

# TERMS AND CONDITIONS

## 1. DEFINITIONS

**"The Seller"** means Emeny Enterprises Pty Limited (A.B.N. 52 142 211 229) and all of its subsidiary and associated companies trading under various names and styles and includes its successor and assigns as well as servants, agents and contractors.

**"The Customer"** means any person, firm, corporation or entity which requests the Goods or Services of The Seller.

**"The Parties"** means the Seller and the Customer.

**"Goods"** shall mean all goods supplied to The Customer by the Seller.

**"Services"** shall mean all services provided by the Seller to the Customer.

**"Contract"** means the agreement formed from the acceptance by the Customer of The Seller's offer to perform services (as defined herein) and shall include the Standard Terms and Conditions set out herein.

**"Conditions"** means the terms and conditions of sale including any amendment or variation.

## 2. CONTRACT

- (a) A binding contract is formed when a request is made by the Customer with The Seller and The Seller agrees to perform the services as requested.
- (b) In making such a request, The Customer acknowledges that the contract formed includes the Terms and Conditions herein and that a binding contract is formed at the time the Seller agrees to perform the services as requested.
- (c) In making a request of The Seller and forming a contract with the Seller for the provision of services, The Customer acknowledges that the contract contains, by necessary implication, the following terms;
  - (i) The Seller has been given permission by The Customer to enter on the property where the pool is located in order to perform the services and to perform work on the property;
  - (ii) The Seller has the right to remove equipment associated with the pool and either work on the equipment on site or to remove the equipment off site in order to perform certain works where the Seller deems it necessary and appropriate in order to properly perform the services for The Customer, such determination to be made by The Seller in its absolute discretion;
  - (iii) The seller has the right to add chemicals and other material to the pool where The Seller, in its absolute discretion, deems it necessary and appropriate in order to properly perform the services for The Customer and acknowledges that, in order to so properly perform the services, The Seller may from time to time be required to add certain chemicals and that The Seller will charge for the costs of any such chemicals.
  - (iv) The seller has the right to perform additional services to the pool where The Seller, in its absolute discretion, deems it necessary and appropriate in order to properly perform the Contract and The Seller may charge for the costs of any such additional services at The Seller's absolute discretion.

## 3. PRICE AND TERMS OF PAYMENT

- (a) The Seller will provide to the Customer an indication of price for the services offered which will be as close as possible to the final price to be charged by the Seller to the Customer. However, the Customer acknowledges that the nature of pool maintenance is such that there may be matters arising that are not, and could not have been, known or apparent to The Seller

at the time of indicating the price and that the actual price charged, therefore, may vary from the price indicated by the Seller in the first instance and acknowledges that in such circumstances, the Seller is not bound by the price indicated in the first instance.

- (b) For the purposes of requiring payment from the Customer, the Seller shall issue an invoice to the Customer stating, amongst other things, the price of the services and any chemicals used in providing the services and The Customer shall pay the price stated in any such invoice and such payment shall be made by a method of payment approved by the Seller without deduction or set off.
- (c) The Seller shall invoice The Buyer at a time of its own choosing and in its absolute discretion. Unless notified on the face of the invoice or otherwise in writing by The Seller, payment of the price on the invoice shall be made by The Customer within 30 days following the date of the invoice and time shall be of the essence in this regard.
- (d) The Seller is entitled, in its absolute discretion, to request a deposit of up to 50% of the total price quoted be paid upfront for any Goods or Services requested by the Customer.
- (e) If the amount owing and stated on the invoice is not paid by The Customer to The Seller by the due date;
  - (i) The Seller is entitled to suspend the provision of all further services to The Customer until payment is made in full in respect of all outstanding invoices, whether other invoices are overdue at that time or not and The Customer acknowledges that if The seller exercises its right to suspend services in these circumstances, The Seller is not liable for any damages that are sustained by virtue of the Seller's failure to continue to provide the services and that The Customer indemnifies the Seller in respect of any claims that are brought against the Seller in this regard;
  - (ii) The Seller is entitled to charge interest on all overdue amounts, to be charged at the higher of either the rate prescribed by the Civil Procedure Act (NSW) or 10.00% per annum and payments made by The Customer thereafter will be first credited against any such interest calculated and charged;
  - (iii) The Customer agrees that it will pay or reimburse to The Seller any and all costs, expenses or commissions incurred by it or its legal advisors, mercantile agents or other parties acting on the Seller's behalf in respect of any steps instituted or considered against The Customer whether for recovery of debt, possession of any products, taking of any security or otherwise.
  - (iv) If the Seller has in its possession any equipment removed from the Customer's premises in the process of providing the services to the Customer, the Customer acknowledges the Seller's right, and grants permission to The Seller, to retain possession of such equipment pending the payment of all outstanding monies owing to the Seller by The Customer and agrees it will make no claim against the Seller in this regard.
- (f) The Seller will provide different pricing indications depending on whether the Customer is seeking a one-off or irregular service, or whether the Customer is seeking an ongoing contract, with an ongoing contract being cheaper. However, The Customer acknowledges that if The Seller provides a pricing indication based on an ongoing contract and The Customer terminates the contract without fulfilling the full period of the ongoing contract, The Seller is entitled to charge the difference between the discounted price (offered on the basis of ongoing contract) and the full price that The Seller would otherwise have charged in respect of all previous invoices issued to the Customer.

- (g) The Seller shall not, under any circumstances, be liable for any claim, loss or damage sustained or incurred by The Customer or any other party arising in any way whatsoever as a result of the provision of the services, any delay in delivery of the services or any other failure to provide the services or part thereof as anticipated.

#### **4. LIMITATION OF LIABILITY**

- (a) To the extent permitted by law, all statutory and other implied conditions and warranties relating to the supply of the services by the Seller are negated and the liability of the Seller pursuant to any provision of legislation or pursuant to any other potential liability (whether arising from negligence or not) including consequential loss is limited at the option of The Seller to the provision of the services.
- (b) Except as expressly provided in these Terms, the Seller shall not be liable for any loss, damage, injury to property or persons including but not limited to loss of profits, business or other direct, indirect, special, consequential or incidental damages resulting from, arising out of or in connection with the provision of the services by The Seller, whether arising directly or indirectly out of or in any way attributable to the performance or non-performance of the services by The Seller.
- (c) The Customer is liable for and shall indemnify The Seller and its officers, employees, contractors and agents against any liability, loss, claim, charge, payments made, cost or expense whatsoever, whether arising under contract, statute or common law, incurred or sustained by the seller or its officers, employees, contractors and agents in respect of any property damage, loss or loss of use of any property including economic and consequential loss arising therefrom or personal injury to, or death of, any person.

#### **5. WARRANTY**

- (a) The Seller provides a warranty for any installation work performed by the Seller for a period of 30 days from the date of completing the installation work.
- (b) Second-hand or used Goods are sold "as is" and do not carry an express warranty period over and above any non-excludable rights conferred on the Customer by law. The Customer acknowledges that they have been given a reasonable opportunity to inspect the Goods before purchase.
- (c) All implied conditions and warranties in relation to the Goods to be supplied by The Seller are excluded to the maximum extent permitted by law, to the extent that so far as legally possible these Conditions will comprise the entirety of both the Seller's and the Customers' rights and obligations.
- (d) Subject to any non-excludable rights conferred on the Customer by law, if the Customer wishes to make a claim in respect of a warranty or any other claim in respect of the Goods, the Customer must give written notice of the claim to the Seller within 14 days of delivery of the Goods. The Seller is not liable for any claim if the Customer does not comply with this time limit.
- (e) The Seller assigns all of its interest or benefit in any manufacturers warranty in respect of the Goods to the Customer upon receipt of full payment for the product.
- (f) The Seller may be engaged to attend the property of The Customer to perform services at the request of another party as a result of The Customer's reporting of a warranty item. Where it is found by The Seller, after performing the services, that the services required were as a result of a warranty item, The Customer will not be required to make payment to The Seller in respect of the provision of any services. However, the Customer hereby acknowledges that if in the course of providing the services, it becomes apparent to The Seller that the services

required were not as a result of a warranty item, The Customer will be liable to The Seller directly.

#### **6. CHLORINATOR – POSSIBLE RUSTING OF POOL STRUCTURE**

- (a) The Customer releases the Seller from any loss or damage or claim arising out of or in relation to the rusting of the Customer's pool caused by the chlorinator purchased or otherwise supplied to the Customer from the Seller.
- (b) The Customer is liable for and shall indemnify The Seller against any liability, loss, claim, charge, payments made, cost or expense whatsoever, arising out of or in relation to the rusting of the Customer's pool caused by the chlorinator purchased or otherwise supplied to the Customer from the Seller.

#### **7. DISPUTE RESOLUTION PROCESS**

- (a) If the Customer is not satisfied with the Service performed by the Seller, the Customer is to notify the Seller by email within 48 hours of the service being performed and allow the Seller 3 business days to respond.
- (b) The Seller may, in its absolute discretion:
  - (i) Re-perform the service; or
  - (ii) Reimburse the Customer (either partially or fully) for the service.
- (c) In the event that an agreement cannot be reached between the parties, the parties agree to attend upon a mediation to resolve the dispute before commencing court or tribunal proceedings.

#### **8. RISK AND OWNERSHIP OF GOODS**

- (a) Risk in all Goods supplied passes to the Customer when Goods are delivered to the Customer.
- (b) Ownership of all Goods delivered to the Customer remains with the Seller until payment is made for the Goods. The Customer holds all Goods delivered to the Customer as fiduciary bailee.

#### **9. REPOSSESSION OF GOODS**

- (a) If the Customer fails to pay for the Goods on the due date, the Customer irrevocably authorises the Seller to enter the Customer's premises (or any other premises under the Customer's control if the Goods are stored at such premises) and use reasonable force to retake possession of the Goods without liability for trespass or any resulting damage.
- (b) The Customer agrees to indemnify the Seller and keep the Seller harmless for all claims by causes of action which may arise by the Seller retaking possession and the Customer agrees to pay the Seller costs of retaking possession. The Seller will be entitled but not obligated to resell any Goods repossessed pursuant to the provisions of this clause.

#### **10. PERSONAL PROPERTIES SECURITIES ACT 2009 ("PPSA")**

- (a) The Customer acknowledges that these Conditions constitute a security agreement for the purposes of Section 10 of the PPSA which creates a security interest in favour of the Seller in all the Goods previously supplied (if any) and all Goods supplied thereafter by the Seller to the Customer to secure the payment from time to time and of all money owing by the Customer to the Customer.
- (b) Pursuant to Section 157 of the PPSA, unless otherwise agreed in writing, the Customer waives the right to receive a verification statement in respect of any financing statement or financing change statement relating to the security interest.

- (c) To the maximum extent permitted by law, the Customer waives the Customer's rights under sections 95, 96, 125, 121(4), 130 (1)(a), 132(1), 132(3)(d), 132(4), 134(2)(a), 135, 140(2)(f), 142 and 143 of the PPSA.
- (d) For the purposes of section 125 of the PPSA the Customer agrees that a "reasonable period" will not mean less than 12 months regardless of the circumstances.
- (e) All terms used in clauses 8 and 9, unless otherwise provided, have the same meaning as given to those terms in the PPSA.

#### **11. SEVERABILITY**

In the event that any of the provisions or conditions of the Terms and Conditions or any clause or sub-clause of the Terms cannot be given full force and effect by reason of statutory invalidity, uncertainty or otherwise, the provision or condition, clause or sub-clause shall be severed, ignored or read down restrictively to maintain and uphold so far as possible the remaining conditions and provisions of the Terms.