



**AJ's Stainless Pty Ltd ACN 647 781 039 Trading as Marko Stainless & Aluminium ABN 71 647 781 039 ("We", "Us" or "Our") Terms and Conditions of Sale 2021**

**1. Introduction**

- 1.1 The execution of an Application or an Order Form in respect of our goods or services shall be an offer by you to enter into a contract pursuant to the that Order Form or Application, and subject to these terms and conditions.
- 1.2 We may accept said offer verbally, in writing or by commencing to perform services for you.
- 1.3 The Customer agrees that these terms and conditions shall prevail in all circumstances, and the Cust may not seek to incorporate their own terms or conditions into the Agreement, and acknowledges that such terms and conditions shall not apply, even if attached to an Order form or anything else.

**2. Interpretation**

- 1.1 **"Agreement"** means the contract referred to in Clause 1.1.
- 1.2 **"Application"** means the application by the Customer to Us for credit.
- 1.3 **"Claim"** means any actions, claims, losses, costs and charges (including legal costs on a full indemnity basis or solicitor an own client basis, whichever is the higher), liabilities, judgments, orders, damages and expenses.
- 1.4 **"Company"** means AJ's Stainless Pty Ltd ACN 647 781 039.
- 1.5 **"Company Staff"** means all of Our employees, workers, contractors or anyone else who carries out work or provides goods or services for Us.
- 1.6 **"Current Cost"** means, in respect of Goods at any given time, the then-current price that We generally charge our customers for those Goods.
- 1.7 **"Current Rate"** means, at any given time, the then-current rate generally charged per hour by Us in respect of such Services.
- 1.8 **"Customer"** means any recipient, individual or company, of goods and services from the Company, or anyone who orders goods or services from the Company.
- 1.9 **"Delivery and Installation Agreement"**: This Agreement is a Delivery and Installation Agreement to the extent that We have agreed in writing to deliver Goods and install same at a specific location.
- 1.10 **"Goods"** means products, materials and services provided by Us at the request of the Customer.
- 1.11 **"Guarantor"** means any person who executes this document the Customer's behalf, or any party specified to execute this Agreement in their capacity as guarantor.
- 1.12 **"Installation Costs"** means, in respect of the installation of Goods or any other Service, the price set out in the Order Form in respect of such installation, as varied in accordance with these Terms and Conditions or, if no such price is specified, then the price calculated in accordance with the Current Rate.
- 1.13 **"Location"** means the location at which we have agreed in writing to install Goods.
- 1.14 **"Loss or Damage"** includes (without limit) direct loss or loss of profits or indirect, consequential, incidental, special, exemplary or punitive loss or damage howsoever caused (including through the negligence of the Customer or others).
- 1.15 **"Order Form"** means Our order form that we submit to you for execution.
- 1.16 **"PPSA"** means the Personal Properties Securities Act 2009 (Cth) as amended from time to time.
- 1.17 **"PPSR"** means the Personal Properties Securities Register established under the PPSA.
- 1.18 **"Price"** means, in respect of Goods, the price set out in the Order Form provided by Us or, if no such price is specified, then

such price is calculated in accordance with the Current Cost.

1.19 **"Parties"** means Us, the Customer and the Guarantors.

1.20 **"Services"** means any installation or other services carried out by Us.

1.21 **"Terms and Conditions"** means these terms and conditions of sale.

1.22 In this Agreement, unless otherwise indicated by the context:

- i Words importing the singular include the plural and vice versa;
- ii An expression importing a natural person includes a body corporate;
- iii A reference to a party includes that party's successors and permitted assigns; and
- iv A covenant or agreement on the part of two or more persons binds them severally and jointly.

### 3. Payment and Price

3.1 Payment for Goods must be made by the Customer and received in full by Us before the end of the calendar month after the calendar month in which the Company issues a tax invoice in respect of the Goods. If a shorter period is specified for payment in the Order Form, then payment must be made within that shorter period.

3.2 All prices as published from time to time are subject to change without notice. Prices may be increased after acceptance by a Customer if the Company incurs an increase from its suppliers or any increase in its costs of production or carriage.

3.3 At intervals of not less than 7 days We may provide the Customer with progress payment claims with respect to the value of the Goods.

3.4 The Customer shall also pay Us any costs that We incur in storing uncollected Goods (if not collected within 7 days from the agreed collection date or the date that We notify the Customer the Goods are available for collection), any applicable stamp duty, or other expenses directly or indirectly incurred by Us.

3.5 If the Customer fails to make payment in accordance with Clause 3, We shall be entitled to:

- o Charge interest at the rate of twelve per centum (12%) per annum on a cumulative basis on all overdue amounts (including late payment charges and amounts other than the prices) calculated on a day-to-day basis on any monies due but unpaid, such interest to be computed from the due date for payment AND the parties agree that such charges shall be payable on demand.
- o Claim from the Customer all costs relating to any action taken by Us to recover monies or goods due from the Customer including any mercantile agents costs and legal costs and disbursements on a solicitor client basis.
- o Require the payment of cash upon delivery of any further Goods; and
- o Cease any further deliveries to the Customer and to terminate any agreement in relation to Goods that have not been delivered.

3.6 Retention will not be accepted by Us under any circumstances.

3.7 We may deduct any amount due to Us under any tax invoice or statement of account by way of set-off or cross claim and all amounts must be fully paid to Us without any deduction whatsoever.

#### **4. Delivery and installation**

- 4.1 To the extent that this is a Delivery and Installation Agreement:
- i. The Customer shall pay the Price of the relevant Goods, together with the Installation Costs in respect of the installation of the Goods.
  - ii. The Customer warrants that the Location is in all respects safe, easily accessible, and that there is no issue or condition present at the Location that could adversely affect the relevant installation, or result in additional time being taken to install the relevant Goods.
  - iii. The Customer warrants that it has disclosed to Us all matters relevant to the Installation or the Location, and anything that a reasonable person in Our position would desire to be made aware before such an installation.
- 4.2 To the extent that this is not a Delivery and Installation Agreement, the Customer shall arrange for collection of the Goods or arrange its own delivery at its own cost in all respects.
- 4.3 If We agree to deliver Goods, then all reasonable efforts to deliver the Goods to the Customer at the time(s) arranged will be made by Us. However, We will in no circumstances be liable for any Claim that relates to a delay in delivery or installation or failure to give notice of a delay in delivery or installation. Any Cost incurred due to the failure of the Customer to accept the Goods will be borne by the Customer in full and payable immediately to Us.
- 4.4 We are not liable for and will not take responsibility for any delay in delivery for any reason or Our inability to secure continuation of supply of the Goods.
- 4.5 Any damage to property on delivery or any damage to the Goods being delivered or any direct or indirect loss suffered by the Customer by reason of any delay or failure in delivery will not be Our responsibility. The Customer accepts all risk in this regard.
- 4.6 The Customer is obliged to inspect the Goods upon delivery as soon as practicable and immediately advise Us of any damage to the Goods. The Customer must retain the Goods in the condition in which they were delivered to enable the Company to inspect the Goods.
- 4.7 There will be no obligation on Our part to accept the return of the Goods unless required by law.

#### **5. Default and Warranties**

- 5.1 Default of these Terms and Conditions includes any breach by the Customer of these Terms and Conditions, non-payment for the Goods or installation by the due date or any act of bankruptcy or insolvency including the external administration of the Customer.
- 5.2 Any default of the Customer will enable Us to claim the return of the Goods without notice or to withdraw credit to the Customer making all monies payable on demand and We at Our discretion may treat the whole contract as repudiated and sue for breach of contract.
- 5.3 The Customer warrants that all information supplied by the Customer, whether incorporated into the Application or not, is true and correct in all respects.
- 5.4 Orders of Goods may not be cancelled without Our consent.
- 5.5 If We agree to accept return of Goods, a restocking charge will apply and be payable upon demand, representing 50% of the Price and Installation Costs (if applicable) or such other percentage as we may specify.

5.6 If We agree to accept return of Goods, that agreement may be retracted if the Goods have been used, damaged or are in any way in an inferior condition to when they were originally supplied to the Customer.

## **6. Credit**

6.1 Credit may be granted to the Customer upon Application if approved by Us. Notice to the Customer will be provided to the Customer confirming the agreement for Credit.

6.2 The Customer must notify in writing to Us any change in the information provided on Application or other information provided.

## **7. Fit for Purpose**

7.1 Except as expressly provided to the contrary, all representations, warranties, terms and conditions in relation to the Goods and installation are excluded to the maximum extent permitted by law.

7.2 The Customer is required to expressly advise the Company of the specific purpose for the Goods.

## **8. Limitation of Liability**

8.1 If the Customer obtains goods or services from Us as a consumer, within a meaning of the Australian Consumer Law, then the following provisions shall apply:

- i Such goods and services are supplied are subject to the guarantees set out in division 1 of the Australian Consumer Law ("The Guarantees"), subject to clauses ii and iii;
- ii In a case of goods, Our liability for failure to comply with the guarantee (other than a guarantee under section 51, 52 or 53 of the Australian Consumer Law) is limited to the replacement of the goods or the supplier of equivalent goods;
- iii In the case of services, the liability of the Company for failure to comply with the guarantee is limited to the supply of the services again; and
- iv This clause 8.1 prevails over all other provisions of this Agreement.

8.2 To the fullest extent permitted by applicable law and without limiting any other provision of this Agreement, Our maximum aggregate liability in respect of any Claim shall not exceed the sum paid by the Customer in respect of the Goods or services to which such Claim relates.

8.3 Where loss or damage is not covered in paragraph 8.1 or 8.2, We are not liable to the Customer under statute or rule of law or equity (including negligence or otherwise) for any loss or damage arising out of Our supply of the Goods or any services.

8.4 To the fullest extent permitted by law, the Parties agree that We shall not have any liability, obligation or responsibility, whether in contract, tort (including but not limited to negligence), under statute or any other basis, for any direct or indirect incidental, consequential, special or exemplary damages, or damages for loss of profits, revenue, data or use, damages for personal injury, damage to property, arising in any way in connection with this Agreement or the Goods or services, including, but not limited to, damage to property, injury to persons, lost profits, or delays or inconvenience, even if such party has been advised of the possibly of such damages.

8.5 The Customer releases the Company Staff from any Claim for which We are not liable to the Customer and this Agreement. Without limiting the foregoing, the Customer shall indemnify Us for any claim against Us by any Company Staff as a result of the Customer making a claim against such Company Staff. The Customer is agreeing to this clause 8 with Us as the agent

of such Company Staff.

- 8.6 The Customer shall indemnify Us for any Loss or Damage that arises directly or indirectly from any non-compliance by the Customer or any other entity with any provision of any contract with Us.
- 8.7 Without limiting the foregoing, We shall not be liable in respect of any Goods that are misused or used otherwise than in accordance with Our or the manufacturer's instructions, installed incorrectly by the Customer or anyone other than Us, or that have not been maintained properly or maintained otherwise than strictly as instructed.
- 8.8 The Customer acknowledges that, to the extent permitted by law, We do not make any warranties or representations in respect of the Goods, including in respect of their suitability for any purpose.
- 8.9 If the Customer does not notify us of an issue with Goods within 7 days after the earliest of receipt, collection or installation of the Goods, then the Customer is deemed to accept the Goods and their installation in full and shall not make any Claim in respect of those Goods or their installation.
- 8.10 No supply by Us shall be deemed to constitute a sale by sample, and the Customer is responsible in all respects for ensuring that the Goods ordered are suitable in all respects for the purposes of the Customer.
- 8.11 We are not liable in any circumstances for any liquidated damages.

## **9. Risk and Returns**

- 9.1 Upon delivery, collection or installation of the Goods all risks pass to the Customer or risks pass upon the passing of title to the Customer whichever is earlier.
- 9.2 Goods manufactured to order are non-refundable.
- 9.3 The Company is not obligated to accept the return of any Goods, and if it does it does so at its absolute discretion. Goods will not be refunded after the expiry of 30 days from the date of purchase or delivery (whichever is later).

## **10. Indemnity**

- 10.1 The Customer indemnifies and will keep Us indemnified against any loss or damage suffered by Us as a result of any breach by the Customer of the terms of this Agreement (including legal costs on a full indemnity basis).

## **11. Costs**

- 11.1 The Customer shall be liable to the Company for all legal costs (on a solicitor and own client basis) and the costs of any mercantile agents in respect of proceedings for recovery under this Agreement.

## **12. Severance**

- 12.1 If a provision of this Agreement would but for this clause be unenforceable the provision must be read down to the extent necessary to avoid that result. If the provision cannot be read down it is to be severed without affecting the validity and enforceability of the remainder of this Agreement.

### **13. Applicable Law**

13.1 The laws of the State of New South Wales shall govern this Agreement and the Courts of that State shall have non-exclusive jurisdiction in connection with this Agreement.

### **14. GST**

14.1 All prices and quotations (unless clearly otherwise indicated in writing) are exclusive of Goods and Services Tax (GST).

14.2 If GST is imposed or payable on a supply under this Agreement then the Customer shall pay in addition to the price of the Goods and services or the value of any supply the amount of GST applicable at the time. Payment of GST is to be made at the same time of payment of the relevant taxable supply.

### **15. Force Majeure**

15.1 We are not liable for damage or delay in so far as the damage or delay was due to impediment beyond Our control.

15.2 Such impediment includes but without limiting the foregoing:

- i Strike, lockout boycott or other action including when a Party is itself an object or party thereof;
- ii War or any other conflict or acts of terrorism;
- iii Acts of government or authority whether lawful or unlawful;
- iv Fire or discontinuous energy production, delivery of water, electricity or heating;
- v Exceptional weather conditions or natural disasters including but not limited to storm, cyclone, hurricane, earthquake, landslide, flood, drought, plague etc.;
- vi Partial or total damage of machinery;
- vii Lack of component parts, raw materials, fire and discontinuance of common transport;
- viii Delay by subcontractors;
- ix The failure of a supplier to Us to perform their obligations or the failure of Our importation or other arrangements in respect of the Goods; and
- x Any similar event.

15.3 A Party shall inform the other Party of the event of force majeure as well as of the termination of the force majeure as soon as reasonably practicable.

15.4 In the event that force majeure continues longer than three (3) months, We have the right to terminate this Agreement with immediate effect and without liability.

### **16. Safety**

- 16.1 The Customer must advise the Company Staff of any requisite safety protocols or appropriate procedures that apply to visitors of Location on or prior to any relevant arrival at the Location and shall indemnify Us of any costs that arise directly or indirectly due to such procedures.
- 16.2 The Customer must ensure that the Location is safe in all respects for all purposes upon any visit by the Company Staff.
- 16.3 The Customer must advise Us immediately upon any concerns that the Customer has in relation to safety on, in or around the Location for purposes of this clause.
- 16.4 If the Company Staff determines that the Location is unsafe in any respect, such staff member or contractor may immediately terminate their attendance at the premises, and such termination will not directly or indirectly constitute a breach of any Agreement with the Customer.

## **17. Interest**

- 17.1 If any amount is not paid by the Customer as and when such payment force due, in addition to all other rights that the Company may have, the Customer shall pay to the Company interest at the rate of 10% per annum, calculated daily on such outstanding amount.
- 17.2 The interest referred to above constitutes a genuine pre-estimate of the damage may be suffered by the Company in respect of such breach.
- 17.3 The interest referred to in this clause shall be payable on demand.

## **18. Retention of Title**

- 18.1 Title to the Goods shall remain vested in Us and shall not pass to the Customer until the Price and Installation Costs for those Goods or related services and any Goods or services previously supplied to the Customer has been paid in full and received by Us.
- 18.2 Until title to the Goods passes in accordance with clause 18.1:
- i We shall have the authority to retake, sell or otherwise deal with or dispose of all or any part of the Goods;
  - ii We and the Company Staff and Our agents and employees shall be entitled at any time and without the need to give notice enter upon the Location or any property upon which the Goods or any part stored, or upon which We reasonably consider that they may be kept;
  - iii The Customer shall store or mark the Goods in a manner reasonably satisfactory to Us indicating that title to the Goods remains vested in the Us; and
  - iv The Customer shall insure the Goods to the full replacement value, and arrange for the Company to be noted on the relevant insurance policy as the loss payee.
- 18.3 The retention of title referred to in this Clause shall not affect the provisions of this Agreement that relate to the passing of risk.
- 18.4 This Agreement may create a registered security interest under the PPSA in the Goods and any proceeds. Neither Party has

agreed to postpone the time for attachment of the security interest. The Customer agrees that value has been given for the creation of the security interest.

18.5 Where We have other enforcement rights in addition to the enforcement rights provided for under the PPSA, those other enforcement rights will be continue to apply.

18.6 The Customer must ensure that any security interest created is enforceable, that Our priority is preserved and that any defect in the security interest is overcome, including by expeditiously executing any documents and doing anything required by Us.

18.7 The Customer must not, without Our written consent, sell, lease, dispose of, create a security interest in, mortgage or part with possession of the Goods or any interest in them or permit any lien over them. The Customer may only disclose information or documents if We have given Our prior written consent.

18.8 To the extent that the PPSA permits, the Customer waives its rights to receive a copy of any verification statement or financing change statement, any notice required under the PPSA, and its rights under Sections 95, 96, 117, 118, 120, 121(4), 123, 125, 126, 128, 129, 130, 135, 142 and 143 of the PPSA.

18.9 The Customer shall insure the Goods and maintain such insurance against theft or any damage until such Goods and any associated costs have been paid for in full to Us. The Customer must provide to Us on demand copies of any insurance policy evidencing such insurance.

18.10 A certificate signed by any of Our directors specifying Goods as unpaid for shall constitute conclusive evidence of such non-payment and as conclusive evidence that the title to such Goods remains with Us.

## **19. Personal Guarantee**

19.1 The Guarantor hereby agrees to guarantee to Us the performance and observance by the Customer of all of the Customer's obligations pursuant to this Agreement.

19.2 If there is more than one Guarantor, then any obligation applying to them shall apply to each Guarantor severally and to all Guarantors jointly.

19.3 This is a continuing guarantee and binds the Guarantor notwithstanding:-

19.3.1 The subsequent death, bankruptcy or liquidation of any one or more of the Parties.

19.3.2 Any indulgence, waiver or extension of time by Us to the Customer or to the Guarantor.

19.4 In the event of any breach by the Customer or the Guarantor covered by this guarantee, including in the payment of any money, We may proceed to recover the amount claimed as a debt or as damages from the Guarantor without having instituted legal proceedings against the Customer and without first exhausting Our rights against the Customer.

## **20. General**

20.1 Unless otherwise specifically permitted by these Terms and Conditions, no variation of these Terms and Conditions is valid and binding on the Parties unless in writing and signed by the parties.