

# TERMS & CONDITIONS OF TRADE

P & E SCALZI PTY LTD TRADING AS "SCALZI PRODUCE"



ABN 51 633 452 044

## 1. GENERAL

In these Terms and Conditions of Trade:

- "Vendor"** means P & E Scalzi Pty Ltd trading as "Scalzi Produce" (ABN 51 633 452 044 ).
- "Customer"** means the person, company, partnership or trust placing an order with the Vendor for goods. Where there is more than one liability of that customer, the debt shall be joint and several.
- "Goods"** means all goods (including services) supplied by the Vendor to the Customer whether or not such goods are the subject of invoice, delivery or receipt docket
- "GST"** means any consumption tax imposed by the government, whether at point of supply or at some other specified occurrence, by whatever name.

## 2. APPLICATION

- 2.1 These Terms and Conditions of Trade ("**Terms of Trade**") shall apply to the supply of all Goods by the Vendor to every Customer and to all quotations, purchase orders, invoices or other documentation concerning such Goods unless otherwise specifically agreed in writing.
- 2.2 The Customer, irrespective of whether it has an existing account with the Vendor at the date of notice of these Terms of Trade, shall be deemed to accept or have accepted these Terms of Trade unless the Vendor is notified in writing within 7 days of the Customer being given those Terms of Trade in whole or in part
- 2.3 The Customer acknowledges that the Vendor will accept orders for Goods only upon these Terms of Trade.
- 2.4 These Terms of Trade shall apply to the exclusion of any other appearing on any invoice or other document of the Vendor which other terms and conditions shall be totally disregarded from the date from which these Terms of Trade are notified to the Customer
- 2.5 No terms and conditions, including any written or attached purchase order or document or included or implied term by law, shall be binding upon the Vendor unless agreed in writing by the Vendor but nothing shall be deemed an attempt to exclude conditions applied by law which cannot be excluded by agreement
- 2.6 The Customer shall be deemed to have been notified of these Terms of Trade 3 days after being dispatched if sent by ordinary post to the address of the Customer when opening an account with the Vendor or such other address as has since been notified to the Vendor in writing.
- 2.7 Given that these Terms of Trade apply generally and exclusively to the supply of Goods to the Customer it shall not be necessary to include these Terms of Trade on any of the Vendors orders, invoices or other documentation, as these Terms of Trade shall be deemed included therein

## 3. DELIVERY

- 3.1 Any time quoted for delivery is an estimate only
- 3.2 The Vendor shall not be liable for any loss or damage howsoever arising as a result or consequence of any failure to deliver or delay in delivery arising from any circumstances of whatsoever nature
- 3.3 The Vendor reserves the right to vary delivery, dispatch or completion dates as necessary where delays beyond its control occur in completion or orders and the Customer agrees to accept delivery, dispatch or completion on such dates as varied
- 3.4 If the Vendor determines that it is or maybe unable to deliver within reasonable time or at all, the contract may be cancelled by the Vendor. In the event of cancellation the Customer shall have no claim against the Vendor for any damage, loss, cost or expenses or whatsoever nature or howsoever arising
- 3.5 The Vendor is not obliged to deliver the goods or any part thereof if the Customer is in default of any of its obligations or if the Customer appears to the Vendor to be unable to pay its debts
- 3.6 The Vendors delivery records shall be prima facie proof of delivery of the Goods of the quantity and description stated therein in good order to the Customer and his receipt thereof notwithstanding the absence of any representative of the Customer at the delivery site upon delivery

## 4. PASSING OF PROPERTY

- 4.1 The property in any Goods shall not pass from the Vendor to the Customer but shall remain with the Vendor until payment in full of the Price and notwithstanding possession of the Goods may pass to the Customer unless the Vendor declares by notice in writing given to the Customer that property in Goods has passed.
- 4.2 Immediately upon giving such notice property in the Goods shall pass to the Customer and the Vendor shall be entitled to rely on property having passed for the purpose of maintaining an action to recover the Price of the Goods or for any other reason
- 4.3 The Customer hereby authorises the Vendor to enter onto it's premises during normal business hours for the purpose of retaking possession of any Goods in respect of which payment has not been received by the Vendor after expiry of the 7 days notice referred to in Clause 12.2 and may without notice, enter any premises where it suspects the goods may be and remove them, notwithstanding that they may have been attached to other goods not the property of the Vendor and for this purpose the

Customer irrevocably licenses the Vendor to enter such premises and also indemnifies the Vendor from and against all costs, claims, demands or actions by any party arising from such action; and

4.4 The Goods are held by the Customer as fiduciary bailee and agent for the Vendor

## **5. PERSONAL PROPERTY SECURITIES ACT 2009 (CTH) (PPSA) REGISTRATION**

5.1 The Customer agrees that the Vendor will have a Purchase Money Security Interest (as defined in the PPSA) in any produce supplied to the Customer under these Terms of Trade or any related order or contract.

5.2 The Vendor may register any security interest contemplated by these Terms of Trade and/or any related order or contract on the PPS Register (as defined in the PPSA). The Customer must supply the Vendor with any information and take any steps the Vendor requires for the purposes of effecting and enforcing such registration.

5.3 The Customer irrevocably and unconditionally waives its rights to receive any notice from the Vendor in connection with the registration.

5.4 The Customer will not allow a security interest to be created or registered over the Products in priority to the security interest held by the Vendor.

5.5 The Customer agrees that any action taken by the Vendor in relation to the Vendor's security interest in the products is at the cost of the Customer.

5.6 The parties agree that for the purposes of Section 115 of the PPSA, nothing in Sections 95, 121 (4), 125, 130 (to the extent that it requires the Vendor to give any notice to the Customer), 132 (3) (d), 132 (4) and 135 of the PPSA will apply to any collateral arising from or in connection with these Terms of Trade and/or any related order or contract.

5.7 Notwithstanding Section 275 of the PPSA the parties further agree to keep confidential the contents of these Terms of Trade and related material.

## **6. FREIGHT**

6.1 Freight is always payable by the Customer unless otherwise stated in the invoice

6.2 The Vendor when authorised by the Customer to arrange freight of the goods, is not deemed to be the Customer's agent in that regard.

## **7. PRICE**

7.1 The price charged for the Goods by the Vendor to the Customer does not include GST, sales tax or any other taxes, duties or imposts imposed on or in relation to the goods or services in Australia or overseas

7.2 In addition to the amount payable, the Customer must therefore pay to the Vendor, where applicable, the GST payable by the Vendor in respect of that amount

7.3 All other charges howsoever incurred and by whoever incurred relating to the Goods are the responsibility of the Customer

7.4 The Vendor agrees to provide the Customer with a tax invoice that complies with the definition contained in Section 29-70 of A New Tax System (Goods and Services Tax) 1999 or amending legislation

7.5 The Vendor reserves the right to add any government levies or taxes to the price of Goods effected at the date of delivery

## **8. WEIGHT, QUALITY AND QUANTITY**

8.1 The goods are sold and it is hereby agreed that they are accepted by the Customer upon delivery as being the weight and quantity stated on the vendors invoice

8.2 The Customer must:

8.2.1 within 24 hours of delivery give notice in writing to the Vendor of any complaint concerning the quality of the Goods

8.2.2 within 2 business days after giving the notice aforesaid in paragraph 7.2.1 obtain from the Vendor written confirmation of receipt of the notice aforesaid or any agreement on any credit for those Goods.

Upon failure of either of the aforesaid, the Customer is deemed to have no claim against the Vendor with respect to the quality or quantity of the Goods

## **9. WARRANTY**

9.1 The Vendor's liability under any warranty (at law or otherwise) is limited to replacing goods that the Vendor accepts are defective and covered by the warranty

9.2 The Vendor is not obliged to replace or compensate the Customer for:

9.2.1 misuse, physical abuse, neglect or accident however arising;

9.2.2 goods not being handled in accordance with industry recommendations;

9.2.3 goods that are not defective if they meet accepted industry standards with respect to colour, size and grade

9.3 This warranty is limited to replacing any goods the Vendor accepts are defective and covered by this warranty.

## **10. RISK**

Notwithstanding any other provision in these terms and conditions the risk of loss or damage to the Goods shall pass to the Customer when the Goods leave the Vendor's site.

## 11. CONSIGNMENT – AGENCY

No consignment or agency relation is created or intended between the Vendor and the Customer.

## 12. PAYMENT AND INTEREST

- 12.1 The price is strictly payable in full by the due date (“**Due Date**”) being **7 days** from the date of the invoice unless agreed otherwise in writing by the Vendor
- 12.2 The Customer shall be invoiced and the vendor shall be paid in Australian dollars in cash, cheque, bank draft, irrevocable letter of credit, telegraphic transfer, any agreed combination thereof, or in such other manner or currency as is approved by the Vendor in writing. In case of cheques, payment shall not be considered to have been made unless and until clearance of those cheques
- 12.3 Where goods are exported and credit insurance is in place, the Vendor account cannot exceed the value insured or the terms of the credit insurance.

## 13. DEFAULT IN PAYMENT

- 13.1 Should the Customer default in payment of any part of the price by the Due Date then without prejudice to any other rights the Vendor may have:
  - 13.1.1 Any other amounts outstanding by the Customer shall become immediately due and payable and shall be paid by the Customer to the Vendor
  - 13.1.2 The Vendor may suspend supply and/or delivery of any and all Goods to the Customer until receipt in full of all monies outstanding.
  - 13.1.3 The Vendor may retake possession of any Goods supplied by the Vendor to the Customer which it is acknowledged shall have remained the property of the Vendor by virtue of Clause 4.1 thereof
  - 13.1.4 The Customer shall pay to the Vendor all reasonable costs of the default including all legal or other expenses incurred by the Vendor (on an actually incurred basis).
  - 13.1.5 The Customer shall cease to be entitled to any discount (if any) allowed by the Vendor in respect of the Goods and shall pay to the Vendor any further sum required
  - 13.1.6 The Vendor may charge the Customer interest (calculated in accordance with 3.1.7 below) on any unpaid amounts for the period from the Due Date until the date of payment in full. Such interest to be calculated on a daily basis.
  - 13.1.7 The interest rate payable shall be the Commonwealth Bank of Australia overdraft rate on sums up to \$100,000.00 DR published from time to time plus 4%.
- 13.2 The Vendor shall not be entitled to exercise any of the foregoing rights in the Clause until it has given the Customer 7 days’ notice in writing of payment

## 14. PROVISION OF CREDIT

- 14.1 The Vendor may at any time and for whatever reason suspend, cancel, reduce or review a Customer’s credit facility upon notice to the Customer (whether written or oral or by electronic transmission)
- 14.2 The Vendor may at any time request additional information or the provision of further security in relation to a credit facility and may suspend or cancel a credit facility if the information or security requested is not provided within a reasonable time.
- 14.3 Where credit is requested for up to \$100,000, the Customer agrees to supply the Vendor with the value of debtors, creditors, stock on hand, bank overdraft limit and current value, other assets and other liabilities at the time of applying for credit and at least annually thereafter.
- 14.4 Where credit is requested for \$100,000 or more, the Customer agrees to supply the Vendor with a full set of financial statements at least annually or more often if requested by the Vendor.

## 15. MARKET CREDIT SERVICE

- 15.1 When the Customer registers and thereafter transacts with the Vendor through a market credit service in their primary state of business, those transactions remain subject at all times to these terms and conditions.
- 15.2 All recovery actions taken by any market credit service or its agents, employees or contractors regarding any debt incurred by the Customer will not in any way serve to limit or extinguish any of the rights of the Vendor pursuant to these terms and conditions including but not limited to the right to take all steps and do all things necessary to collect any outstanding monies from the Customer.
- 15.3 To the extent that any action taken by any credit agency acting other than under the direct instructions of the Vendor, is inconsistent with any provision of these terms and conditions, these terms and conditions shall prevail PROVIDED HOWEVER that this clause can only be construed to the benefit of the Vendor, and not the Customer.

## 16. CANCELLATIONS

- 16.1 Orders cannot be cancelled without the Vendor's consent and upon terms that will indemnify the Vendor against all losses
- 16.2 Orders or balances of orders may be cancelled at the Vendor's option in the event of any failure by the Customer to adhere to the terms of the supply contract.
- 16.3 If, through circumstances beyond the control of the Vendor, the Vendor is unable to supply the goods or services, then the Vendor may cancel the Customer's order (even if it has already been accepted) by notice in writing to the Customer
- 16.4 The Vendor will be under no liability to the Customer or any third party for any damages or losses, direct or indirect, resulting from such cancellation

## 17. ORDERS

- 17.1 Where orders for the Goods are made verbally the Vendor's records thereof shall prima facie be evidence of that order or any variation thereto
- 17.2 All orders are deemed to be made in South Australia

## 18. LIABILITY

- 18.1 Where the Customer is a consumer for the purposes of the Trade Practices Act 1974 as amended ("the Act") or similar State or Territory law it will have the benefit of all non-excludable statutory rights and remedies in respect of the Goods
- 18.2 Except to the extent to such non-excludable statutory rights and remedies these conditions supersede and exclude all other conditions and warranties whether expressed or implied by law and all prior agreements and representations
- 18.3 In all cases other than where the Goods are of a kind ordinarily acquired for personal, domestic or household use or consumption the liability of the Vendor for a breach of a term or condition implied by the Act or similar State or Territorial law (other than by Section 69 of the Act or corresponding Section of any similar State or Territorial Act or Ordinances) shall be limited at the Vendor's option to:
  - 18.3.1 the replacement of the Goods or the supply of equivalent Goods;
  - 18.3.2 the payment of the cost of replacing the Goods or acquiring equivalent Goods
- 18.4 In the event of Section 74(H) of the Act or corresponding section of any similar State or Territorial Act or Ordinances applying to these terms and conditions then notwithstanding such Section in the case where the Goods are goods other than goods of a kind ordinarily acquired for personal, domestic or household use or consumption the liability of the Vendor under the aforesaid Section shall be limited to the liability to pay to the Customer an amount equal to:
  - 18.4.1 the cost of replacing the Goods;
  - 18.4.2 the cost of obtaining equivalent Goods;whichever is the lowest amount.
- 18.5 Where to the extent that the Act or other legislation does not apply to these terms and conditions the Vendor shall have nor responsibility or liability whatsoever including without limiting the generality of the foregoing any liability for negligence or any liability for consequential loss, however arising and all other conditions and warranties contained in and implied by any statute or rule of law are hereby expressly excluded and negated.
- 18.6 Without derogating from the foregoing it is expressly agreed that all rights, immunities and exemptions from liability in favour of the Vendor specified in these terms and conditions shall have and continue to have their full force and effect in all circumstances.

## 19. REPRESENTATIONS

The Vendor will not be responsible for any promise, conditions, warranties or representations made by any of its representatives, employees or agents unless the same are expressly set out herein or given by the Vendor in writing and the Customer acknowledges that these Terms of Trade and such writing signed by the Vendor shall represent the whole Agreement between the parties to the exclusion of any other Agreement or understanding whatsoever.

## 20. WAIVER

Failure by the Vendor to insist upon strict performance of any terms, warranty or condition of these Terms of Trade shall not be deemed a waiver thereof or of any rights that the Vendor may have and no express waiver shall be deemed a waiver or any subsequent breach of any term, warranty or condition.

## 21. FORCE MAJEURE

The Vendor shall not be liable for any failure to perform or delay in performance of the Contract due to strikes, fires, explosions, flood, riots, lock outs, injunction, interruption of transportation, accidents, inability to obtain supplies, war, governmental action or other circumstances beyond the Vendor's reasonable control.

## **22. DISPUTE RESOLUTION**

In the event of any dispute between Scalzi and the Customer being unable to be resolved between them through consultation, the Customer agrees to undertake mediation (at the request of Scalzi) through an external independent party (mediator) as appointed by Scalzi, to be held in the State of South Australia at a time and place reasonably appointed by Scalzi. All costs associated with the appointment of the mediator and of the mediation are to be borne equally by Scalzi and the Customer unless otherwise agreed between them. In the event that Scalzi and the Customer are unable to resolve the dispute by mediation within fourteen (14) days of the mediation having taken place, then either party shall be entitled to pursue the claim or action or remedy as it may be advised.

## **23. PREVAILING LAW**

The laws of South Australia govern:

23.1 the Goods;

23.2 these terms and conditions;

and any proceedings shall be brought in South Australian Courts.

## **24. DISCLOSURE AND USE OF PERSONAL INFORMATION**

24.1 The Customer understands that the Privacy Act (Commonwealth) allows Scalzi to give a credit reporting agency certain personal information about the Customer.

24.2 The information which may be given to an agency is covered by the Act and includes:

24.2.1 Particulars to identify the Customer,

24.2.2 The fact that the Customer has applied for credit and the amount,

24.2.3 The fact that Scalzi is a credit provider to the Customer,

24.2.4 Payments which become overdue more than 30 days,

24.2.5 Advice that payments are no longer overdue,

24.2.6 Cheques of \$100.00 or more drawn by the Customer which are bank has dishonoured more than once,

24.2.7 In specified circumstances, that any opinion of Scalzi the Customer has committed a serious credit infringement

24.2.8 That the credit provided to the Customer by Scalzi has been discharged.

25. The Customer hereby acknowledges and agrees that Scalzi is entitled to undertake all necessary inquiries, investigations and assessments to ensure the accuracy of the information provided herein and further that such information as verified may be used by Scalzi and any authorised agent, employee or subcontractor engaged by Scalzi for the purpose of reviewing, vetting, monitoring and if necessary, actioning the Customer's use and performance in the operation of the account/credit facility, including recovery of any outstanding account balance.