

## **COMMERCIAL REFRIGERATION & WHOLESALE LIMITED**

### **TERMS AND CONDITIONS OF SALE**

#### **1: General**

##### 1.1

All goods are sold and services provided in accordance with the following terms and conditions which shall be construed in accordance with New Zealand law.

##### 1.2

The Seller gives all technical assistance entirely at the Buyer's risk.

##### 1.3

Subject to clause 6.2, all representations or terms (including any condition or warranty expressed or implied by law, statute or otherwise) not expressly included in these terms and conditions are hereby expressly excluded, unless expressly accepted by the Seller in writing.

#### **2: Prices**

Unless otherwise agreed in writing between the Seller and the Buyer, all goods are sold at the Seller's current prices at the time of delivery exclusive of goods and services tax, other taxes and duties, freight and insurance, and quotations are accordingly subject to variation.

#### **3: Delivery**

##### 3.1

Delivery is deemed to be made to the Buyer:

###### 3.1.1

if delivered by the Seller, when the goods reach the delivery address; or

###### 3.1.2

if not delivered by the Seller, when the goods are first despatched from the Seller's premises.

##### 3.2

All carriers who are not the Seller are deemed to be agents of the Buyer.

3.3 The Seller will use reasonable endeavours to maintain deliveries according to schedule, but any period or dates quoted for delivery are to be regarded as approximate only.

3.4 The Seller is not responsible for non-delivery caused by any factors beyond its reasonable control. The Buyer is bound to accept and pay for goods delivered within a reasonable time after any cause of delay has ceased.

3.5

The Seller may stop future deliveries until the Buyer has paid for all previous deliveries (whether payment is due or not).

3.6

The Buyer authorises the Seller to arrange for carriage of goods on such terms and conditions as the Seller thinks fit.

#### **4: Returns and Cancelled Orders**

4.1

Subject to clause 6.2, goods will only be accepted for return within 7 days of the date of delivery and in the same condition as they were in as at delivery. The goods remain at the risk of the Buyer until the goods are physically received back and accepted by the Seller. Freight for such returns will be at the Buyer's risk and expense.

4.2

The Buyer may not cancel any order without the prior written consent of the Seller, and the Buyer shall pay all costs incurred by the Seller in respect of the cancelled order.

#### **5: Services**

5.1

Unless otherwise arranged in writing with the Seller, the Seller does not provide any services to the Buyer and the installation, repair and maintenance of the goods is the responsibility of the Buyer.

5.2

If the Seller installs, repairs or maintains the goods it will use reasonable care but gives no warranty as to the efficacy of the installation, repair or maintenance, except as expressly agreed in writing.

5.3

If the Seller provides services to the Buyer these will be provided at the Buyer's risk and the Buyer acknowledges that the Seller has no knowledge or control over health and safety or other procedures on premises other than the Seller's premises.

#### **6: Consumer Guarantees Act 1993**

6.1

The Buyer acknowledges that if the Buyer is not a consumer (as defined in the Consumer Guarantees Act 1993 ("Act")) or if the goods are being purchased for business purposes (as provided in section 43 of the Act), the terms and guarantees under the Act do not apply.

6.2

Nothing in these terms and conditions is intended to have the effect of contracting out of the provisions of the Consumer Guarantees Act 1993 except to the extent permitted by that Act, and all provisions of these terms and conditions shall be read as modified to the extent necessary to give effect to that intention. If the Buyer does not fall within clause 6.1 the provisions of the Consumer Guarantees Act 1993 apply.

### 6.3

The Buyer undertakes to insert a similar provision to clause 6.1 in its terms and conditions of trade with any business or non-consumer purchaser it resupplies with the goods and further undertakes to indemnify the Seller from any loss or liability incurred under the Consumer Guarantees Act 1993 as a direct result of its failure to include such a provision.

### 6.4

The Buyer will indemnify the Seller for any liability that the Seller may incur which arises as a consequence of representations made by the Buyer about any of the goods which are made otherwise than in accordance with the Seller's express specifications and warranties which accompany the goods.

## **7: Risk**

### 7.1

Goods are at the sole risk of the Buyer from time delivery is deemed to be made under clause 3.1 whether received by the Buyer or not, whether or not there is a delay in delivery and even though ownership of the goods may not have passed to the Buyer.

### 7.2

The Seller has no obligation to do anything to limit any loss it might suffer if the Buyer does not pay the Seller on time.

### 7.3

The Buyer shall at all times insure the goods and keep them insured for their full insurable value against all insurable causes including loss or damage by fire and theft. If the goods are lost, damaged or destroyed then the Buyer agrees to make a claim against the insurance policy with respect to the lost, damaged or destroyed goods and to immediately pay the proceeds received to the Seller, and the Buyer will remain liable to the Seller for any shortfall in the insurance proceeds.

## **8: Payments**

### 8.1

The Buyer must, subject to the other provisions of these terms and conditions, pay for the goods on delivery unless prior written arrangements have been made with the Seller ("the due date"), time being of the essence.

### 8.2

If the Buyer owes money to the Seller under more than one invoice, the Seller may allocate any payment received from the Buyer to payment or part payment of any outstanding invoice, notwithstanding any instructions of the Buyer to the contrary.

### 8.3

If the Buyer does not pay in full by the due date, and without prejudice to the Seller's other rights and remedies:

#### 8.3.1

the Seller may charge the Buyer interest at the Default Rate on the amount outstanding from the due date until actual payment; and

#### 8.3.2

the Seller will be entitled to treat the contract as having been cancelled by the Buyer.

### 8.4

All discounts cease to apply if all monies due are not received by the Seller on the due date.

### 8.5

The Seller may demand full payment of any monies due at any time and without notice.

### 8.6

Payment shall become immediately payable regardless of the terms of payment and the Seller may take immediate action to recover payment if the Buyer is in default under any agreement with the Seller or commits an act of bankruptcy or goes into liquidation or receivership or enters into a creditor's composition or has its credit standing impaired in any way.

### 8.7

Payment by cheque or other bill of exchange or any promissory note will not be deemed to be payment until actually honoured or cleared to the credit of the Seller, and until such time, shall not prejudice or affect the Seller's rights or powers or remedies against the Buyer and/or the goods.

## **9: Retention Of Title**

### 9.1

Ownership in the goods shall not pass to the Buyer and any proceeds of sale of the goods shall belong to the Seller until the Buyer has paid for the goods in full.

### 9.2

The Buyer acknowledges and agrees that the Seller may register any security interest that the Seller has in respect of the goods and their proceeds on the Personal Property Securities Register and that such security interest survives until the goods are fully paid for.

### 9.3

Until payment to the Seller has been made in full for the goods, the Buyer acknowledges and agrees that:

#### 9.3.1

the Seller supplies the goods to the Buyer on the condition that the Seller has a PMSI in the goods;

#### 9.3.2

in relation to goods that are inventory, the Buyer will not allow any non-purchase money security interest to arise in respect of the goods unless the Seller has perfected its PMSI prior to the Buyer's possession of the goods;

#### 9.3.3

the Buyer will not permit the goods to become accessions or commingled with other goods or mass if the Seller has not perfected any security interest that the Seller has in relation to the goods; and

#### 9.3.4

if the Buyer (notwithstanding clause 9.1 of these terms and conditions) sells the goods prior to payment for the same to the Seller, the Buyer will pay the proceeds arising from that dealing into a separate account with separate records so that those proceeds remain identifiable and traceable to that dealing and the goods. The Buyer agrees that there will be no other funds in the account. If the Buyer further deals with such proceeds, the Buyer will manage that dealing or dealings in a manner having the result that the proceeds remain identifiable or traceable to the original goods. If the Buyer sells the goods prior to payment for the same to the Seller, all claims which the Buyer holds against third parties shall be handed over to the Seller.

### 9.4

If the Seller perfects any security interest that the Seller has in relation to the goods, the Buyer will not do anything that results in the Seller having less than the security or priority position in respect of the PPSA that the Seller assumed at the time of that perfection.

### 9.5

The Buyer irrevocably gives the Seller and its agents the right to enter upon the Buyer's premises, without giving notice and without being in any way liable to the Buyer, or to any person or company claiming through the Buyer, to take possession of the goods while the Buyer owes money to the Seller, or if the Seller has sufficient cause to exercise any rights that the Seller has under section 109 of the PPSA.

### 9.6

If the Seller is a secured party under the PPSA:

9.6.1

the parties contract out of Part 9 of the PPSA in the following manner: the rights and obligations contained in sections 114, 125, 129, 132, 133 and 134 of that Part do not apply between the Seller and the Buyer;

9.6.2

the Buyer waives its rights granted in sections 121 and 131 of the PPSA. Further, in accordance with section 148 of the PPSA, the Buyer waives its right to receive any financing statement or financing change statement from the Seller; and

9.6.3

The parties contract out of the Buyer's right to receive a statement of account under section 116 of the PPSA and the debtor's right to receive notice of a secured party's proposal to retain collateral under section 120(2) of the PPSA.

9.7

The Buyer will assist the Seller by completing any formalities or providing any information required by the Seller such that the Seller may establish and maintain the best security position that it is entitled to under the PPSA.

**10: Warranties**

10.1

If goods supplied to the Buyer by the Seller are stated as being covered by a warranty, the provisions of this clause 10 constitute the warranty, except as modified in writing by the Seller.

10.2

The warranty period commences on the date of delivery and runs for the term stated, or if no term is stated, for 30 days.

10.3

Replacements or work carried out on the goods do not extend the warranty period beyond that calculated under clause 10.2. The warranty period for replacement parts expires with the warranty for the goods as a whole.

## 10.4

The Seller will (at its option) repair (or reimburse the Buyer for the cost of repairs) or replace the goods during the warranty period where the goods are defective or malfunction in the ordinary course of usage provided that:

### 10.4.1

the goods have been used in a manner suitable to the design of the goods and the failure is not due directly or indirectly to the improper use of the goods;

### 10.4.2

the Seller is not required to refund the purchase price;

### 10.4.3

any defect or malfunction is not the result of incorrect installation by a person other than the Seller, inadequate or improper power, gas and/or water supply or connection, power surge or fluctuation of any kind, inadequate ventilation or drainage, fire, or flooding.

## 10.5

The warranty does not cover:

### 10.5.1

glass or light bulbs;

### 10.5.2

any goods that have had their serial plate removed or tampered with;

### 10.5.3

ordinary wear and tear;

### 10.5.4

any goods that have been serviced, dismantled, repaired or altered by personnel not authorised by the Seller;

### 10.5.5

any field labour and mileage not authorised by the Seller;

### 10.5.6

any defect or malfunction caused by accident or other event outside the reasonable control of the Buyer.

## 10.6

The warranty only applies if:

### 10.6.1

upon discovery of the defect or malfunction the Buyer immediately ceases and does not continue to use or operate the goods without the Seller's consent;

### 10.6.2

the Buyer makes a claim to the Seller in writing within 7 days of discovering the defect or malfunction;

### 10.6.3

the claim is made within the warranty period described in clause 10.2

## 10.7

The Seller will respond to a warranty claim within a reasonable time having regard to the time required to reasonably investigate the claim and assess the action required.

## 10.8

The limits on liability levels in clause 11.2 apply to liability under any warranty and accordingly the Seller is not obliged to expend more on carrying out its obligations under any warranty than is set out in clause 11.2.

## 10.9

The warranty is personal to the original Buyer and is not transferable or assignable in any way without the Seller's written consent.

## 10.10

Clause 10 is subject to clause 6.2.

## **11: Remedies**

### 11.1

The Buyer must promptly examine the goods and their installation. Subject to any written warranty given by the Seller, any claim by the Buyer will be deemed to be irrevocably waived if not made within 30 days of the date of deemed delivery of the goods to the Buyer under clause 3.1.

### 11.2

Subject to clause 6.2, if the Seller is under any liability to the Buyer then whether such liability is in contract, tort or otherwise and notwithstanding any relief or remedy to which the Seller may be entitled to under the Contractual Remedies Act 1979 or at law or in equity, such liability shall be limited to the price at which the goods and services are supplied to the Buyer or the actual loss or



damage suffered by the Buyer whichever is the lesser. Under no circumstances will the Seller be liable for indirect or consequential loss of any kind whatsoever.

## **12: Disputes**

### 12.1

The Buyer must give the Seller notice in writing forthwith if the Buyer disputes any invoice. The parties shall discuss the disputed amount in good faith and attempt to resolve the dispute within 20 days of the date of the Buyer's notice. Pending resolution of the dispute the Buyer shall forthwith pay that part of the invoice not in dispute.

### 12.2

Either party may refer any dispute between the parties to arbitration under the Arbitration Act 1996 or any Act passed in amendment thereof or in substitution therefor provided that any amount awarded is limited as set out in clause 11.2.

## **13: Waiver**

No waiver or omission to act by the Seller at any time shall affect or impair in any way or the rights of the Seller to avail itself of the remedies it may have.

## **14: Privacy Act 1993**

### 14.1

The information contained in any application or order by the Buyer is being collected by the Seller primarily for the purpose of determining the creditworthiness of the Buyer and for the registering of a financing statement on the Personal Property Securities Register. The information collected will be used by the Seller or any third party nominated by the Seller for this purpose. The Seller shall hold the information collected and the Buyer acknowledges the voluntary supply of the information. The Buyer acknowledges that should the information requested by the Seller be withheld the Seller is entitled to reject any application or order by the Buyer at the Seller's discretion.

### 14.2

The Seller acknowledges the Buyer's right of access to and correction of the information collected concerning the Buyer.

### 14.3

The Buyer agrees that the Seller may obtain information about the Buyer from any person (including any credit or debt collection agency) in the course of the Seller's business including credit assessment, debt collecting and direct marketing activities, and the Buyer consents to any person providing the Seller with such information.

### 14.4

The Buyer agrees that the Seller may use any information it has about the Buyer relating to the Buyer's creditworthiness and give that information to any other person, including any credit or debt collection agency, for credit assessment and debt collection purposes. The Buyer agrees that any other information collected by the Seller about the Buyer may be used by the Seller in the course of its business.

14.5

The Buyer shall notify the Seller of any change in circumstances which may affect the accuracy of the information provided by the Buyer to the Seller.

## **15: Intellectual Property**

15.1

All of the Seller's trademarks or other intellectual property rights in respect of the goods remain the Seller's property and the Buyer may not use, remove, interfere with or alter them in any way.

15.2

The Buyer must notify the Seller immediately if it receives a claim from a person alleging that it is the owner of any intellectual property rights relating to the goods and if the Seller considers itself to be affected, the Seller shall be entitled to completely control the defence or settlement of the claim.

## **16: Partial Invalidity**

If any part or all of a provision is held to be illegal or unenforceable for any reason, such illegality or unenforceability shall be applicable only to that part or all of the said provision or provisions, and the remainder of the said provision or provisions and these terms and conditions shall remain in full force and effect.

## **17: Entire Agreement**

Unless expressly provided otherwise in any written agreement between the Seller and the Buyer, these terms and conditions constitute the entire agreement, understanding and arrangements (expressed and implied) relating to the sale of goods from the Seller to the Buyer and supersede and cancel any previous agreement, understanding and arrangement relating thereto whether written or oral.

## **18: Amendment**

These terms and conditions may be amended by the Seller giving the Buyer notice in writing of the amendment.

## **19: Definitions and Construction**

The following terms have the meaning set out below:

19.1

“Accessions”, “Commingled Goods”, “Inventory”, “Perfect”, “Non-Purchase Money Security Interest”, “Personal Property Securities Register”; “Proceeds”, “Purchase Money Security Interest”, “Secured Party”, “Security Interest” and “Verification Statement” have the meaning given to such terms in the PPSA or that may be taken from their use in the PPSA.

19.2

"Buyer" means any party placing an order for goods from the Seller.

19.3

“goods” means the goods ordered from the Seller by the Buyer.

19.4

“Default Rate” means 3% per annum above the Seller’s bank overdraft rate at the time the default is made.

19.5

“PMSI” means a Purchase Money Security Interest as this term is defined in the PPSA.

19.6

"PPSA" means the Personal Property Securities Act 1999 and associated regulations.

19.7

"Seller" means Commercial Refrigeration and Wholesale Limited.

19.8

“Services” means services provided by the Seller to the Buyer.