

Brinkman Australia Pty Ltd – Terms & Conditions of Trade

1. **Definitions**
- 1.1 "Brinkman" means Brinkman Australia Pty Ltd, its successors and assigns or any person acting on behalf of and with the authority of Brinkman Australia Pty Ltd.
- 1.2 "Client" means the person/s buying the Goods as specified in any invoice, document or order, and if there is more than one Client is a reference to each Client jointly and severally.
- 1.3 "Goods" means all Goods or Services supplied by Brinkman to the Client at the Client's request from time to time (where the context so permits the terms "Goods" or "Services" shall be interchangeable for the other).
- 1.4 "Price" means the Price payable for the Goods as agreed between Brinkman and the Client in accordance with clause 6 below.
2. **Acceptance**
- 2.1 The Client is taken to have exclusively accepted and is immediately bound, jointly and severally, by these terms and conditions if the Client places an order for or accepts delivery of the Goods.
- 2.2 These terms and conditions may only be amended with Brinkman's consent in writing and shall prevail to the extent of any inconsistency with any other document or agreement between the Client and Brinkman.
3. **Electronic Transactions (Victoria) Act 2000**
- 3.1 Electronic signatures shall be deemed to be accepted by either party providing that the parties have complied with Section 9 of the Electronic Transactions (Victoria) Act 2000 or any other applicable provisions of that Act or any Regulations referred to in that Act.
4. **Online Ordering**
- 4.1 The Client acknowledges and agrees that:
 - (a) Brinkman does not guarantee the website's performance or availability of any of its Goods; and
 - (b) on-line ordering may be unavailable from time to time for regularly scheduled maintenance and/or upgrades; and
 - (c) there are inherent hazards in electronic distribution and as such Brinkman cannot warrant against delays or errors in transmitting data between the client and Brinkman including orders. The Client agrees that to the maximum extent permitted by law, Brinkman will not be liable for any losses which the Client suffers as a result of online-ordering not being available or for delays or errors in transmitting orders.
- 4.2 Brinkman reserves the right to terminate the Client's order in the event that Brinkman learns that the Client has provided false or misleading information, interfered with other users or the administration of Brinkman's Services, or violated these terms and conditions.
5. **Change in Control**
- 5.1 The Client shall give Brinkman not less than fourteen (14) days prior written notice of any proposed change of ownership of the Client and/or any other change in the Client's details (including but not limited to, changes in the Client's name, address, contact phone or fax numbers, or business practice). The Client shall be liable for any loss incurred by Brinkman as a result of the Client's failure to comply with this clause.
6. **Price and Payment**
- 6.1 At Brinkman's sole discretion the Price shall be either:
 - (a) as indicated on any invoice provided by Brinkman to the Client; or
 - (b) Brinkman's quoted price (subject to clause 6.2) which will be valid for the period stated in the quotation or otherwise for a period of thirty (30) days.
- 6.2 Brinkman reserves the right to change the Price if a variation to Brinkman's quotation is requested. Any variation from the plan of scheduled Services or addition to the Services to be provided, specific instructions from the Client (including providing Services to prevent unforeseen circumstances or to solve difficulties that have arisen), specifications of the Goods (including, but not limited to, any variation as a result of fluctuations in currency exchange rates or increases to Brinkman in the cost of taxes, levies, materials and labour) will be charged for on the basis of Brinkman's quotation and will be shown as variations on the invoice.
- 6.3 At time of completion as per clause 8 and after consultation, if the size of the installation or that assembled increases or decreases relative to the original quote (being subject to any variations as per clause 6.2), Brinkman shall reserve the right to charge for the additional work as a variation or to credit the expenses actually saved.
- 6.4 At Brinkman's sole discretion a non-refundable deposit may be required.
- 6.5 Time for payment for the Goods being of the essence, the Price will be payable by the Client on the date/s determined by Brinkman, which may be:
 - (a) on delivery of the Goods;
 - (b) before delivery of the Goods;
 - (c) by way of instalments/progress payments in accordance with Brinkman's payment schedule;
 - (d) the date specified on any invoice or other form as being the date for payment; or
 - (e) failing any notice to the contrary, the date which is fourteen (14) days following the date of any invoice given to the Client by Brinkman.
- 6.6 Payment may be made by cash, cheque, bank cheque, electronic/on-line banking, credit card (plus a surcharge of up to three percent (3%) of the Price), or by any other method as agreed to between the Client and Brinkman.
- 6.7 Unless otherwise stated the Price does not include GST. In addition to the Price the Client must pay to Brinkman an amount equal to any GST Brinkman must pay for any supply by Brinkman under this or any other agreement for the sale of the Goods. The Client must pay GST, without deduction or set off of any other amounts, at the same time and on the same basis as the Client pays the Price. In addition the Client must pay any other taxes and duties that may be applicable in addition to the Price except where they are expressly included in the Price.
7. **Delivery of Goods**
- 7.1 Delivery ("Delivery") of the Goods is taken to occur at the time that:
 - (a) the Client or the Client's nominated carrier takes possession of the Goods at Brinkman's address; or
 - (b) Brinkman (or Brinkman's nominated carrier) delivers the Goods to the Client's nominated address even if the Client is not present at the address.
- 7.2 At Brinkman's sole discretion the cost of delivery is in addition to the Price.
- 7.3 The Client must take delivery by receipt or collection 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 Brinkman shall be entitled to charge a reasonable fee for redelivery and/or storage.
- 7.4 Brinkman may deliver the Goods in separate instalments. Each separate instalment shall be invoiced and paid in accordance with the provisions in these terms and conditions.
- 7.5 Any time or date given by Brinkman to the Client is an estimate only. The Client must still accept delivery of the Goods even if late and Brinkman will not be liable for any loss or damage incurred by the Client as a result of the delivery being late.
- 7.6 The Client shall ensure that Brinkman has access to auxiliary tools and materials that may be required for the completion of the Services at no cost to Brinkman.
- 7.7 Brinkman may at its discretion notify the Client that it requires to store at the worksite materials, fittings and appliances, or plant and tools required for the Services, in which event the Client shall supply Brinkman a safe area for storage and shall take all reasonable efforts to protect all items so stored from possible destruction, theft or damage. In the event that any such items are destroyed, stolen or damaged then the cost of repair or replacement shall be the Client's responsibility.
8. **Completion**
- 8.1 Inspection shall occur within fourteen (14) days of completion of the work being completed. The time and date of the inspection shall be by agreement between the parties. The Client may be accompanied by an expert.
- 8.2 Completion is deemed to have occurred:
 - (a) if the installation or the work has been installed in fully complete and operational condition; and
 - (b) if after testing within the context of the inspection has:
 - (i) been proved to meet the Client's requirements; and
 - (ii) has been approved by the Client at the inspection and tested.
- 8.3 Minor defects shall not be cause for withholding approval by the Client as these are to be remedied by Brinkman within a mutually agreed timeframe.
- 8.4 For other defects and in conjunction with clause 18, on completion of remedial work, another inspection shall be carried out on the same basis of clause 8.1.
- 8.5 Failure on the behalf of the Client to allow for an inspection to occur, shall entitle Brinkman to deem the work has been factually performed and the work completed.
9. **Risk**
- 9.1 Risk of damage to or loss of the Goods passes to the Client on Delivery and the Client must insure the Goods on or before Delivery.
- 9.2 If any of the Goods are damaged or destroyed following delivery but prior to ownership passing to the Client, Brinkman is entitled to receive all insurance proceeds payable for the Goods. The production of these terms and conditions by Brinkman is sufficient evidence of Brinkman's rights to receive the insurance proceeds without the need for any person dealing with Brinkman to make further enquiries.
- 9.3 If the Client requests Brinkman to leave Goods outside Brinkman'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.
- 9.4 Where Brinkman is required to install the Goods the Client warrants that the structure of the premises or equipment in or upon which these Goods are to be installed or erected is sound and will sustain the installation and work incidental thereto and Brinkman shall not be liable for any claims, demands, losses, damages, costs and expenses howsoever caused or arising in connection with the installation and work incidental thereto.
- 9.5 Where the contract does not include installation of Goods by Brinkman, Brinkman shall not be liable for any defect or damage resulting from incorrect or faulty installation.
- 9.6 Any advice, recommendation, information, assistance or service provided by Brinkman in relation to Goods or Services supplied is given in good faith, is based on Brinkman's own knowledge and experience and shall be accepted without liability on the part of Brinkman and it shall be the responsibility of the Client to confirm the accuracy and reliability of the same in light of the use to which the Client makes or intends to make of the Goods or Services.
- 9.7 The Client accepts that Brinkman shall not be held responsible for any losses or damage to the Goods that may arise due to, but not limited to:
 - (a) situations outside of Brinkman's control;
 - (b) inexpert use by the Client including:
 - (i) the Client's failure to observe the regulations, instructions consultancy activities and manuals provided by Brinkman; or
 - (ii) fails to pass such information in 9.7(b)(i) to subsequent buyers or
 - (iii) the Client has used the supplied Goods outside the Client's business or for private use.
 - (c) defects in the Client's business or management; or
 - (d) the use of harmful substances, pesticides, herbicides or other methods of protection.
10. **Specifications, Trials and Acceptance Testing**
- 10.1 The Client acknowledges that:
 - (a) all descriptive specifications, illustrations, drawings, data, dimensions, ratings and weights stated in Brinkman's fact sheets, price lists or advertising material, are approximate only and are given by way of identification only. The Client shall not be entitled to rely on such information, and any use of such does not constitute a sale by description, and does not form part of the contract, unless expressly stated as such in writing by Brinkman;
 - (b) while Brinkman may have provided information or figures to the Client regarding the performance of the Goods, the Client acknowledges that Brinkman has given these in good faith, and are estimates based on industry prescribed estimates under optimal operating conditions.
- 10.2 Where it is required as part of delivery or the acceptance of the Goods that trial runs are to be conducted, the Client shall provide the opportunity after operational installation of the Goods to conduct pre-testing, and to implement any improvements and/or alterations as deemed fit by Brinkman. The Client shall also indemnify Brinkman against all costs, loss, damages arising or that may result in an interruption to production processes.
- 10.3 Where an acceptance testing has been accepted by the Client as per clause 10.2, Brinkman shall deem that the Client has accepted:
 - (a) the assembly of the Goods; or
 - (b) the Goods being put into operation on the completion of the inspection.
- 10.4 Brinkman shall reserve the right to charge for any expenses associated with performing trials or acceptance testing which shall be charged as an extra.
11. **Provisions for Computer Software Applications**
- 11.1 In conjunction with clause 19, the provision for a right to use software provided by Brinkman does not constitute a complete or partial transfer of copyright or other intellectual property in the software.
- 11.2 Under the right to use the software, the Client may use the software on one computer, one processor and one location at the same time.
- 11.3 The Client is allowed to make a spare copy of the software on the proviso that all distinguishing marks, (including, but not limited to, trademarks, logos, brand names, copyright notes, user names and numbers) are copied identically. Where mutatis mutandis applies to the copy, then the original provided by Brinkman shall become the spare copy.
- 11.4 The Client is not permitted to:
 - (a) copy the software either partially or completely in any way regardless of method or medium;
 - (b) remove or alter distinguishing marks (including, but not limited to, trademarks, logos, brand names, copyright notes, user names and numbers);
 - (c) to partly or entirely alter, adapt, convert, decompile, disassemble, simulate or process the software in any manner to apply reverse engineering or to have this performed by a third party;
 - (d) to partly or completely let out the software, to alienate it, to transfer it as a security or under whichever title, make it available to any third party, to submit it for perusal or make it accessible;
 - (e) unless otherwise specifically agreed to, share the software partially or wholly with another computer either electronically or by telecommunications, or to use it on another computer which is part of or is linked to a network.
- 11.5 The Client and the Client's employees shall take all precautions necessary to prevent the software from falling into the hands of any third party.
12. **Access**
- 12.1 The Client shall ensure that Brinkman has clear and free access to the work site at all times to enable them to undertake the Services. Brinkman shall not be liable for any loss or damage to the site (including, without limitation, damage to pathways, driveways and concreted or paved or grassed areas) unless due to the negligence of Brinkman.
13. **Underground Locations**
- 13.1 Prior to Brinkman commencing any work the Client must advise Brinkman of the precise location of all underground services on the site and clearly mark the same. The underground mains & services the Client must identify include, but are not limited to, electrical services, gas services, sewer services, pumping services, sewer connections, sewer sludge mains, water mains, irrigation pipes, telephone cables, fibre optic cables, oil pumping mains, and any other services that may be on site.
- 13.2 Whilst Brinkman will take all care to avoid damage to any underground services the Client agrees to indemnify Brinkman in respect of all and any liability claims, loss, damage, costs and fines as a result of damage to services not precisely located and notified as per clause 13.1.
14. **Compliance with Laws**
- 14.1 The Client and Brinkman shall comply with the provisions of all statutes, regulations and bylaws of government, local and other public authorities that may be applicable to the Services.
- 14.2 The Client shall obtain (at the expense of the Client) all licenses and approvals that may be required for the Services.
- 14.3 The Client agrees that the site will comply with any relevant work health and safety laws and any other relevant safety standards or legislation.
15. **Title**
- 15.1 Brinkman and the Client agree that ownership of the Goods shall not pass until:
 - (a) the Client has paid Brinkman all amounts owing to Brinkman; and
 - (b) the Client has met all of its other obligations to Brinkman.
- 15.2 Receipt by Brinkman 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.
- 15.3 It is further agreed that:
 - (a) until ownership of the Goods passes to the Client in accordance with clause 15.1 that the Client is only a bailee of the Goods and must return the Goods to Brinkman on request.
 - (b) the Client holds the benefit of the Client's insurance of the Goods on trust for Brinkman and must pay to Brinkman the proceeds of any insurance in the event of the Goods being lost, damaged or destroyed.
 - (c) the Client must not sell, dispose, or otherwise part with possession of the Goods other than in the ordinary course of business and for market value. If the Client sells, disposes or parts with possession of the Goods then the Client must hold the proceeds of any such act on trust for Brinkman and must pay or deliver the proceeds to Brinkman on demand.
 - (d) the Client should not convert or process the Goods or intermix them with other goods but if the Client does so then the Client holds the resulting product on trust for the benefit of Brinkman and must sell, dispose of or return the resulting product to Brinkman as it so directs.
 - (e) the Client irrevocably authorises Brinkman to enter any premises where Brinkman believes the Goods are kept and recover possession of the Goods.
 - (f) Brinkman may recover possession of any Goods in transit whether or not delivery has occurred.
 - (g) the Client shall not charge or grant an encumbrance over the Goods nor grant nor otherwise give away any interest in the Goods while they remain the property of Brinkman.
 - (h) Brinkman may commence proceedings to recover the Price of the Goods sold notwithstanding that ownership of the Goods has not passed to the Client.
16. **Personal Property Securities Act 2009 ("PPSA")**
- 16.1 In this clause financing statement, financing change statement, security agreement, and security interest has the meaning given to it by the PPSA.
- 16.2 Upon assenting to these terms and conditions in writing the Client acknowledges and agrees that these terms and conditions constitute a security agreement for the purposes of the PPSA and creates a security interest in all Goods and/or collateral (account) – being a monetary obligation of the Client to Brinkman for Services – that have previously been supplied and that will be supplied in the future by Brinkman to the Client.
- 16.3 The Client undertakes to:
 - (a) promptly sign any further documents and/or provide any further information (such information to be complete, accurate and up-to-date in all respects) which Brinkman may reasonably require to:
 - (i) register a financing statement or financing change statement in relation to a security interest on the Personal Property Securities Register;
 - (ii) register any other document required to be registered by the PPSA; or
 - (iii) correct a defect in a statement referred to in clause 16.3(a)(i) or 16.3(a)(ii);
 - (b) indemnify, and upon demand reimburse, Brinkman for all expenses incurred in registering a financing statement or financing change statement on the Personal Property Securities Register established by the PPSA or releasing any Goods charged thereby;

Brinkman Australia Pty Ltd – Terms & Conditions of Trade

- (c) not register a financing change statement in respect of a security interest without the prior written consent of Brinkman;
- (d) not register, or permit to be registered, a financing statement or a financing change statement in relation to the Goods and/or collateral (account) in favour of a third party without the prior written consent of Brinkman;
- (e) immediately advise Brinkman of any material change in its business practices of selling the Goods which would result in a change in the nature of proceeds derived from such sales.
- 16.4 Brinkman and the Client agree that sections 96, 115 and 125 of the PPSA do not apply to the security agreement created by these terms and conditions.
- 16.5 The Client waives their rights to receive notices under sections 95, 118, 121(4), 130, 132(3)(d) and 132(4) of the PPSA.
- 16.6 The Client waives their rights as a grantor and/or a debtor under sections 142 and 143 of the PPSA.
- 16.7 Unless otherwise agreed to in writing by Brinkman, the Client waives their right to receive a verification statement in accordance with section 157 of the PPSA.
- 16.8 The Client must unconditionally ratify any actions taken by Brinkman under clauses 16.3 to 16.5.
- 16.9 Subject to any express provisions to the contrary nothing in these terms and conditions is intended to have the effect of contracting out of any of the provisions of the PPSA.
- 17. Security and Charge**
- 17.1 In consideration of Brinkman agreeing to supply the Goods, the Client charges all of its rights, title and interest (whether joint or several) in any land, realty or other assets capable of being charged, owned by the Client either now or in the future, to secure the performance by the Client of its obligations under these terms and conditions (including, but not limited to, the payment of any money).
- 17.2 The Client indemnifies Brinkman from and against all Brinkman's costs and disbursements including legal costs on a solicitor and own client basis incurred in exercising Brinkman's rights under this clause.
- 17.3 The Client irrevocably appoints Brinkman and each director of Brinkman as the Client's true and lawful attorney/s to perform all necessary acts to give effect to the provisions of this clause 17 including, but not limited to, signing any document on the Client's behalf.
- 18. Defects, Warranties and Returns, Competition and Consumer Act 2010 (CCA)**
- 18.1 The Client must inspect the Goods on delivery and must within seven (7) days of delivery notify Brinkman in writing of any evident defect/damage, shortage in quantity, or failure to comply with the description or quote. The Client must notify any other alleged defect in the Goods as soon as reasonably possible after any such defect becomes evident. Upon such notification the Client must allow Brinkman to inspect the Goods.
- 18.2 Under applicable State, Territory and Commonwealth Law (including, without limitation the CCA), certain statutory implied guarantees and warranties (including, without limitation the statutory guarantees under the CCA) may be implied into these terms and conditions (**Non-Excluded Guarantees**).
- 18.3 Brinkman acknowledges that nothing in these terms and conditions purports to modify or exclude the Non-Excluded Guarantees.
- 18.4 Except as expressly set out in these terms and conditions or in respect of the Non-Excluded Guarantees, Brinkman makes no warranties or other representations under these terms and conditions including but not limited to the quality or suitability of the Goods. Brinkman's liability in respect of these warranties is limited to the fullest extent permitted by law.
- 18.5 If the Client is a consumer within the meaning of the CCA, Brinkman's liability is limited to the extent permitted by section 64A of Schedule 2.
- 18.6 If Brinkman is required to replace the Goods under this clause or the CCA, but is unable to do so, Brinkman may refund any money the Client has paid for the Goods.
- 18.7 If the Client is not a consumer within the meaning of the CCA, Brinkman's liability for any defect or damage in the Goods is:
- (a) limited to the value of any express warranty or warranty card provided to the Client by Brinkman at Brinkman's sole discretion;
- (b) limited to any warranty to which Brinkman is entitled, if Brinkman did not manufacture the Goods;
- (c) otherwise negated absolutely.
- 18.8 Subject to this clause 18, returns will only be accepted provided that:
- (a) the Client has complied with the provisions of clause 18.1; and
- (b) Brinkman has agreed that the Goods are defective; and
- (c) the Goods are returned within a reasonable time at the Client's cost (if that cost is not significant); and
- (d) the Goods are returned in as close a condition to that in which they were delivered as is possible.
- 18.9 Notwithstanding clauses 18.1 to 18.8 but subject to the CCA, Brinkman shall not be liable for any defect or damage which may be caused or partly caused by or arise as a result of:
- (a) the Client failing to properly maintain or store any Goods;
- (b) the Client using the Goods for any purpose other than that for which they were designed;
- (c) the Client continuing the use of any Goods after any defect became apparent or should have become apparent to a reasonably prudent operator or user;
- (d) the Client failing to follow any instructions or guidelines provided by Brinkman;
- (e) fair wear and tear, any accident, or act of God.
- 18.10 Brinkman may in its absolute discretion accept non-defective Goods for return in which case Brinkman may require the Client to pay handling fees of up to twenty-five percent (25%) of the value of the returned Goods plus any freight costs.
- 18.11 Notwithstanding anything contained in this clause if Brinkman is required by a law to accept a return then Brinkman will only accept a return on the conditions imposed by that law.
- 19. Intellectual Property**
- 19.1 Where Brinkman has designed, drawn, calculated, modelled or developed Goods for the Client, then the copyright in any designs and drawings and documents shall remain the property of Brinkman. The documentation, plans, designs, etc. provided to the Client by Brinkman is for the sole use of the Client and shall not be copied, handed over to a third party, presented for perusal or made public without the express permission of Brinkman. Brinkman shall reserve the right to charge a licence fee for any plan, document, calculation or model designed by Brinkman for the Client, and subsequently used by any third party, and any contravention by the Client of this clause shall entitle Brinkman to fine the Client for every offence, without proof of such default being required. This fine does not prejudice Brinkman's right to claim full compensation over and above such fine.
- 19.2 The Client warrants that all designs, specifications or instructions given to Brinkman will not cause Brinkman to infringe any patent, registered design or trademark in the execution of the Client's order and the Client agrees to indemnify Brinkman against any action taken by a third party against Brinkman in respect of any such infringement.
- 19.3 The Client agrees that Brinkman may (at no cost) use for the purposes of marketing or entry into any competition, any documents, designs, drawings or Goods which Brinkman has created for the Client.
- 20. Confidentiality**
- 20.1 Each party agrees to treat all information and ideas communicated to it by the other confidentially and agree not to divulge it to any third party, without the other party's written consent. The parties will not copy any such information supplied, and will either return it or destroy it (together with any copies thereof) on request of the other party.
- 20.2 Where such information and know-how is communicated with any third party, it is the intention of Brinkman and accepted by the Client that all such information is to be treated as confidential by said third party.
- 21. Default and Consequences of Default**
- 21.1 Interest on overdue invoices shall accrue daily from the date when payment becomes due, until the date of payment, at a rate of two and a half percent (2.5%) per calendar month (and at Brinkman's sole discretion such interest shall compound monthly at such a rate) after as well as before any judgment.
- 21.2 If the Client owes Brinkman any money the Client shall indemnify Brinkman from and against all costs and disbursements incurred by Brinkman in recovering the debt (including but not limited to internal administration fees, legal costs on a solicitor and own client basis, Brinkman's contract default fee, and bank dishonour fees).
- 21.3 Further to any other rights or remedies Brinkman may have under this contract, if a Client has made payment to Brinkman by credit card, and the transaction is subsequently reversed, the Client shall be liable for the amount of the reversed transaction, in addition to any further costs incurred by Brinkman under this clause 21 where it can be proven that such reversal is found to be illegal, fraudulent or in contravention to the Client's obligations under this agreement.
- 21.4 Without prejudice to any other remedies Brinkman may have, if at any time the Client is in breach of any obligation (including those relating to payment) under these terms and conditions Brinkman may suspend or terminate the supply of Goods to the Client. Brinkman will not be liable to the Client for any loss or damage the Client suffers because Brinkman has exercised its rights under this clause.
- 21.5 Without prejudice to Brinkman's other remedies at law Brinkman shall be entitled to cancel all or any part of any order of the Client which remains unfulfilled and all amounts owing to Brinkman shall, whether or not due for payment, become immediately payable if:
- (a) any money payable to Brinkman becomes overdue, or in Brinkman's opinion the Client will be unable to make a payment when it falls due;
- (b) the Client becomes insolvent, convenes a meeting with its creditors or proposes or enters into an arrangement with creditors, or makes an assignment for the benefit of its creditors; or
- (c) a receiver, manager, liquidator (provisional or otherwise) or similar person is appointed in respect of the Client or any asset of the Client.
- 22. Cancellation**
- 22.1 Brinkman 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 Brinkman shall repay to the Client any money paid by the Client for the Goods. Brinkman shall not be liable for any loss or damage whatsoever arising from such cancellation.
- 22.2 In the event that the Client cancels delivery of Goods the Client shall be liable for any and all loss incurred (whether direct or indirect) by Brinkman as a direct result of the cancellation (including, but not limited to, any loss of profits).
- 22.3 Cancellation of orders for Goods made to the Client's specifications, or for non-stocklist items, will definitely not be accepted once production has commenced, or an order has been placed.
- 23. Dispute Resolution**
- 23.1 If a dispute arises between the parties to this contract then either party shall send to the other party a notice of dispute in writing adequately identifying and providing details of the dispute. Within fourteen (14) days after service of a notice of dispute, the parties shall confer at least once, to attempt to resolve the dispute. At any such conference each party shall be represented by a person having authority to agree to a resolution of the dispute. In the event that the dispute cannot be so resolved either party may by further notice in writing delivered by hand or sent by certified mail to the other party refer such dispute to arbitration. Any arbitration shall be:
- (a) referred to a single arbitrator to be nominated by the President of the Institute of Arbitrators Australia; and
- (b) conducted in accordance with the Institute of Arbitrators Australia Rules for the Conduct of Commercial Arbitration.
- 24. Privacy Act 1988**
- 24.1 The Client agrees for Brinkman to obtain from a credit reporting body (CRB) a credit report containing personal credit information (e.g. name, address, D.O.B, occupation, previous credit applications, credit history) about the Client in relation to credit provided by Brinkman.
- 24.2 The Client agrees that Brinkman may exchange information about the Client with those credit providers and with related body corporates for the following purposes:
- (a) to assess an application by the 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 creditworthiness of the Client including the Client's repayment history in the preceding two years.
- 24.3 The Client consents to Brinkman being given a consumer credit report to collect overdue payment on commercial credit.
- 24.4 The Client agrees that personal credit information provided may be used and retained by Brinkman for the following purposes (and for other agreed purposes or required by):
- (a) the provision of Goods; and/or
- (b) analysing, verifying and/or checking the Client's credit, payment and/or status in relation to the provision of Goods; and/or
- (c) processing of any payment instructions, direct debit facilities and/or credit facilities requested by the Client; and/or
- (d) enabling the collection of amounts outstanding in relation to the Goods.
- 24.5 Brinkman may give information about the Client to a CRB for the following purposes:
- (a) to obtain a consumer credit report;
- (b) allow the CRB to create or maintain a credit information file about the Client including credit history.
- 24.6 The information given to the CRB may include:
- (a) personal information as outlined in 24.1 above;
- (b) name of the credit provider and that Brinkman is a current credit provider to the Client;
- (c) whether the credit provider is a licensee;
- (d) type of consumer credit;
- (e) details concerning the Client's application for credit or commercial credit (e.g. date of commencement/termination of the credit account and the amount requested);
- (f) advice of consumer credit defaults, overdue accounts, loan repayments or outstanding monies which are overdue by more than sixty (60) days and for which written notice for request of payment has been made and debt recovery action commenced or alternatively that the Client no longer has any overdue accounts and Brinkman has been paid or otherwise discharged and all details surrounding that discharge (e.g. dates of payments);
- (g) information that, in the opinion of Brinkman, the Client has committed a serious credit infringement;
- (h) advice that the amount of the Client's overdue payment is equal to or more than one hundred and fifty dollars (\$150).
- 24.7 The Client shall have the right to request (by e-mail) from Brinkman:
- (a) a copy of the information about the Client retained by Brinkman and the right to request that Brinkman correct any incorrect information; and
- (b) that Brinkman does not disclose any personal information about the Client for the purpose of direct marketing.
- 24.8 Brinkman will destroy personal information upon the Client's request (by e-mail) or if it is no longer required unless it is required in order to fulfil the obligations of this agreement or is required to be maintained and/or stored in accordance with the law.
- 24.9 The Client can make a privacy complaint by contacting Brinkman via e-mail. Brinkman will respond to that complaint within seven (7) days of receipt and will take all reasonable steps to make a decision as to the complaint within thirty (30) days of receipt of the complaint. In the event that the Client is not satisfied with the resolution provided, the Client can make a complaint to the Information Commissioner at www.oaic.gov.au.
- 25. Unpaid Seller's Rights**
- 25.1 Where the Client has left any item with Brinkman for repair, modification, exchange or for Brinkman to perform any other service in relation to the item and Brinkman has not received or been tendered the whole of any monies owing to it by the Client, Brinkman shall have, until all monies owing to Brinkman are paid:
- (a) a lien on the item; and
- (b) the right to retain or sell the item, such sale to be undertaken in accordance with any legislation applicable to the sale or disposal of uncollected goods.
- 25.2 The lien of Brinkman shall continue despite the commencement of proceedings, or judgment for any monies owing to Brinkman having been obtained against the Client.
- 26. Force Majeure**
- 26.1 Where Brinkman or the Client is either wholly or in part is unable by reason of, an Act of God, strike, lockout, or other interference with work, war, blockade, disturbance, lightning, fire, earthquake, storm, flood, explosion, governmental restraint or embargo, unavailability or delay in availability of Goods, or transport, inability or delay in obtaining government approvals, or any other cause which is not reasonably within the control of the affected party (i.e. a force majeure event), to carry out any obligation under this agreement and that party:
- (a) gives the other party prompt notice of that force majeure with full particulars of the probable extent to which it will be unable to perform, or be delayed in performing its obligations under this agreement; and
- (b) uses all possible diligence to remove that force majeure as soon as possible; then those obligations shall be suspended so far as it is affected by the force majeure event and during its continuance provided that:
- (i) an obligation to pay money is never excused by force majeure; and
- (ii) the requirement that any force majeure event shall be removed with all possible diligence shall not require the settlement of strikes, lockouts, or other labour disputes, or claims or demands by any government, on terms contrary to the wishes of the party affected.
- 27. General**
- 27.1 The failure by Brinkman to enforce any provision of these terms and conditions shall not be treated as a waiver of that provision, nor shall it affect Brinkman's right to subsequently enforce that provision. 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.
- 27.2 These terms and conditions and any contract to which they apply shall be governed by the laws of Victoria, the state in which Brinkman has its principal place of business, and are subject to the jurisdiction of the Melbourne Courts in that state.
- 27.3 Subject to clause 18 Brinkman 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 Brinkman of these terms and conditions (alternatively Brinkman's liability shall be limited to damages which under no circumstances shall exceed the Price of the Goods).
- 27.4 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 Brinkman nor to withhold payment of any invoice because part of that invoice is in dispute.
- 27.5 Brinkman may license or sub-contract all or any part of its rights and obligations without the Client's consent.
- 27.6 The Client agrees that Brinkman may amend these terms and conditions at any time. If Brinkman makes a change to these terms and conditions, then that change will take effect from the date on which Brinkman notifies the Client of such change. The Client will be taken to have accepted such changes if the Client makes a further request for Brinkman to provide Goods to the Client.
- 27.7 The Client warrants that it has the power to enter into this agreement and has obtained all necessary authorisations to allow it to do so, it is not insolvent and that this agreement creates binding and valid legal obligations on it.