

Comfab Products Pty Ltd ACN 059 063 795 - Terms & Conditions of Sale

1 Definitions

In these Terms:

ACL means the Australian Consumer Law as set out in Schedule 2 of the *Competition and Consumer Act 2010* (Cth);

Agreement means an agreement for the provision of Goods by Comfab to the Customer that is formed pursuant to clause 2.2;

Background IP means, in respect of an Agreement, those IP Rights owned by a party which are in existence prior to the commencement of that Agreement;

Comfab means Comfab Products Pty Ltd ACN 059 063 795;

Consequential Loss means loss of expected savings, loss of profit, loss of revenue, loss of goodwill, lost or delayed production, increased financing costs, downtime, business interruption costs, or any consequential, special or indirect loss or damage, whether or not the possibility or potential extent of the loss or damage was known or foreseeable, howsoever arising;

Consumer has the meaning given in the ACL;

Credit Application means the credit application form issued by Comfab;

Customer means the person, jointly and severally if more than one, acquiring Goods from Comfab as specified on the Credit Application or the PO;

Goods means goods supplied by Comfab to the Customer as specified in the PO;

GST has the meaning given in *A New Tax System (Goods and Services Tax) Act 1999* as amended;

Insolvency Event means where a party is an individual, and commits an act of bankruptcy, has a bankruptcy petition presented against it or is made bankrupt; or is a corporation, and is, or declares that it is insolvent, or is unable to pay its debts as and when they fall due or has a liquidator appointed to it;

IP Rights means statutory and other proprietary rights in respect of trade marks, designs, patents, circuit layouts, copyright, confidential information, know how, manufacturing processes, circuit layouts and all other rights with respect to intellectual property as defined in Article 2 of the Convention Establishing the World Intellectual Property Organisation of July 1967;

Loss means any loss, expense, cost or damage of any kind and includes a fine or penalty imposed by a statutory or other authority;

PO means a purchase order for the Goods submitted by the Customer to Comfab;

PPSA means the *Personal Property Securities Act 2009* (Cth) as amended;

Price means the price for the Goods as specified in the Quote or the Price List;

Price List means the price list for Goods made available by Comfab from time to time and communicated to the Customer orally or in writing.

Quote means Comfab's written quote for the Goods given to the Customer;

Related body corporate has the meaning given in the *Corporations Act 2001* (Cth);

Stock Goods means Goods that have not been manufactured in accordance with the Customer's drawings or specifications or otherwise custom made for the Customer; and

Terms means these Terms and Conditions of Sale.

2 Basis of Agreement

2.1 Unless otherwise agreed by Comfab in writing, these Terms apply exclusively to every Agreement formed between Comfab and the Customer for the supply of Goods and the provision of services and cannot be varied or replaced by any other conditions, including the Customer's terms and conditions (if any).

2.2 An Agreement between Comfab and the Customer for the supply of Goods and/or the provision of services is formed when Comfab accepts, in writing or by email, a PO from the Customer, provided the PO does not contain additional or varied terms or Price to those set out in the Quote or the Price List communicated to the Customer.

2.3 A Quote issued by Comfab is open for acceptance within the period stated in the Quote or 30 days if no period is stated.

2.4 A PO must be in writing and contain a description of the Goods and/or services to be supplied and details of any special requirements.

2.5 Each Agreement incorporates any Quote, the PO and these Terms.

2.6 If there is any inconsistency between these Terms, any Quote and the PO, the inconsistency must be resolved in accordance with the following order of priority: (a) Quote; (b) Terms; and (c) PO.

2.7 Comfab may vary these Terms by written notice to the Customer at any time. Any variations will apply to all POs placed after the notice date.

3 Prices

3.1 Unless otherwise specified in the Quote or Price List, Prices exclude GST, any other taxes or duties imposed on or in relation to the Goods and costs associated with delivery of the Goods to the Customer.

3.2 If the Customer requests any variation to an Agreement, or if there is any change in the costs incurred by Comfab in relation to the Goods or the provision of the services, including due to increased costs of labour or materials, fluctuating currency exchange rates, freight insurance and customs or primage duties, Comfab may vary its Price to take account of any such change, by notifying the Customer in writing. Comfab is under no obligation to supply the Goods unless and until the Customer accepts the Price variation.

4 Payment

4.1 Where Comfab agrees in writing to grant a credit facility to the Customer under the terms of a Credit Application, the Customer must pay for the Goods in full within 30 days from end of the month in which the tax invoice is issued by Comfab for the Goods.

4.2 If no credit facility is in place between Comfab and the Customer, the Customer must pay for the Goods in full:

- (a) in respect of Stock Goods, before Comfab despatches the Goods for delivery to the Customer; and
- (b) in respect of all other Goods, before Comfab manufactures the Goods.

4.3 All payments must be made by direct debit to Comfab's nominated account or by cheque or credit card in accordance with details set out on Comfab's invoices.

5 Payment Default & Termination

5.1 If the Customer defaults in payment by the due date of any amount payable to Comfab or otherwise breaches these Terms or suffers an Insolvency Event, all money payable under the PO by the Customer to Comfab on any account, becomes immediately due and payable without the requirement of any notice to the Customer, and Comfab may, without prejudice to any of its other rights:

- (a) 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;
- (b) charge the Customer for, and the Customer must indemnify Comfab against, all costs and expenses (including without limitation all legal costs and expenses) incurred by it resulting from the default or in taking action to enforce compliance with an Agreement or to recover any Goods;
- (c) at the Customer's cost, take all steps necessary (including legal action) to recover the Goods, including entering the Customer's premises where the Goods are, or are believed to be, located, and the Customer expressly consents to Comfab (and its employees, officers and agents) entering the premises for the purposes of recovering the Goods;
- (d) enforce any security interests in Goods held by the Comfab; or
- (e) cease or suspend supply of any further Goods or the provision of credit facilities to the Customer.

5.2 Either party may terminate an Agreement:

- (a) immediately on written notice to the other party where either party has a liquidator appointed to it; or
- (b) on 14 days written notice where the other party is in breach of its obligations under an Agreement and such breach is not remedied within 30 days of written notice that specifies the breach.

5.3 Termination of an Agreement does not affect the rights of a party which accrued prior to the effective date of termination.

6 Passing of Property

6.1 Until Comfab receives full payment in cleared funds of all amounts owing to it by the Customer (including for all Goods supplied by it to the Customer):

- (a) title in all Goods remains with Comfab;
- (b) the Customer must hold the Goods so they can be identified as the property of Comfab (including by maintaining Comfab's labelling and packaging) and keep the Goods separate from its goods;
- (c) the Customer must hold the proceeds of any sale of the Goods on trust for Comfab in a separate account with a bank to whom the Customer has not given security; and
- (d) Comfab may without notice, lawfully enter any premises where it suspects the Goods are and remove them, notwithstanding that they may have been attached to other goods or property, and for this purpose the Customer irrevocably licences Comfab to enter such premises and indemnifies Comfab from and against all costs, claims, demands or actions by any party arising from such action.

7 PPSA

7.1 For the purposes of these Terms:

- (a) terms used in clause 7 that are defined in the PPSA have the same meaning as in the PPSA;
- (b) these Terms are a security agreement and Comfab has a purchase money security interest in all present and future Goods supplied by Comfab to the Customer and the proceeds of the Goods received by the Customer;
- (c) the security interest is a continuing interest irrespective of whether there are monies or obligations owing by the Customer to Comfab at any particular time; and
- (d) the Customer must do whatever is necessary (including executing all documents) in order to give effect to the security interest created under an Agreement (including procuring any third party to take all necessary steps as Comfab may at any time require).

7.2 Where permitted by the PPSA, the Customer:

- (a) waives any rights to receive the notifications, verifications, disclosures or other documentation specified under sections 95, 118, 121(4), 130, 132 135 and 157 of the PPSA; and
- (b) agrees that: (i) the provisions of Chapter 4 of the PPSA which are for the benefit of the Customer or which place obligations on Comfab will apply only to the extent that they are mandatory; (ii) where Comfab has rights in addition to those in Chapter 4 of the PPSA, those rights will continue to apply; and (iii) pursuant to section 275(6) of the PPSA, neither Comfab nor the Customer is required to disclose to an interested person information regarding Comfab's security interest.

7.3 The Customer must not, without the prior written consent of Comfab:

- (a) register a financing statement or a financing change statement in relation to the Goods pursuant to the PPSA;
- (b) make a demand to alter the financing statement in relation to the Goods pursuant to section 178 of the PPSA; or
- (c) grant any security interest, lien or other right over the Goods (of any of them).

7.4 Comfab may allocate amounts received from the Customer in any manner Comfab determines.

8 Risk and Insurance

8.1 Risk in the Goods and all insurance responsibility for theft, damage or otherwise will pass to the Customer immediately on delivery of Goods to the Customer.

9 Performance of Agreement

9.1 Any period or date for delivery of Goods stated by Comfab is an estimate only. Comfab:

- (a) will use its reasonable endeavours to meet any such estimated dates for delivery; and
- (b) may make a partial delivery of Goods under an Agreement, but will not be liable for any Loss suffered by the Customer or any third party for failure to meet any estimated delivery date or making a partial delivery.

9.2 A completed driver's manifest or delivery docket whether signed by the driver or by the Customer or its employee or agent will be proof of delivery of Goods invoiced.

10 Delivery

10.1 Comfab will arrange for the delivery of the Goods to the Customer to the location set out in the Quote or as otherwise agreed between the parties. Unless otherwise agreed by Comfab, the Customer must pay the cost of delivery for the Goods (including detention time on freight in respect of the Goods).

- 10.2 The Customer must advise Comfab in writing within 7 days of delivery if there is damage to the Goods, that the wrong Goods have been received or that the quantity of the Goods is incorrect.
- 10.3 If the Customer does not give written notice to Comfab within 7 days of delivery of the Goods of any of the matters specified in clause 10.2, the Customer is deemed to have accepted the Goods.

11 Warranties and Liability

11.1 Comfab warrants that:

- (a) all Goods supplied to the Customer under an Agreement: (i) substantially comply with the PO for the Goods; (ii) are fit for the purpose for which they are intended; (iii) are of merchantable quality; (iv) are free from defects; (v) are new; and (vi) will be supplied free from all encumbrances; and
- (b) Comfab will at all times: (i) exercise all care, skill, attention and diligence and will employ techniques of a high standard in accordance with best industry practice; and (ii) comply with all laws applicable to the supply of the Goods to the Customer.

11.2 Except as set out in clause 11.1 of these Terms, and subject to any guarantees, terms, warranties and conditions that by law cannot be excluded (including guarantees given under Division 1 of Part 3-2 of the ACL), any term, guarantee, condition or warranty in respect of the Goods and any services provided under an Agreement or any remedy for their failure, whether implied by statute, common law, trade usage, custom or otherwise, is expressly excluded.

11.3 The liability of Comfab (and its Related bodies corporate) to the Customer (if the Customer is a Consumer or acquires the Goods as a Consumer) for any breach of a consumer guarantee, warranty or condition imposed by the ACL is limited to such one or more of the following as Comfab decides:

- (a) in relation to Goods: (i) replacing the Goods or resupplying equivalent goods; (ii) repairing the Goods; (iii) paying the cost of replacing the Goods or acquiring equivalent goods; or (iv) paying the cost of having the Goods repaired; or
- (b) in relation to the supply of services, to (i) supplying the services again; or (ii) providing for the cost of having the services provided again.

11.4 Except as provided in this clause 11.3 and in clause 11.5, nothing in these Terms restricts, limits or modifies any rights a Consumer may have against Comfab (and its Related bodies corporate) under Divisions 1 and 2 of Part 5-4 of the ACL.

11.5 The liability of Comfab (and its Related bodies corporate) to indemnify the Customer under Division 3 of Part 5-4 of the ACL where the Customer has supplied the Goods or services to a Consumer:

- (a) if the Goods are not of a kind ordinarily acquired for personal, domestic or household use or consumption, is limited to: (i) the cost of replacing the Goods; (ii) the cost of supplying equivalent Goods; or (iii) the cost of having the Goods repaired, whichever is the lowest amount;
- (b) if the services are not of a kind ordinarily acquired for personal, domestic or household use or consumption, is limited to in relation to the supply of services, to: (i) supplying the services again; or (ii) providing for the cost of having the services provided again; and
- (c) if the Goods or services are of a kind ordinarily acquired for personal, domestic or household use or consumption, is limited to the payment of the indemnity amount determined for the purposes of section 274 of the ACL.

11.6 To the maximum extent permitted by law and subject to the other provisions of this clause 11, Comfab's total liability to the Customer (or any Related body corporate) arising out of or in connection with its performance of its obligations pursuant to an Agreement (including the supply or installation of any Goods), howsoever arising is limited as follows:

- (a) Comfab will have no liability to the Customer (or any Related body corporate) for any Consequential Loss; and
- (b) Comfab's total aggregate liability for all Losses of the Customer (and all Related bodies corporate), howsoever arising, will not exceed the GST-exclusive Price paid by the Customer to Comfab for the specific Goods that give rise to the Loss in question.

12 Changes to orders, cancellation and exchange or return of Goods

12.1 Photographs, drawings, illustrations, weights, dimensions and any other particulars accompanying, associated with or given in a Quote, or any catalogue or marketing material given by or on behalf of Comfab may be subject to alteration without notice.

12.2 Comfab reserves the right to make changes in the construction and/or design of goods for the benefit of the design or manufacture of the Goods and in accordance with Comfab's current corresponding standard models and the Customer must accept such changes.

12.3 If the Customer wishes to request any changes to an order for Goods after an Agreement has been formed, the Customer must make that request in writing. Changes must be agreed to in writing by an authorised employee of Comfab, who will also advise of any new Price. If Comfab agrees to the amendment, the Customer must submit an updated PO containing the revised Price. Other than as specified in clause 2.2, no additional work will be carried out by Comfab without the Customer's written instruction or PO and acceptance of the revised Price.

12.4 No purported cancellation or suspension of PO or any part of it by the Customer is binding on Comfab once the PO has been accepted.

12.5 Subject to clause 12.6, the Customer may return Stock Goods to Comfab within 30 days of delivery of the Goods to the Customer. Comfab reserves the right to charge a restocking fee for any return and will notify the Customer of the amount of the restocking fee at the time it approves the return.

12.6 The Customer may not return any Goods (whether for exchange or refund) unless prior approval in writing has been given by Comfab. Comfab may, at its sole discretion, issue a credit for the Goods, exchange them or provide a refund of the Price paid for the Goods.

12.7 If Comfab agrees to accept the return of any Goods, Comfab will not be responsible for any freight or delivery charges for such return unless Comfab unless the carrier is one nominated by Comfab.

12.8 Malfunction or breakdown of Goods due to use of incorrect or non-specified spare parts shall be the responsibility of the Customer.

13 Customer Responsibilities

13.1 The Customer is responsible for:

- (a) unloading the Goods when they are delivered by Comfab pursuant to clause 10.1; and
- (b) installing the Goods.

13.2 Where requested by the Customer, Comfab may, but under no obligation to, provide verbal instructions for installing the Goods.

13.3 Where the Customer has requested Comfab manufacture Goods according to the Customer's specifications and/or drawings, the Customer must review and approve drawings submitted to the Customer for the purpose of approving Goods or services to be provided. Comfab will not commence manufacturing any Goods until such approval is received by Comfab.

14 Intellectual Property

14.1 Nothing in an Agreement affects any party's existing rights in any Background IP. Subject to each party's compliance with the Agreement, including the Customer's payment of the Price in accordance with the Agreement and any restrictions specified in an Agreement, each party grants to the other a non-exclusive, royalty-free revocable licence to use (excluding the right to sub-licence) that party's Background IP solely in connection with the Agreement and solely for the purpose for which it was provided and in accordance with the terms of the Agreement.

14.2 The parties acknowledge and agree that:

- (a) Comfab owns, or has rights to use, all the IP Rights in the Goods (including any Goods manufactured in accordance with the Customer's drawings or specifications) and any material, manuals, descriptions, drawings or designs associated with the Goods (including any drawings created by Comfab in accordance with the Customer's specifications) (**Comfab IP**); and
- (b) Comfab grants the Customer a non-exclusive, perpetual, royalty-free revocable licence to use the Comfab IP solely for the purpose of using, commercialising or selling the Goods.

14.3 The Customer is not permitted to sub-licence or assign the licence to use the Comfab IP granted under this clause without Comfab's prior written consent.

15 Force Majeure

15.1 Comfab is not liable in any way to the extent that it is prevented from acting by circumstances beyond its reasonable control including, without limitation, industrial disputes, strikes, lockouts, accident, breakdown, import or export restrictions, acts of God, pandemic, epidemic or acts of terrorism or war. If an event of force majeure occurs, Comfab may suspend or terminate any Agreement by giving the Customer written notice.

16 Trustees

16.1 If the Customer is a trustee of a trust, the Customer acknowledges that the trustee will be liable for complying with the Agreement and that the assets of the Trust will be available to meet payment of the Price.

17 Miscellaneous

17.1 The law of Victoria applies to these Terms and each Agreement. The parties submit to the exclusive jurisdiction of the courts of or in Victoria and the courts of appeal therefrom, in respect of any matters arising out of or in connection with an Agreement.

17.2 Comfab's failure to enforce any of these Terms will not be construed as a waiver of any of Comfab's rights.

17.3 If any of the Terms are unenforceable they will be read down so as to be enforceable or, if they cannot be so read down, the unenforceable terms will be severed from these Terms without affecting the enforceability of the remaining terms.

17.4 A notice given under these Terms must be in writing and handed personally or sent by email or post to the last known address of the addressee. Notices sent by post to an address in Australia are deemed to be received within 3 days of posting. Notices sent by email are deemed received upon successful transmission.

By signing below, the parties agree that these Terms apply exclusively to every Agreement formed between Comfab and the Customer for the supply of Goods and the provision of services.

SIGNED for and on behalf of:

_____ (**Customer**) by its duly authorised representative:

Signature of authorised representative

Name and position of authorised representative (*please print*)

The person named above warrants in favour of Comfab Products Pty Ltd that they are duly authorised to sign on behalf of the Customer and to bind the Customer to these Terms and to an Agreement.

SIGNED for and on behalf of **Comfab Products Pty Ltd** by its duly authorised representative:

Signature of authorised representative

Name and position of authorised representative (*please print*)

The person named above warrants in favour of the Customer that they are duly authorised to sign on behalf of Comfab and to bind Comfab to these Terms and to an Agreement.