Alphington Carports Pty Ltd T/A Modern Outdoor Living – Terms & Conditions of Trade

1. Definitions

1.1 "Seller" shall mean Alphington Carports Pty Ltd T/A Modern Outdoor Living its successors and assigns or any person acting on behalf of and with the authority of Alphington Carports Pty Ltd T/A Modern Outdoor Living.

1.2 "Buyer" shall mean the Buyer (or any person acting on behalf of and with the authority of the Buyer) as described on any quotation, work authorisation or other form as provided by the Seller to the Buyer.

1.3 "Guarantor" means that person (or persons), or entity, who agrees to be liable for the debts of the Buyer on a principal debtor basis.

1.4 "Goods" shall mean Goods supplied by the Seller to the Buyer (and where the context so permits shall include any supply of Services as hereinafter defined) and are as described on the invoices, quotation, work authorisation or any other forms as provided by the Seller to the Buyer.

1.5 "Materials" shall mean Materials required to complete the Services.

1.6 "Services" shall mean all Services supplied by the Seller to the Buyer and includes any advice or recommendations (and where the context so permits shall include any supply of Goods as defined above).

1.7 "Price" shall mean the price payable for the Goods as agreed between the Seller and the Buyer in accordance with clause 4 of this contract.

2. The Commonwealth Trade Practices Act 1974 ("TPA") and Fair Trading Acts ("FTA")

2.1 Nothing in this agreement is intended to have the effect of contracting out of any applicable provisions of the TPA or the FTA in each of the States and Territories of Australia, except to the extent permitted by those Acts where applicable.

3. Acceptance

3.1 Any instructions received by the Seller from the Buyer for the supply of Goods and/or the Buyer's acceptance of Goods supplied by the Seller shall constitute acceptance of the terms and conditions contained herein.

3.2 Where more than one Buyer has entered into this agreement, the Buyers shall be jointly and severally liable for all payments of the Price.

3.3 Upon acceptance of these terms and conditions by the Buyer the terms and conditions are binding and can only be amended with the written consent of the Seller.

3.4 The Buyer shall give the Seller not less than fourteen (14) days prior written notice of any proposed change of ownership of the Buyer or any change in the Buyer's name and/or any other change in the Buyer's details (including but not limited to, changes in the Buyer's address, facsimile number, or business practice). The Buyer shall be liable for any loss incurred by the Seller as a result of the Buyer's failure to comply with this clause.

3.5 Goods are supplied by the Seller only on the terms and conditions of trade herein to the exclusion of anything to the contrary in the terms of the Buyer's order notwithstanding that any such order is placed on terms that purport to override these terms and conditions of trade.

4. Price And Payment

4.1 At the Seller's sole discretion the Price shall be either:
(a) as indicated on invoices provided by the Seller to the Buyer in respect of Goods supplied; or
(b) the Seller's current price at the date of delivery of the Goods according to the Seller's current Price list; or
(c) the Seller's quoted Price (subject to clause 4.2) which shall be binding upon the Seller provided that the Buyer shall accept the Seller's quotation in writing within thirty (30) days.

4.2 The Seller reserves the right to change the Price in the event of a variation to the Seller's quotation.

4.3 At the Seller's sole discretion a deposit may be required.

4.4 At the Seller's sole discretion:
(a) payment shall be due on delivery of the Goods; or
(b) payment shall be due before delivery of the Goods; or
(c) payment for approved Buyers shall be made by instalments in accordance with the Seller's payment schedule.

4.5 Time for payment for the Goods shall be of the essence and will be stated on the invoice or any other forms. If no time is stated then payment shall be due seven (7) days following the date of the invoice.

4.6 At the Seller's sole discretion payment of the Price shall be subject to retention by the Buyer of an amount (hereafter called the "retention money"), being equal to a percentage of the Price as agreed between the parties. The Buyer shall hold the retention money for the agreed period following completion of the works during which time all works are to be completed and/or all defects are to be remedied.

4.7 Payment will be made by cash, or by cheque, or by bank cheque, or by direct credit, or by any other method as agreed to between the Buyer and the Seller.

4.8 GST and other taxes and duties that may be applicable shall be added to the Price except when they are expressly included in the Price.

5. Delivery Of Goods

5.1 At the Seller's sole discretion delivery of the Goods shall take place when:
(a) the Buyer takes possession of the Goods at the Seller's address; or
(b) the Buyer takes possession of the Goods at the Buyer's nominated address (in the event that the Goods are delivered by the Seller or the Seller's nominated carrier); or
(c) the Buyer's nominated carrier takes possession of the Goods in which event the carrier shall be deemed to be the Buyer's agent.

5.2 At the Seller's sole discretion the costs of delivery is included in the Price.

5.3 The Buyer shall make all arrangements necessary to take delivery of the Goods whenever they are tendered for delivery. In the event that the Buyer is unable to take delivery of the Goods as arranged then the Seller shall be entitled to charge a reasonable fee for redelivery.

5.4 Delivery of the Goods to a third party nominated by the Buyer is deemed to be delivery to the Buyer for the purposes of this agreement.

5.5 The Buyer shall take delivery of the Goods tendered notwithstanding that the quantity so delivered shall be either greater or lesser than the quantity purchased provided that:
(a) such discrepancy in quantity shall not exceed five percent (5%); and
(b) the Price shall be adjusted pro rata to the discrepancy.

5.6 The failure of the Seller to deliver shall not entitle either party to treat this contract as repudiated.

5.7 The Seller shall not be liable for any loss or damage whatever due to failure by the Seller to deliver the Goods (or any of them) promptly or at all, where due to circumstances beyond the control of the Seller.

6. Risk

6.1 If the Seller retains ownership of the Goods nonetheless, all risk for the Goods passes to the Buyer on delivery.

6.2 If any of the Goods are damaged or destroyed following delivery but prior to ownership passing to the Buyer, the Seller is entitled to receive all insurance proceeds payable for the Goods. The production of these terms and conditions by the Seller is sufficient evidence of the Seller's rights to receive the insurance proceeds without the need for any person dealing with the Seller to make further enquiries.

6.3 Timber is a natural product and as such colour, shade tone, markings, and veining may vary from samples provided. Whilst the Seller will make every effort to match sales samples to the finished Goods the Seller accepts no liability whatsoever where the samples differ to the finished Goods.

6.4 Where the Buyer has supplied materials for the Seller to complete the Services, the Buyer acknowledges that he accepts responsibility for the suitability of purpose, quality and any faults inherent in the Materials. The Seller shall not be responsible for any defects in the works, any loss or damage to the Materials (or any part thereof), howsoever arising from the use of Materials supplied by the Buyer.

6.5 Timber is a hydroscopic material subject to expansion and contraction, therefore the Seller will accept no responsibility for gaps that may appear in the flooring during prolonged dry periods.

6.6 The Buyer acknowledges that Goods supplied may:
(a) exhibit variations in shade, colour, texture, surface, finish, markings and may contain natural fissures, occlusions, lines, indentations and may fade or change colour over time; and
(b) expand, contract or distort as a result of exposure to heat, cold, weather; and
(c) mark or stain if exposed to certain substances; and
(d) be damaged or disfigured by impact or scratching.

7. Special Clauses

7.1 Where the Buyer has supplied materials for the Seller to complete the works, the Buyer acknowledges that he accepts responsibility for the suitability of purpose, quality and any faults inherent in the materials. The Seller shall not be responsible for any defects in the works, any loss or damage to the materials (or any part thereof), howsoever arising from the use of materials supplied by the Buyer.

7.2 The Buyer acknowledges that variations of colour and texture are inherent in concrete. The Seller shall not be liable for any loss, damages or costs howsoever arising resulting from any variation of the colour or texture between different batches of product.

7.3 Detailed drawings of any services that will be embedded in the concrete are to be provided to the Seller prior to commencement of any works. Whilst all due care will be taken no liability will be accepted by the Seller for damage to the services or any other element embedded in the concrete.

7.4 The Buyer acknowledges that the curing time for concrete can be affected by elements such as temperature or the weather, as such the Seller offers no guarantee as to the length of time the curing process will take.

7.5 The Seller offers no guarantee against cracking of concrete.

7.6 Where the Seller gives advice or recommendations to the Buyer, or the Buyer's agent, regarding the suitability of the worksite for the laying of concrete slabs, foundations or similar works and such advice or recommendations are not acted upon then the Seller shall require the Buyer or their agent to authorise commencement of the works in writing. The Seller shall not be liable in any way whatsoever for any damages or losses that occur after any subsequent commencement of the works.

8. Damages

8.1 The Seller shall not be liable for any loss or damage caused in accessing the work site beyond reasonable control of the Seller (including, without limitation, damage to pathways, driveways and concreted or paved or grassed areas).

9. Underground Locations

9.1 Prior to the Seller commencing any work the Buyer must advise the Seller of the precise location of all underground services on the site and clearly mark the same. The underground mains & services the Buyer must identify include, but are not limited to, electrical services, gas services, sewer services, pumping services, sewer connections, sewer sludge mains, water mains, irrigation pipes, Telstra cables, fibre optic cables, oil pumping mains, and any other services that may be on site.

9.2 Whilst the Seller will take all care to avoid damage to any underground services the Buyer agrees to indemnify the Seller in respect of all and any liability claims, loss, damage, costs and fines as a result of damage to services not precisely located and notified as per clause 9.1.

10. Dispute Resolution

10.1 If a dispute arises between the parties to this contract then either party shall send to the other party a notice of dispute in writing adequately identifying and providing details of the dispute. Within fourteen (14) days after service of a notice of dispute, the parties shall confer at least once, to attempt to resolve the dispute. At any such conference each party shall be represented by a person having authority to agree to a resolution of the dispute. In the event that the dispute cannot be so resolved either party may by further notice in writing delivered by hand or sent by certified mail to the other party refer such dispute to arbitration. Any arbitration shall be:
(a) referred to a single arbitrator to be nominated by the President of the Institute of Arbitrators Australia; and
(b) conducted in accordance with the Institute of Arbitrators Australia Rules for the Conduct of Commercial Arbitration.

11. Insurance

11.1 The Seller shall have public liability insurance of at least $5m. It is the Buyers responsibility to ensure that they are similarly insured.

12. Compliance with Laws

12.1 The Buyer and the Seller shall comply with the provisions of all statutes, regulations and bylaws of government, local and other public authorities that may be applicable to the works.

12.2 The Buyer shall obtain (at the expense of the Buyer) all licenses and approvals that may be required for the works.

12.3 The Buyer agrees that the site will comply with any occupational health and safety laws relating to building/construction sites and any other relevant safety standards or legislation.

13. Title

13.1 The Seller and Buyer agree that ownership of the Goods shall not pass until:
(a) the Buyer has paid the Seller all amounts owing for the particular Goods; and
(b) the Buyer has met all other obligations due by the Buyer to the Seller in respect of all contracts between the Seller and the Buyer.

13.2 Receipt by the Seller of any form of payment other than cash shall not be deemed to be payment until that form of payment has been honoured, cleared or recognised and until then the Seller's ownership or rights in respect of the Goods shall continue.

13.3 It is further agreed that:
(a) where practicable the Goods shall be kept separate and identifiable until the Seller shall have received payment and all other obligations of the Buyer are met; and
(b) until such time as ownership of the Goods shall pass from the Seller to the Buyer the Seller may give notice in writing to the Buyer to return the Goods or any of them to the Seller. Upon such notice the rights of the Buyer to obtain ownership or any other interest in the Goods shall cease; and
(c) the Seller shall have the right of stopping the Goods in transit whether or not delivery has been made; and
(d) if the Buyer fails to return the Goods to the Seller then the Seller or the Seller's agent may enter upon and into land and premises owned, occupied or used by the Buyer, or any premises as the invitee of the Buyer, where the Goods are situated and take possession of the Goods; and
(e) the Buyer is only a bailee of the Goods and until such time as the Seller has received payment in full for the Goods then the Buyer shall hold any proceeds from the sale or disposal of the Goods, up to and including the amount the Buyer owes to the Seller for the Goods, on trust for the Seller; and
(f) the Buyer shall not deal with the money of the Seller in any way which may be adverse to the Seller; and
(g) the Buyer shall not charge the Goods in any way nor grant nor otherwise give any interest in the Goods while they remain the property of the Seller; and
(h) the Seller can issue proceedings to recover the Price of the Goods sold notwithstanding that ownership of the Goods may not have passed to the Buyer; and
(i) until such time that ownership in the Goods passes to the Buyer, if the Goods are converted into other products, the parties agree that the Seller will be the owner of the end products.

14. Defects

14.1 The Buyer shall inspect the Goods on delivery and shall within seven (7) days of delivery (time being of the essence) notify the Seller of any alleged defect, shortage in quantity, damage or failure to comply with the description or quote. The Buyer shall afford the Seller an opportunity to inspect the Goods within a reasonable time following delivery if the Buyer believes the Goods are defective in any way. If the Buyer shall fail to comply with these provisions the Goods shall be presumed to be free from any defect or damage. For defective Goods, which the Seller has agreed in writing that the Buyer is entitled to reject, the Seller's liability is limited to either (at the Seller's discretion) replacing the Goods or repairing the Goods except where the Buyer has acquired Goods as a consumer within the meaning of the Trade Practices Act 1974 (CWlth) or the Fair Trading Acts of the relevant state or territories of Australia, and is therefore also entitled to, at the consumer's discretion either a refund of the purchase price of the Goods, or repair of the Goods, or replacement of the Goods.

14.2 Goods will not be accepted for return other than in accordance with 14.1 above.

15. Warranty

15.1 For Goods not manufactured by the Seller, the warranty shall be the current warranty provided by the manufacturer of the Goods. The Seller shall not be bound by nor be responsible for any term, condition, representation or warranty other than that which is given by the manufacturer of the Goods.

16. Intellectual Property

16.1 Where the Seller has designed, drawn or written Goods for the Buyer, then the copyright in those designs and drawings and documents shall remain vested in the Seller, and shall only be used by the Buyer at the Seller's discretion.

16.2 The Buyer warrants that all designs or instructions to the Seller will not cause the Seller to infringe any patent, registered design or trademark in the execution of the Buyer's order and the Buyer agrees to indemnify the Seller against any action taken by a third party against the Seller in respect of any such infringement.

17. Default & Consequences of Default

17.1 Interest on overdue invoices shall accrue daily from the date when payment becomes due, until the date of payment, at a rate of two and one half percent (2.5%) per calendar month (and at the Seller's sole discretion such interest shall compound monthly at such a rate) after as well as before any judgment.

17.2 In the event that the Buyer's payment is dishonoured for any reason the Buyer shall be liable for any dishonour fees incurred by the Seller.

17.3 If the Buyer defaults in payment of any invoice when due, the Buyer shall indemnify the Seller from and against all costs and disbursements incurred by the Seller in pursuing the debt including legal costs on a solicitor and own client basis and the Seller's collection agency costs.

17.4 Without prejudice to any other remedies the Seller may have, if at any time the Buyer is in breach of any obligation (including those relating to payment), the Seller may suspend or terminate the supply of Goods to the Buyer and any of its other obligations under the terms and conditions. The Seller will not be liable to the Buyer for any loss or damage the Buyer suffers because the Seller has exercised its rights under this clause.

17.5 If any account remains overdue after thirty (30) days then an amount of the greater of twenty dollars ($20.00) or ten percent (10.00%) of the amount overdue (up to a maximum of two hundred dollars ($200.00)) shall be levied for administration fees which sum shall become immediately due and payable.

17.6 Without prejudice to the Seller's other remedies at law the Seller shall be entitled to cancel all or any part of any order of the Buyer which remains unfulfilled and all amounts owing to the Seller shall, whether or not due for payment, become immediately payable in the event that:
(a) any money payable to the Seller becomes overdue, or in the Seller's opinion the Buyer will be unable to meet its payments as they fall due; or
(b) the Buyer becomes insolvent, convenes a meeting with its creditors or proposes or enters into an arrangement with creditors, or makes an assignment for the benefit of its creditors; or
(c) a receiver, manager, liquidator (provisional or otherwise) or similar person is appointed in respect of the Buyer or any asset of the Buyer.

18. Security And Charge

18.1 Despite anything to the contrary contained herein or any other rights which the Seller may have howsoever:
(a) where the Buyer and/or the Guarantor (if any) is the owner of land, realty or any other asset capable of being charged, both the Buyer and/or the Guarantor agree to mortgage and/or charge all of their joint and/or several interest in the said land, realty or any other asset to the Seller or the Seller's nominee to secure all amounts and other monetary obligations payable under these terms and conditions. The Buyer and/or the Guarantor acknowledge and agree that the Seller (or the Seller's nominee) shall be entitled to lodge where appropriate a caveat, which caveat shall be withdrawn once all payments and other monetary obligations payable hereunder have been met.
(b) should the Seller elect to proceed in any manner in accordance with this clause and/or its sub-clauses, the Buyer and/or Guarantor shall indemnify the Seller from and against all the Seller's costs and disbursements including legal costs on a solicitor and own client basis.
(c) the Buyer and/or the Guarantor (if any) agree to irrevocably nominate constitute and appoint the Seller or the Seller's nominee as the Buyer's and/or Guarantor's true and lawful attorney to perform all necessary acts to give effect to the provisions of this clause 18.1.

19. Cancellation

19.1 The Seller may cancel any contract to which these terms and conditions apply or cancel delivery of Goods at any time before the Goods are delivered by giving written notice to the Buyer. On giving such notice the Seller shall repay to the Buyer any sums paid in respect of the Price. The Seller shall not be liable for any loss or damage whatever arising from such cancellation.

19.2 In the event that the Buyer cancels delivery of Goods the Buyer shall be liable for any loss incurred by the Seller (including, but not limited to, any loss of profits) up to the time of cancellation.

20. Privacy Act 1988

20.1 The Buyer and/or the Guarantor/s agree for the Seller to obtain from a credit reporting agency a credit report containing personal credit information about the Buyer and Guarantor/s in relation to credit provided by the Seller.

20.2 The Buyer and/or the Guarantor/s agree that the Seller may exchange information about the Buyer and the Guarantor/s with those credit providers either named as trade referees by the Buyer or named in a consumer credit report issued by a credit reporting agency for the following purposes:
(a) to assess an application by Buyer; and/or
(b) to notify other credit providers of a default by the Buyer; and/or
(c) to exchange information with other credit providers as to the status of this credit account, where the Buyer is in default with other credit providers; and/or
(d) to assess the credit worthiness of Buyer and/or Guarantor/s.

20.3 The Buyer consents to the Seller being given a consumer credit report to collect overdue payment on commercial credit (Section 18K(1)(h) Privacy Act 1988).

20.4 The Buyer agrees that personal credit information provided may be used and retained by the Seller for the following purposes and for other purposes as shall be agreed between the Buyer and Seller or required by law from time to time:
(a) provision of Goods; and/or
(b) marketing of Goods by the Seller, its agents or distributors in relation to the Goods; and/or
(c) analysing, verifying and/or checking the Buyer's credit, payment and/or status in relation to provision of Goods; and/or
(d) processing of any payment instructions, direct debit facilities and/or credit facilities requested by Buyer; and/or
(e) enabling the daily operation of Buyer's account and/or the collection of amounts outstanding in the Buyer's account in relation to the Goods.

20.5 The Seller may give information about the Buyer to a credit reporting agency for the following purposes:
(a) to obtain a consumer credit report about the Buyer; and/or
(b) allow the credit reporting agency to create or maintain a credit information file containing information about the Buyer.

21. General

21.1 If any provision of these terms and conditions shall be invalid, void, illegal or unenforceable the validity, existence, legality and enforceability of the remaining provisions shall not be affected, prejudiced or impaired.

21.2 These terms and conditions and any contract to which they apply shall be governed by the laws of Victoria and are subject to the jurisdiction of the courts of Victoria.

21.3 The Seller shall be under no liability whatever to the Buyer for any indirect loss and/or expense (including loss of profit) suffered by the Buyer arising out of a breach by the Seller of these terms and conditions.

21.4 In the event of any breach of this contract by the Seller the remedies of the Buyer shall be limited to damages which under no circumstances shall exceed the Price of the Goods.

21.5 The Buyer shall not be entitled to set off against or deduct from the Price any sums owed or claimed to be owed to the Buyer by the Seller.

21.6 The Seller may license or sub-contract all or any part of its rights and obligations without the Buyer's consent.

21.7 The Buyer agrees that the Seller may review these terms and conditions at any time. If, following any such review, there is to be any change to these terms and conditions, then that change will take effect from the date on which the Seller notifies the Buyer of such change.

21.8 Neither party shall be liable for any default due to any act of God, war, terrorism, strike, lock-out, industrial action, fire, flood, storm or other event beyond the reasonable control of either party.

21.9 The failure by the Seller to enforce any provision of these terms and conditions shall not be treated as a waiver of that provision, nor shall it affect the Seller's right to subsequently enforce that provision.

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