

THERMON AUSTRALIA PTY LTD

PART 2: TERMS AND CONDITIONS OF TRADE

1. Definitions

In these conditions:

"**ACL**" means the Australian Consumer Law Schedule of the Competition and Consumer Act 2010 (Cth);

"**Agreement**" means any agreement for the provision of goods by Thermon to the Customer;

"**consumer**" is as defined in the ACL;

"**Customer**" means the person, jointly and severally if more than one, acquiring goods from Thermon;

"**goods**" means goods supplied by Thermon to the Customer;

"**GST**" means the Goods and Services tax as defined in *A New Tax System (Goods and Services Tax) Act 1999* as amended;

"**Intellectual Property**" means all copyright, trade marks, designs, specifications, drawings, confidential information, manufacturing processes, circuit layouts and all modifications, improvements and derivations (whether registrable or not) owned or licensed by Thermon in respect of the goods;

"**PO**" means a purchase order submitted by the Customer to Thermon, which the Customer agrees are incorporated in these Terms;

"**PPSA**" means the Personal Property Securities Act as amended;

"**price list**" means the price list or catalogue issued by Thermon from time to time;

'**Related Body Corporate**' has the meaning given in the *Corporations Act 2001 (Cth)*

"**RMA**" means Return Material Authority;

"**Terms**" means these Terms and Conditions of Trade; and

"**Thermon**" means Thermon Australia Pty Ltd (ACN 000 554 932).

2. Basis of Agreement

2.1 Unless otherwise agreed by Thermon in writing, the Terms apply exclusively to every Agreement and cannot be varied or replaced by any other conditions, including the Customer's terms and conditions of purchase (if any).

2.2 Any quotation provided by Thermon to the Customer for the proposed supply of goods is:

- (a) provided on the basis of Thermon's price list;
- (b) an invitation to treat only; and
- (c) only valid if in writing.

2.3 The Terms may include additional terms in Thermon's quotation, which are not inconsistent with the Terms.

2.4 An Agreement is accepted by Thermon when Thermon accepts, in writing or electronic means, a PO from the Customer or provides the Customer with the goods.

2.5 Thermon may vary or amend these Terms by written notice to the Customer at any time. Any variations or amendments will apply to orders placed after the notice date.

3. Pricing

3.1 Prices quoted for the supply of goods exclude GST and any other taxes or duties imposed on or in relation to the goods.

3.2 Unless otherwise agreed, the Customer is responsible for all costs associated with delivery of the goods to the Customer.

3.3 If the Customer requests any variation to the Agreement, or if there is any change in the costs incurred by Thermon in relation to the goods, including due to fluctuating currency exchange rates, freight insurance and customs or primage duties, Thermon may vary its price to take account of any such change, by notifying the Customer.

4. Payment

4.1 Unless credit is provided, the Customer must pay for the goods in full strictly by cash on delivery.

4.2 Where Thermon grants credit facilities to the Customer, payment for the goods must be made in full within 30 days from the end of the month in which the goods were delivered.

4.3 Thermon is entitled at any time to request such security or additional security as it in its discretion thinks fit.

4.4 Payment by cheque is not deemed made until the proceeds of the cheque have cleared.

4.5 Payment terms may be revoked or amended at Thermon's sole discretion immediately upon giving the Customer written notice.

4.6 The time for payment is of the essence.

5. Payment Default

5.1 If the Customer defaults in payment by the due date of any amount payable to Thermon, or otherwise breaches any term of this Agreement, then all money which would become payable by the Customer to Thermon at a later date on any account, becomes immediately due and payable without the requirement of any notice to the Customer, and Thermon may, without prejudice to any of its other accrued or contingent rights:

- (a) charge the Customer interest on any sum due at the prevailing rate pursuant to the Penalty Interest Rates Act 1983 (Vic) plus 4 per cent for the period from the due date until the date of payment in full;
- (b) charge the Customer for, and the Customer must indemnify Thermon from, all costs and expenses (including without limitation all legal costs and expenses) incurred by it resulting from the default or in taking action to enforce compliance with the Terms or to recover any goods;
- (c) cease or suspend supply of any further goods or the provision of credit facilities to the Customer;
- (d) by written notice to the Customer, terminate any uncompleted contract.

5.2 Clauses 5.1(c) and (d) may also be relied upon, at Thermon's option:

- (a) where the Customer is a natural person and becomes bankrupt or enters into any scheme of arrangement or any assignment or composition with or for the benefit of his or her creditors or any class of his or her creditors generally; or
- (b) where the Customer is a corporation and enters into any scheme of arrangement or any assignment or composition with or for the benefit of its creditors or any class of its creditors generally, or has a liquidator, provisional liquidator, receiver, receiver and manager, administrator or similar functionary appointed in respect of its assets, or any action is taken for, or with the view to, the liquidation (including provisional liquidation), winding up or dissolution without winding up of the Customer.

6. Passing of Property

6.1 Until Thermon receives full payment in cleared funds for all goods supplied by it to the Customer, as well as all other amounts owing to Thermon by the Customer:

- (a) title and property in all goods remain vested in Thermon and does not pass to the Customer;
- (b) the Customer must hold the goods as fiduciary bailee and agent for Thermon;
- (c) the Customer must keep the goods separate from its goods and maintain Thermon's labelling and packaging;
- (d) the Customer must hold the proceeds of any sale of the goods on trust for Thermon in a separate account with a bank to whom the Customer has not given security, however failure to do so will not affect the Customer's obligation to deal with the proceeds as trustee;
- (e) in addition to its rights under the PPSA, Thermon may without notice, enter any premises where it suspects the goods are and remove them, notwithstanding that they may have been attached to other goods not Thermon's property, and for this purpose the Customer irrevocably licences Thermon to enter such premises and also indemnifies Thermon from and against all costs, claims, demands or actions by any party arising from such action.

7. Personal Property Securities Act

7.1 Notwithstanding anything to the contrary contained in these Terms, the PPSA applies to these Terms.

7.2 For the purposes of the PPSA:

- (a) terms used in clause 7 that are defined in the PPSA have the same meaning as in the PPSA;
 - (b) these Terms are a security agreement and Thermon has a Purchase Money Security Interest in all present and future goods supplied by Thermon to the Customer and the proceeds of the goods by the customer;
 - (c) the security interest is a continuing interest irrespective of whether there are monies or obligations owing by the Customer to Thermon at any particular time; and
 - (d) the Customer must do whatever is necessary in order to give a valid security interest over the goods which is able to be registered by Thermon on the Personal Property Securities Register.
- 7.3 The security interest arising under this clause 7 attaches to the goods when the goods are dispatched from Thermon's premises and not at any later time.
- 7.4 Where permitted by the PPSA, the Customer waives any rights to receive the notifications, verifications, disclosures or other documentation specified under sections 95, 118, 121(4), 130, 132(3)(d), 132(4), 135 and 157 of the PPSA.
- 7.5 To the extent permitted by the PPSA, the Customer agrees that:
- (a) the provisions of Chapter 4 of the PPSA which are for the benefit of the Customer or which place obligations on Thermon will apply only to the extent that they are mandatory or Thermon agrees to their application in writing; and
 - (b) where Thermon has rights in addition to those in Chapter 4 of the PPSA, those rights will continue to apply.
- 7.6 The Customer must immediately upon Thermon's request:
- (a) do all things and execute all documents necessary to give effect to the security interest created under this Agreement; and
 - (b) procure from any person considered by Thermon to be relevant to its security position such agreements and waivers (including as equivalent to those above) as Thermon may at any time require.
- 7.7 The customer must not, without the prior written consent of Thermon:
- (a) register a financing change statement pursuant to the PPSA; or
 - (b) grant any security interest, lien or other right over the goods (of any of them)
- 7.8 Thermon may allocate amounts received from the Customer in any manner Thermon determines, including in any manner required to preserve any Purchase Money Security Interest it has in the goods supplied by Thermon.

8. Risk and Insurance

- 8.1 The risk in the goods and all insurance responsibility for theft, damage or otherwise will pass to the Customer immediately on the goods being delivered to the Customer's premises or nominated delivery point.

9. Performance of Agreement

- 9.1 Any period or date for delivery of goods stated by Thermon is an estimate only and not a contractual commitment.
- 9.2 Thermon will use its reasonable endeavours to meet any estimated dates for delivery of the goods but will not be liable for any loss or damage suffered by the Customer or any third party for failure to meet any estimated date.
- 9.3 A completed driver's manifest or delivery docket whether signed by the driver or by the Customer or its employee or agent will be proof of delivery of goods invoiced.

10. Delivery

- 10.1 Thermon will arrange for the delivery of the goods to the Customer and shall designate the route and the means of transportation for the delivery of goods.
- 10.2 Thermon may make part delivery of goods and may invoice the Customer for the goods provided.
- 10.3 The Customer must advise Thermon in writing within 72 hours of delivery:
- (a) if there is damage to the goods;
 - (b) that the wrong goods have been received; or
 - (c) that the quantity of the goods is incorrect.

11. Liability

- 11.1 Except as set out in the Terms, and subject to any guarantees, terms, warranties and conditions that by law cannot be excluded (including guarantees given under Division 1 of Part3-2 of the ACL), any term, guarantee, condition or warranty in respect of the quality, merchantability, acceptability, fitness for purpose, condition, description, assembly, manufacture, design or performance of the goods or any remedy for their failure, whether implied by statute, common law, trade usage, custom or otherwise, is expressly excluded.
- 11.2 The liability of Thermon (and its related bodies corporate) to the Customer (if the Customer is a consumer under the ACL) for any breach of a consumer guarantee, warranty or condition imposed by the ACL is limited to such one or more of the following as Thermon decides:
- (a) replacing the goods or resupplying equivalent goods;
 - (b) repairing the goods;
 - (c) paying the cost of replacing the goods or acquiring equivalent goods;
 - (d) paying the cost of having the goods repaired.
- Except as provided in this clause 11.2 and in clause 11.3, nothing in the Terms restricts, limits or modifies any rights a consumer (as defined in the ACL) may have against Thermon (and its related bodies corporate) under Divisions 1 and 2 of Part 5-4 of the ACL.
- 11.3 The liability of Thermon (and its related bodies corporate) to indemnify the Customer under Division 3 of Part 5-4 of the ACL where the customer has supplied the goods to a consumer under the ACL:
- (a) if the goods are not of a kind ordinarily acquired for personal, domestic or household use or consumption, is limited to the amount specified in section 276A(1) of the CLA; and
 - (b) if the goods are of a kind ordinarily acquired for personal, domestic or household use or consumption, is restricted solely to the payment of the amount specified in section 274 of the CLA.
- 11.4 If the goods are acquired by the Customer otherwise than as a consumer (as defined in the ACL), then:
- (a) the liability of Thermon (and its related bodies corporate) to the Customer; and
 - (b) the remedies available to the Customer against Thermon (and its related bodies corporate),
- in connection with the goods, their quality, merchantability, acceptability, fitness for purpose, condition, description, assembly, manufacture, design or performance are limited solely to those provided for in:
- (c) the specified warranty terms for the goods, as supplied by TAPL with the goods or otherwise available from TAPL;
 - (d) any other express warranty terms given by TAPL in respect of the goods
- The benefit of the warranty given under those terms is personal to the Customer and is not assignable without the prior consent of Thermon.

12. Cancellation

- 12.1 If, through circumstances beyond Thermon's control, it is unable to deliver the goods, then it may cancel the Customer's order (even if it has already been accepted) by notice to the Customer.
- 12.2 No purported cancellation or suspension of an order or any part of it by the Customer is binding on Thermon once the order has been accepted.

13. Specifications

- 13.1 All specifications, drawings, illustrations, descriptive matter and particulars contained in Thermon's catalogues, price list, website and marketing documents ("Specifications") are indicative only, do not form part of this Agreement, and are not representations or warranties of any kind.

14. Shortages and exchanges

- 14.1 Subject to the remainder of this clause 14, if any shortages, claim for damaged goods or non-compliance with the

- Agreement specifications is notified to and accepted by Thermon, Thermon may, at its option, exchange the goods or provide credit in accordance with this clause 14.
- 14.2 Subject to the remainder of this clause 14, catalogue products may be returned for change of mind.
- 14.3 Thermon will not under any circumstances accept goods for return if:
- the goods are custom made or have otherwise been specifically produced, imported or acquired to fulfil the Agreement;
 - have been altered in any way;
 - have been used or cut; or
 - are not in their original condition and packaging.
- 14.4 Prior to returning any goods, the Customer must obtain an RMA number. No returns will be accepted without an RMA number. An RMA number must be obtained by contacting Thermon at 30 London Drive, Bayswater, Victoria, 3153. Phone: (03) 9762 6900. Fax (03) 9762 9519. Email aus.sales@thermon.com and then providing by email the following:
- Thermon project, quote, sales order and / or invoice number;
 - Customer PO number;
 - shipment date;
 - complete description and quantity of good(s) being returned; and
 - reason for return.
- 14.5 Subject to clause 14.6, if Thermon accepts goods for return, the Customer will receive a credit for the returned goods equal to the price charged by Thermon less (in Thermon's sole discretion) a 25% deduction for handling and restocking charges and less any cost borne by Thermon in association with settling and paying claims arising out of the termination of work it subcontracts or any orders relating to the goods covered.
- 14.6 Thermon may exchange "stockable" heating cables without imposing a restocking fee if:
- the cables are returned within 12 months of original shipment;
 - the footage and type of cable returned is similar to the cable available for exchange;
 - the returned cable is unused, uncut, resaleable and in the original packaging; and
 - the Customer provides a new PO.
- 14.7 The Customer must pay all freight charges associated with the return of goods to Thermon.
- 14.8 If the Customer is a consumer, nothing in this clause 14 limits any remedy available for a failure of the statutory guarantees under the ACL.
- 15. Warranty**
- 15.1 Thermon's goods come with guarantees that cannot be excluded under the ACL. If the Customer is a consumer (as defined by the ACL), the customer is entitled to a replacement or refund for a major failure and for compensation for any other reasonably foreseeable loss or damage. The Customer is also entitled to (if a consumer) to have the goods repaired or replaced if the goods fail to be of acceptable quality and the failure does not amount to major failure.
- 15.2 Each range of goods provided by Thermon is subject to specific warranty terms, limitations and exclusions:
- that are supplied with the goods; and
 - that are available from Thermon upon request.
- If specific warranty terms:
- are not supplied with the goods; or
 - are not otherwise available from Thermon upon request,
- then clauses 15.3 to 15.12 will apply.
- 15.3 Subject to clause 15.2, Thermon warrants that the goods will be free from defects in materials and workmanship for 12 months from the date of [purchase]/[delivery to the Customer] Subject to the specific terms, limitations and exclusions referred to in clause 15.2, Thermon warrants that its goods will be free from defect in materials or workmanship for 12 months from the date of purchase.
- 15.4 If a defect appears in Thermon's manufacture or workmanship of the goods before the end of the warranty period, Thermon will, in its sole discretion, either repair or replace the goods or the defective part of the goods free of charge or provide credit for the goods equal to the price charged by Thermon.
- 15.5 Thermon reserves the right to replace defective parts of the goods with parts and components of similar quality, grade and composition where an identical part or component is not available.
- 15.6 Goods presented for repair may be replaced by refurbished goods of the same type rather than being repaired. Refurbished parts may be used to repair the goods.
- 15.7 The warranty does not apply where:
- the goods have been subjected to abnormal conditions;
 - the goods have not been used or installed in accordance with Thermon's instructions, recommendations or specifications or have been misused, neglected or improperly maintained; and
 - unauthorised repairs, work or alterations to the goods have been attempted.
- 15.8 If a fault covered by warranty occurs, the Customer must:
- follow the process for returns set out in clause 14.4 and
 - make the goods available to Thermon for inspection and testing. The Customer is responsible for all costs incurred in returning the goods to Thermon.
- 15.9 If the Customer requires replacement goods prior to inspection or repairs being undertaken, Thermon may require the Customer to provide a new PO number for the replacement goods to be shipped and invoiced. If Thermon subsequently determines that the Customer has a valid warranty claim, Thermon will issue a credit to be applied against the new invoice in which the replacement goods were shipped.
- 15.10 Thermon will pay freight costs associated with returning the repaired or replacement goods to the Customer.
- 15.11 Subject to clause 15.10, the repair or replacement of the goods or the provision of credit equal to the price charged for the goods is the absolute limit of Thermon's liability under this express warranty.
- 15.12 This warranty is in addition to any warranties imposed by Australian State and Federal legislation that cannot be excluded.
- 16. Intellectual Property**
- 16.1 The Customer acknowledges that it has no proprietary right or interest in the Intellectual Property.
- 16.2 The Customer must not register or record or attempt to register or record anywhere in the world the Intellectual Property or any part thereof or any patents, inventions, trade marks or designs derived from or similar to the Intellectual Property or aid or abet anyone else in doing so.
- 16.3 The Customer must not at any time create, sell, manufacture or process any products using or taking advantage of the Intellectual Property.
- 16.4 Any Intellectual Property provided to the Customer by Thermon in connection with the goods remains Thermon's exclusive property and must be returned to Thermon on demand and shall not be copied or communicated to any third party without Thermon's express prior written consent.
- 17. Force Majeure**
- 17.1 Thermon is not liable in any way howsoever arising under the Agreement to the extent that it is prevented from acting by circumstances beyond its reasonable control including, without limitation, industrial disputes, strikes, lockouts, accident, breakdown, import or export restrictions, acts of God, acts of terrorism, or acts of war. If an event of force majeure occurs, Thermon may suspend or terminate the Agreement by giving the Customer written notice.
- 18. Trust Company**
- 18.1 In the case of a Trust Company, the Customer acknowledges that the Trustee shall be liable for complying with this Agreement and that in addition the assets of the Trust shall be available to meet payment for the goods.
- 19. Miscellaneous**

- 19.1 The law of Victoria from time to time governs the Terms. The parties agree to the non-exclusive jurisdiction of the courts of Victoria, the Federal Court of Australia, and of courts entitled to hear appeals from those Courts.
- 19.2 Thermon's failure to enforce any of these Terms shall not be construed as a waiver of any of Thermon's rights.
- 19.3 If any of the Terms are unenforceable it shall be read down so as to be enforceable or, if it cannot be so read down, the term shall be severed from these Terms without affecting the enforceability of the remaining terms.
- 19.4 A notice must be in writing and handed personally or sent by facsimile, email or prepaid mail to the last known address of the addressee. Notices sent by pre-paid post are deemed to be received upon posting. Notices sent by facsimile or email are deemed received upon confirmation of successful transmission.
- 19.5 The Customer must notify Thermon of any proposed changes of ownership or registered particulars or alteration or addition to the shareholding or directorship of the Customer at least 14 days prior to the change taking effect.

