

# TERMS OF TRADE

## 1. Terms of Trade

1.1. These Terms apply to every supply of Products made by Kwillow to the Customer. By placing an Order with Kwillow, the Customer agrees that it is bound by these Terms and that the Customer's own terms and conditions do not apply. These Terms may be modified by Kwillow's specific terms in a Quote or Order.

## 2. Definitions

2.1. **Credit Account** means an account held by the Customer with Kwillow for purchasing Products on credit; **Customer** means the person who purchases Products from Kwillow and includes any person acting on behalf of and with the authority or apparent authority of the Customer; **Kwillow** means Kwillow Limited and its successors and assigns; **Order** means an agreement between Kwillow and the Customer for Kwillow to provide Products to the Customer; **PPSA** means the Personal Property Securities Act 1999; **Products** means all products supplied by Kwillow to the Customer; **Quote** means a written offer from Kwillow to the Customer to supply Products for a specified price subject to the terms and conditions of such an offer; **Terms** means these terms and conditions subject to any variation.

## 3. Quotes and Orders

3.1. Quotes are based on Kwillow's current materials and procurement rates.

3.2. Kwillow may alter or withdraw a Quote at any time except where the Quote is expressed to be for a fixed period. A Quote will be valid for the term specified on the Quote and if no term is specified, the Quote is valid for 30 days.

3.3. Kwillow may decline any Order in its sole discretion.

## 4. Price

4.1. The price of Products will be as agreed in an Order or accepted Quote as applicable.

4.2. Prices, unless otherwise stated:

- (a) do not include taxes, GST, import duties or other levies or tariffs, freight or insurance charges, which if applicable will be an extra charge. Any increases in prices due to taxes, tariffs, exchange rate increases, duties, freight or insurance charges after the Quote will be to the Customer's account; and
- (b) are given in New Zealand dollars unless otherwise stated. Prices quoted in foreign currency are based on rates published by Kwillow's bank selling rate as at the date upon which such price is given and any subsequent variation of such rates at the date of payment will be to the Customer's account.

4.3. Where Kwillow agrees to supply Products on condition that a deposit will be paid then, in the event that the Customer terminates the contract, fails to take delivery of the Products or is otherwise in breach of the contract, Kwillow is entitled (at Kwillow's election) to terminate the contract and retain the deposit (in addition to any other rights or remedies Kwillow may have under this contract or at law or otherwise).

## 5. Delivery and Risk

5.1. Delivery of the Products will be to the Customer's nominated address. Kwillow is not liable for late delivery of the Products.

5.2. Risk passes to the Customer when the Products are given to a carrier, courier or to the Customer's agent for purposes of delivery.

## 6. Payment

6.1. Where the Customer has a Credit Account, payment for Products charged to a Credit Account must be made in accordance with this clause 6. If the Customer does not have a Credit Account, payment must be made on placing an Order.

6.2. Payment of all money (and for the avoidance of doubt all GST and taxes of a similar nature, if applicable) must be made without set-off or deduction of any kind by the 20th day of the month following the invoice (**Payment Date**).

6.3. In the event of payment not being received by the Payment Date (and without prejudice to Kwillow's other remedies under this contract or at law or otherwise) Kwillow may:

- (a) charge interest at a per annum rate equivalent to 3% above Kwillow's bank commercial overdraft rate on the Payment Date (as certified by Kwillow's bank). Such default interest may be charged by Kwillow on the overdue money on a day to day basis from the Payment Date until all money has been paid in full. All money must be applied first in payment of default interest (if any). No credit will be extended on overdue accounts;

- (b) charge the Customer all costs including legal fees (on a solicitor-client basis), debt collection charges and court costs incurred by Kwillow in recovering outstanding monies; and

- (c) terminate this agreement and/or the Customer's right to hold a Credit Account.

6.4. If the Customer disputes any item or part of any item in an invoice, the Customer will notify Kwillow within 5 business days of receipt of the invoice specifying the item(s) disputed. Payment of a disputed invoice may be deferred only in respect of the disputed part of the invoice.

## 7. Security Interest

7.1. The Customer acknowledges and agrees that:

- (a) these Terms constitute a security agreement in all present and after acquired Products, and any proceeds of the sale of such Products, and such security interest is registrable on the Personal Property Securities Register under the PPSA as security for all amounts owing to Kwillow;

- (b) it will do all things and execute all documents which, in Kwillow's opinion, are necessary or desirable to ensure that Kwillow acquires and maintains a perfected first ranking security interest in the Products;

- (c) it waives its rights to receive a copy of any verification statement under the PPSA, and that (as between Kwillow and the Customer) the Customer will have no rights under sections 114(1)(a), 116, 117(1), 119, 120(2), 121, 125, 126, 127, 129, 131, 132, 133, and 134 of the PPSA;

- (d) it will promptly reimburse Kwillow for any costs that Kwillow incurs in registering, maintaining and/or enforcing the security interest created by these Terms; and

- (e) it will immediately notify Kwillow of any change to the Customer's name and address details (or any other information provided to Kwillow), or of any change of control of the Customer, to enable Kwillow to register a financing change statement if required.

## 8. Use of Products

8.1. The Customer must ensure that the Products are used in accordance with any safety directions that are supplied with the Products.

8.2. The Customer must promptly inform Kwillow of any manufacturing fault (or suspected fault) that will or may affect the safety of the Products.

8.3. The Customer acknowledges that the Customer will be responsible for ensuring that all and any instructions, recommended uses and applications relating to the Products are followed and any cautions and/or warnings observed.

## 9. Returns and Cancellations

9.1. Kwillow is under no obligation to accept the cancellation of any Order or the return of Products, which must be agreed to in writing by Kwillow. A failure or refusal to sign a despatch docket will not be evidence of rejection of any Products or cancellation of any Order, such rejection or cancellation to be notified in writing at least 2 hours prior to delivery.

9.2. Products which are damaged before delivery to the Customer may be returned for replacement or credit by quoting the date of delivery and the despatch docket numbers or invoice number provided that:

- (a) the Products are returned to Kwillow (at Kwillow's cost), or Kwillow is required to uplift the Products, within 48 hours of delivery; and

- (b) the Products are in their original condition and packaging as supplied.

## 10. Intellectual Property

10.1. All intellectual property in the Products (including any improvements, additions or modifications to that intellectual property), is owned by Kwillow. Nothing in this agreement will be construed as transferring to the Customer any intellectual property of Kwillow.

## 11. Warranties

11.1. Except for any express written warranty in these Terms or otherwise provided to the Customer, Kwillow provides no warranty expressed or implied, including any implied warranty of merchantability or fitness for purposes or otherwise, in respect of the Products, and any warranties expressed or implied by statute in respect of the Products whether in respect of quality, fitness for intended purposes or otherwise are excluded to the extent that such law or statute permits exclusion.

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### 12. Consumer Guarantees Act 1993

- 12.1. Where the Products are being supplied for the purposes of a business, the Customer agrees that the Consumer Guarantees Act 1993 will not apply.
- 12.2. Where the supply of Products is to a Customer who is a supplier (as defined in the Consumer Guarantees Act) the Customer will not make or allow to be made in respect of the Products supplied any statements or representations as to quality or description other than those made by Kwillow. The Customer hereby indemnifies and will keep indemnified Kwillow against any claims, losses, damages and costs which may be made against Kwillow in respect of statements or representations which are made contrary to the provision of this clause.

### 13. Limitation of Liability

- 13.1. The liability of Kwillow in respect of all claims for loss, damage or injury arising from a breach of any of Kwillow's obligations under these Terms or from any other act or omission of Kwillow is limited, in each case, to the lesser of the:
- (a) replacement or repair of the affected Products;
  - (b) payment of the actual cost of replacing or repairing the affected Products; or
  - (c) price of the affected Products.
- 13.2. Subject to clause 13.1 and to the maximum extent permitted by law, Kwillow will not be liable for any direct or indirect loss or damage (including without limitation loss of profits or savings or for any indirect or consequential loss or damage), however caused, arising out of or in connection with the supply of Products by Kwillow.
- 13.3. No action or claim arising out of the supply of Products by Kwillow may be brought more than 6 months after the Customer becomes aware, or reasonably ought to have become aware, of the circumstances giving rise to the action or claim.

### 14. Force Majeure

- 14.1. No claim or liability will arise against Kwillow under these Terms or any Order or Quote, if and to the extent that Kwillow's failure or omission to carry out or comply with any provisions of these Terms or any Order or Quote arises by reason of any event outside the reasonable control of Kwillow.

### 15. Termination

- 15.1. All outstanding monies will become immediately due and payable from the Customer, and Kwillow reserves the right to immediately cancel any Order and/or the Customer's right to hold a Credit Account, if the Customer:
- (a) ceases or threatens to cease carrying out business;
  - (b) becomes unable to pay its debts as they fall due or otherwise becomes insolvent or bankrupt;
  - (c) has a receiver or a receiver and manager appointed in relation to all or part of its assets, commences liquidation or is placed in statutory management; or
  - (d) breaches any of these Terms and (if the breach is remediable) fails to remedy the breach within 10 days of written notice requiring the breach to be remedied.

### 16. Privacy Act 1993

- 16.1. The Customer authorises Kwillow to collect, retain and use personal information about the Customer for the following purposes:
- (a) assessing the Customer's creditworthiness;
  - (b) administering the Customer's Orders; and
  - (c) receiving information from one or more credit reference agencies concerning the credit history of the Customer; disclosing credit-related information to, and using the credit services of one or more credit reference agencies, on a continuing basis at any time, and entirely at its discretion concerning the Customer's credit worthiness.
- 16.2. For the avoidance of doubt, all authorities given above are continuing authorities, to apply throughout the duration of the trading relationship between Kwillow and the Customer.
- 16.3. The Customer, if an individual, has a right of access to personal information about the Customer held by Kwillow and may request correction of the information.

### 17. Disputes

- 17.1. The parties agree to use their best endeavours to promptly resolve any dispute or difference between them. If a dispute arises (**Dispute**), the party claiming that a Dispute has arisen will serve notice on the other party stating the subject matter and details of the Dispute. After receipt of the notice, the parties will meet (in

person or otherwise) within 10 working days and will attempt in good faith to resolve the Dispute.

- 17.2. If the parties fail to resolve the Dispute within 20 working days of notice of the Dispute, either party may take such legal action, including the commencement of legal proceedings as deemed appropriate or necessary, to resolve or determine the Dispute.

### 18. Guarantee and Indemnity

- 18.1. If applicable, any guarantor/s of the Customer (**Guarantors**) jointly and severally unconditionally guarantee to Kwillow the due and punctual payment by the Customer of all outstanding monies, and agree to keep Kwillow fully indemnified against all damages, losses, costs and expenses arising from any failure of the Customer to pay the monies hereby guaranteed.
- 18.2. As between the Guarantor/s and Kwillow, the liability of the Guarantor/s will be deemed to be that of principal debtor. This guarantee is an addition to, and not in substitution for, any other security or right which Kwillow may have in respect to the Customer's indebtedness and may be enforced against the Guarantor/s without first having recourse to any such securities or rights and without taking steps or proceedings against the Customer.
- 18.3. The liability of the Guarantor/s will not be affected by the granting of time, credit or any indulgence or other concession to the Customer or to any person giving any similar guarantee.
- 18.4. The guarantee and indemnity in this clause 18 is an irrevocable and continuing guarantee and indemnity and will remain in full force until all obligations under the Customer's Credit Account have been fully paid, satisfied or performed.

### 19. General

- 19.1. Kwillow's failure or delay to exercise or enforce any right it has under these Terms will not operate as a waiver of Kwillow's right to exercise or enforce such right or any other right in the future.
- 19.2. Should any part of these Terms be unenforceable, such part will be severed and the remainder of these Terms will remain binding.
- 19.3. Except as required by law, both parties will maintain as confidential any information of a confidential nature that they acquire in relation to the other.
- 19.4. Kwillow may, at any time and in its sole discretion, vary these Terms by notice in writing to the Customer with immediate effect, provided that Kwillow will not make any variation to the nature or extent of the security interest granted by the Customer under clause 7 without the written agreement of the Customer.
- 19.5. The Customer will execute all documents and do all acts and things as may reasonably be required by Kwillow to effect the matters contemplated by these Terms.
- 19.6. Subject to clause 1.1 and except as otherwise agreed by the parties in writing, these Terms and the Webstore Policies constitute the entire agreement between the parties.
- 19.7. Any letter or notice given under these Terms will be validly and sufficiently given if sent by pre-paid post, facsimile or electronic mail to the address details notified by one party to the other from time to time. A notice sent by post will be deemed to have been received on the third working day following the day of posting. A notice sent by facsimile or electronic mail will be deemed to have been received on the date specified on the facsimile transmission receipt or email delivery receipt.
- 19.8. These Terms are governed by the laws of New Zealand and the parties submit to the exclusive jurisdiction of the New Zealand courts.