arising from

such cancellation.

14.2 In the event that the Client cancels delivery of Goods the Client shall be liable for any loss incurred by Bayair (including, but not limited to, any loss of profits) up to the time of cancellation.

14.3 Cancellation of orders for Goods made to the Client's specifications or non-stocklist items will definitely not be accepted, once production has commenced.

14.4 Client may cancel the installation/services at least 48hrs prior to scheduled delivery of such services/goods to receive a full refund of any deposits made. Such notification should be provided in writing via email to Bayair.

#### **15. Privacy Act 1988**

15.1 The Client and/or the Guarantor/s agree for Bayair to obtain from a credit reporting agency a credit report containing personal credit information about the Client and Guarantor/s in relation to credit provided by Bayair.

15.2 The Client and/or the Guarantor/s agree that Bayair may exchange information about the Client and the Guarantor/s with those credit providers either named as trade referees by the Client or named in a consumer credit report issued by a credit reporting agency for the following purposes:

(a) to assess an application by Client; and/or

(b) to notify other credit providers of a default by the Client; and/or

(c) to exchange information with other credit providers as to the status of this credit account, where the Client is in default with other credit providers; and/or

(d) to assess the credit worthiness of Client and/or Guarantor/s.

15.3 The Client consents to Bayair being given a consumer credit report to collect overdue payment on commercial credit (Section 18K(1)(h) Privacy Act 1988).

15.4 The Client agrees that personal credit information provided may be used and retained by Bayair for the following purposes and for other purposes as shall be agreed between the Client and Bayair or required by law from time to time:

(a) provision of Goods; and/or

(b) marketing of Goods by Bayair, its agents or distributors in relation to the Goods; and/or

(c) analysing, verifying and/or checking the Client's credit, payment and/or status in relation to provision of Goods; and/or

(d) processing of any payment instructions, direct debit facilities and/or credit facilities requested by Client; and/or

(e) enabling the daily operation of Client's account and/or the collection of amounts outstanding in the Client's account in relation to the Goods.

15.5 Bayair may give information about the Client to a credit reporting agency for the following purposes:

(a) to obtain a consumer credit report about the Client; and/or

(b) allow the credit reporting agency to create or maintain a credit information file containing information about the Client.

#### **16. Building and Construction Industry Security of Payment Act 2002**

16.1 At Bayair's sole discretion, if there are any disputes or claims for unpaid Goods and/or Services then the provisions of the Building and Construction Industry Security of Payment Act 2002 may apply.

16.2 Nothing in this agreement is intended to have the effect of contracting out of any applicable provisions of the Building and Construction Industry Security of Payment Act 2002 of Victoria, except to the extent permitted by the Act where applicable.

#### **17. General**

17.1 If any provision of these terms and conditions shall be invalid, void, illegal or unenforceable the validity, existence, legality and enforceability of the remaining provisions shall not be affected, prejudiced or impaired.

17.2 These terms and conditions and any contract to which they apply shall be governed by the laws of Victoria and are subject to the jurisdiction of the courts of Victoria.

17.3 Bayair shall be under no liability whatsoever to the Client for any indirect and/or consequential loss and/or expense (including loss of profit) suffered by the Client arising out of a breach by Bayair of these terms and conditions.

17.4 In the event of any breach of this contract by Bayair the remedies of the Client shall be limited to damages which under no circumstances shall exceed the Price of the Goods.

17.5 The Client shall not be entitled to set off against, or deduct from the Price, any sums owed or claimed to be owed to the Client by Bayair nor to withhold payment of any invoice because part of that invoice is in dispute.

17.6 Bayair may license or sub-contract all or any part of its rights and obligations without the Client's consent.

17.7 The Client agrees that Bayair may review these terms and conditions at any time. If, following any such review, there is to be any change to these terms and conditions, then that change will take effect from the date on which Bayair notifies the Client of such change.

17.8 Neither party shall be liable for any default due to any act of God, war, terrorism, strike, lock-out, industrial action, fire, flood, storm or other event beyond the reasonable control of either party.

17.9 The failure by Bayair to enforce any provision of these terms and conditions shall not be treated as a waiver of that provision, nor shall it affect Bayair's right to subsequently enforce that provision.