

Terms & conditions - Australia

1. GENERAL

In these terms and conditions (unless the context requires otherwise):

“Carrier” means a Carrier nominated by the Company to take delivery of the Goods;

“Company” means Fans Direct Pty Ltd ABN: 80 087 430 715

“Consignment Address” means the delivery address of the Customer stated in an Order or otherwise agreed by the Company;

“Customer” means any person who enters into a contract with the Company for the purchase of Goods and includes:

- (i) any successors or permitted assigns; and
- (ii) if the Customer consists of more than one person both of them jointly and each of them severally;

“Goods” means any goods supplied or to be supplied by the Company as specified in an Order accepted by the Company.

“GST” means GST within the meaning of A New Tax System (Goods and Services Tax) Act 1999 (as amended) (“GST Act”)

“Order” means a Customer order placed with the Company for the supply of Goods;

“Related Body Corporate” has the same meaning as in the Corporations Act.

2. QUOTATIONS

A quotation by the Company shall be an invitation to treat, and shall not constitute an offer. Any modification to a quotation will be effective only if it is expressed in writing and signed by a duly authorised officer of the Company.

3. CONTRACT FOR SALE OF GOODS

3.1 Each Order constitutes an offer by the Customer to acquire the Goods subject strictly to these terms and conditions and to the exclusion of any other terms and conditions asserted by the Customer. A contract will be made between the Company and the Customer for the supply of Goods only when an Order is accepted by the Company in writing, orally or by conduct.

3.2 The Company may at any time refuse to extend credit to the Customer and need not give any reason for its refusal.

3.3 These terms and conditions supersede all previous terms and conditions and may only be varied if authorised in writing on behalf of the Company.

4. PAYMENT

4.1 The price for the Goods must be paid within 30 days from the date of delivery of the Goods to the Customer unless other terms of payment are expressly stated in writing and signed by the Company.

4.2 In the event the Customer fails to make payment to the Company when payment falls due, the Company shall have the right, without prejudice to any other right or remedy the Company may be entitled to, to charge interest on any overdue invoice at a rate of 2% per annum in excess of the rate of penalty interest current at the date of default pursuant to the Penalty Interest Rate Act 1983 (Vic) calculated and payable daily and compounded from the due date until the invoice is paid in full. The Customer also must pay all costs and expenses (including legal costs), which may be incurred by the Company in the recovery of the overdue amounts. Any payment by the Customer shall be credited first against any interest so accrued and the balance, if any, shall be applied in reduction of the outstanding balance of the price.

4.3 Notwithstanding that the Customer may be granted time to pay for the Goods and/or services or credit facilities are provided, the Customer must, in the event the Goods are sold and the proceeds of sale received, where applicable, comply with clause 9.

4.4 The extension of credit facilities and the terms upon which such credit is provided are, in all cases at the sole discretion of the Company and are subject to confirmation on the receipt of an Order. In any event the Company retains the right to withdraw credit facilities at any time prior to delivery of Goods.

5. PRICES & GST

5.1 All prices must be as quoted or be in accordance with the Company's current price at the time of the Order whichever is the higher. Verbal quotations are subject to written confirmation.

5.2 All listed, published or quoted prices (unless otherwise expressly indicated) are exclusive of any applicable GST or any other applicable taxes, duties, costs and charges associated with the delivery of the Goods, and all such taxes, duties, costs and charges shall be included as an additional item to the invoiced price.

6. DELIVERY OF GOODS

6.1 The Company will use its best endeavours to meet all quoted delivery or consignment dates but the Company will not be liable to the Customer for any delay in delivery caused by any reason whatsoever.

6.2 If the Customer wishes to use its own carrier, delivery of the Goods shall be ex-Company's store and the Customer shall pay all freight and insurance costs ex-Company's store and shall indemnify the Company against all actions, suits, proceedings, claims demands and all losses, expenses and liabilities, howsoever arising, for the transportation of the Goods delivered ex-Company's store.

6.3 In the event of any delay caused by the Customer or caused by industrial disputes, including strikes and lockouts, circumstances such as fire, war, mobilisation or any other cause beyond the reasonable control of the Company, the Company, at its option, may extend the quoted delivery or consignment dates or consign part of an Order or suspend consignment during that period of delay or may cancel the order and the Customer shall not be relieved of the obligation to accept and pay for an Order, or any part of an Order, in accordance with clause 4, as a result of any such extensions, partial consignments or suspensions.

6.4 Delivery times made known to the Customer will be estimates only and the Company will not be liable for late delivery or non-delivery and under no circumstances will the Company be liable for any loss, damage or delay occasioned to the Customer or its customers arising from late or non-delivery of the Goods.

6.5 The Company will be conclusively presumed to have delivered the Goods in accordance with these terms and conditions if the Goods are delivered to the Consignment Address, whether or not the Company obtains a receipt or signed delivery docket for the Goods from any person.

6.6 If delivery cannot be effected, the Company may store the Goods or redeliver the Goods to the Customer and the Customer must pay or indemnify the Company for all costs and expenses incurred.

6.7 The Company will not be responsible for any loss or damage to Goods in transit. The Company will render to the Customer such assistance as may be necessary to press claims on the Carriers provided the Customer must have notified the Company and the Carrier in writing immediately of any loss or damage discovered on receipt of Goods and must lodge a claim on the Carrier within 3 days of the date of receipt of the Goods.

6.8 In the event of the Company agreeing to the return of the Goods or any part thereof by the Customer, the Goods will be at the Customer's risk until such time as the Goods reach the Company's premises. Made to order Goods or Goods that are not a stock item will not be accepted for return. All expenses of return will be borne by the Customer and a 20% handling charge will be applied to any Goods accepted for return. Any Goods accepted for return must be returned to the place of manufacture or distribution. Where an order is cancelled after production of the ordered items or services, a 20% cancellation fee may be charged.

7. STORAGE OF GOODS

7.1 In the event that, after notification to the Customer that the Goods are ready for delivery, delay in delivery is caused by the Customer or caused by industrial disputes, including strikes and lockouts, circumstances such as fire, war, mobilisation or any other cause beyond the reasonable control of the Company, the Company, at its option, may arrange suitable storage, whether at its premises or elsewhere, and shall take reasonable steps to protect the Customer's interest in the Goods. The Customer shall pay all costs of storage, insurance, demurrage, handling and other charges associated with such storage.

8. RISK AND SUPPLY

8.1 All Goods sold to the Customer shall be at the Customer's risk immediately upon delivery to or collection by the Customer, the Customer's nominee, the Customer's carrier, except where Goods are held for the Customer in accordance with clause 7, in which case risk shall pass to the Customer on the date being seven (7) days from the date of notification to the Customer that the Goods are ready for delivery.

8.2 The Company reserves the right to: (a) withhold supply to the Customer where: (i) the Company has insufficient Goods to fulfil the Order, (ii) the Goods and/or services ordered have been discontinued, (iii) the Customer is in breach of any contract with the Company, or (iv) the Company otherwise considers it appropriate for any other reason; (b) supply by instalments. The exercise of these rights by the Company or delay in supply for any other reason does not entitle the Customer to terminate any contract with the Company or claim any loss or damage.

8.3 The Customer shall provide at the delivery place free of charge all hoisting facilities of adequate size and capacity to lift the Goods without disassembling. Unless the Company otherwise agrees all Goods to be hoisted will not be disassembled in any way to suit the hoisting facilities provided. The Customer agrees to pay any additional costs thereby incurred which will be added to the contract price.

9. TITLE OF GOODS

9.1 The property in the Goods will not pass to the Customer until payment in full on any account whatsoever has been received by the Company and the Customer's cheque has been honoured whether or not that account relates to the sale of the Goods. If the Customer fails to honour any of these terms and conditions of sale, the Company, without notice, will have the right to take possession of the Goods which are the subject of this reservation of title, or trace the proceeds of the sale thereof, as the case may be, and to recover the full amount owing to the Company together with interest and costs, if any.

9.2 The Customer acknowledges that until property and ownership in the Goods passes to the Customer in accordance with sub-clause 9.1, the Customer is in possession of those Goods for and on behalf of the Company as a fiduciary bailee and agent and is only authorised to sell the Goods (in the Customer's own name and not as agent of the Company) in the ordinary course of the Customer's business.

9.3 The Customer shall keep and safely store the Goods on its premises separately and in such manner that the Goods are readily identifiable as the property of the Company and shall display such identification as may from time to time be requested by the Company.

9.4 If payment for any Goods is overdue, the Company is entitled, without prejudice to any of its other rights and remedies, to repossess the Goods and to enter upon any premises upon which the Goods are stored (forcibly if necessary), without notice, for this purpose.

9.5 Until such time as the Company receives payment in full for any Goods, if the Customer sells or receives any payment from a customer or insurer in respect of the Goods, (a) the Customer must: (i) deposit the proceeds of any such sale or disposition and any insurance proceeds (or claim thereon) into a separate and identifiable bank account which shall not be overdrawn; (ii) not mix such proceeds with any other moneys; and (iii) account to the Company for such proceeds, and (b) the Company will be entitled to trace all proceeds of sale of the Goods received by the Customer through the relevant account or any account maintained by the Customer.

9.6 If the Customer incorporates or mixes Goods supplied by the Company (the property in which has not passed to the Customer in accordance with this clause 9) with other Goods not supplied by the Company, the resulting product shall be the property of the Company. The rights of the Company in respect of the resulting product shall be the same as those provided for in this clause 9 in respect of Goods the property in which has not passed to the Customer, except that in exercising these rights the Company shall account to the Customer (on a pro rata basis) for that part of the realised value of the resulting products which is attributable to: (a) the Goods not supplied by the Company; and (b) the Customer's cost of manufacture.

9.7 Nothing in sub-clauses 9.1 to 9.6 inclusive shall affect the Company's rights as an unpaid vendor. This clause 9 is not intended to create a charge over the Goods or over any book debts or proceeds of sale in respect of the sale of the Goods. To the extent that any part of this clause is construed as creating a charge, the offending words shall be deleted.

10. WARRANTY/LIABILITY

10.1 The Company agrees and acknowledges that the Customer is entitled to all rights and remedies in respect of the Goods which the Customer has under the Trade Practices Act and similar State and Territory laws and which cannot be lawfully excluded, restricted or modified. These terms and conditions do not purport to, and do not have the effect of, excluding, restricting or modifying the exercise of any such right or remedy or the liability of the Company in respect of any such right or remedy.

10.2 The Company warrants that all Goods manufactured or supplied by it will be free of defects in workmanship and materials for a period of 12 months from the date of commissioning but not exceeding eighteen (18) months from the date of invoice to the Customer provided that the Goods are installed according to the requirements of AS/NZS3000:2007 Australian/New Zealand wiring rules. The Customer does not have any rights or remedies in respect of the Goods other than the rights and remedies expressly provided for in these terms and conditions or agreed and acknowledged by the Company in these terms and conditions.

10.3 Subject always to Clauses 10.1 and 10.4:

(a) all conditions, warranties and guarantees other than those expressly provided for in these terms and conditions or agreed and acknowledged by the Company in these terms and conditions are excluded to the fullest extent permitted by law; and

(b) the Company will not be liable to the Customer for any loss caused (in whole or in part) by or arising out of any use of the Goods or any defect resulting from:

- (i) normal wear and tear or accident;
- (ii) misuse or other unsuitable or unauthorised use of the Goods or negligence or error in storage, maintaining or handling the Goods or equipment with or on which it operates. Reference will be made to appropriate standards issued by the Standards Association of Australia and by the Company in determining the suitability of any use made of the Goods;
- (iii) incorrect installation or assembly of or failure to service the Goods or to otherwise follow the Company's service instructions including permitting repairs, installation, assembly or service by persons not approved by the Company or replacements of parts not manufactured or supplied by the Company;
- (iv) modifications or changes to the Goods without the Company's prior written authorisation; or
- (v) any other unauthorised act or fault by the Customer or a third party.

10.4 Where the Customer is a consumer under the Trade Practices Act or similar State and Territory laws and Goods supplied or services provided to the Customer are not of a kind ordinarily acquired for personal, domestic or household use or consumption, then unless the Customer establishes that reliance on this provision would not be fair and reasonable, the liability for a breach of a condition or warranty implied into these terms and conditions by the Trade Practices Act or by any similar State or Territory laws (other than a condition implied by section 69 of the Trade Practices Act or by the equivalent provisions of any similar State or Territory laws) is limited to any one of the following as determined by the Company:

(a) in the case of Goods supplied:

- (i) the replacement of the Goods or the supply of equivalent Goods;
- (ii) the repair of the Goods;
- (iii) the payment of the cost or replacement of the Goods or of acquiring equivalent Goods; or
- (iv) for the payment of the cost of having the Goods repaired.

(b) in the case of services provided:

- (i) the supply of the services again; or
- (ii) the payment of the cost of having the services supplied again.

10.5 The Customer acknowledges that neither the Company nor any person purporting to act on its behalf has made any representation or given any promise or undertaking which is not expressly set out in the Order or these terms and conditions whether as to the fitness of the Goods for any particular purpose or any other matter.

11. SPECIFICATIONS AND INFORMATION

11.1 Where the Company is not the manufacturer, the Company relies on the specifications and warranties supplied by the manufacturer.

12. INTELLECTUAL PROPERTY

12.1 The Customer acknowledges that all rights in respect of patents, copyrights, design rights, trade marks or other industrial or intellectual property rights connected with the Goods shall not pass to the Customer. The Customer shall indemnify the Company against any and all liabilities, claims and costs incurred by or made against the Company as a direct or indirect result of carrying out of any work required to be done on or to the Goods in accordance with the requirements or specifications of the Customer involving any infringement or alleged infringement of any rights of any third party.

12.2 If any action, suit, proceeding, claim or demand is brought or made alleging that the sale, use or any other dealing with the Goods infringes the trade mark, trade name, patent, copyright, registered design or any other intellectual or industrial property rights of third parties, the Customer shall forthwith notify the Company thereof and give every assistance to the Company in connection therewith as the Company may reasonably require and shall not itself handle, deal with or compromise any such action, suit, proceedings, claim or demand except with the prior written consent of the Company.

13. CANCELLATION

13.1 No Order may be cancelled except with the Company's consent in writing and on terms which will indemnify the Company against all losses.

14. TERMINATION

14.1 The Company will be entitled to terminate any Order with the Customer or revoke any credit terms granted if the Customer fails to punctually pay moneys due to the Company, has any security enforced against it, commits an act of bankruptcy or, being a company, passes a resolution for winding up (except for the purposes of reconstruction) or a court makes an order winding up the Customer or if the Company notifies the Customer that it is of the view that the Customer or any Related Body Corporate of the Customer is in financial difficulties.

14.2 Upon the occurrence of a termination event referred to in Clause 14.1, the Company reserves the right to cancel an Order with the Customer (to the extent that the Order remains unperformed) in whole or in part without any liability attaching to the Company, stop any Goods in transit and dispose of the Goods produced for or supplied to the Customer, to a third party and all moneys owing to the Company in respect of any Order will be immediately payable by the Customer.

14.3 Termination is without prejudice to any right or obligation, which may have accrued prior to termination.

15. CLAIMS AND DISPUTES

15.1 Any claims as to quality or quantity of Goods supplied must be made within 7 days of delivery of the Goods to the Customer. In the event of a dispute between the Customer and the Company relating to either the quality, quantity or delivery of the Goods, the Customer agrees to pay the Company all such amounts owing to the Company by the Customer until such time as the dispute is resolved.

16. FORCE MAJEURE

16.1 The Company will not be liable for any loss incurred as a result of delay or failure to meet an accepted Order or to observe any of these terms and conditions (other than an obligation to pay money) due to an event of force majeure, being any cause or circumstance beyond the Company's control, including but not limited to any failure or delay in performance caused by any strikes, lockouts, labour disputes, fires, acts of God or public enemy, malicious or accidental damage, delays in transport, breakdowns in machinery or restrictions or prohibitions by any government or any or any semi-government authorities or embargoes.

16.2 During the continuance of an event of force majeure affecting the Company, its obligations hereunder will be suspended and will resume as soon as possible after the cause or circumstance has ceased to have effect.

17. SEVERABILITY

17.1 If any of these terms or conditions infringes any law in Australia they must be read down so that they do not infringe that law, otherwise such parts will be deemed void and severable.

18. GOVERNING LAW

18.1 These terms and conditions are governed by and must be construed in accordance with the laws of Victoria and the Customer hereby agrees to submit to the exclusive jurisdiction of the courts of Victoria and any court of appeal therefrom.

19. MISTAKE

19.1 Any mistake on any quotation, Order, invoice, delivery document or other document issued by the Company in relation to the Goods shall not be binding on the Company and the Company may in its discretion issue such amended document as is required to rectify such mistake. The Customer shall comply with the Company's amended document.