

## TERMS AND CONDITIONS

### INTERPRETATION

1. In these Terms and Conditions, unless the context otherwise requires:
  - (a) "**Credit**" means a line of credit or credit account (if any) offered to the Customer by Swift;
  - (b) "**Customer**" means the party who is specified as the Customer in the Product Order Form or any other party who places an Order and includes the party's transferees, successors and permitted assigns. Where the Customer is more than one person or entity, the liability of each such person or entity is joint and several;
  - (c) "**Delivery Date**" means the date and time listed as the Product Delivery/Collection Date and Time in the Product Order Form, or any date and time that Swift agrees in writing to deliver the Products to the Customer;
  - (d) "**Encumber**" means an encumbrance or security interest including but not limited to a mortgage, fixed charge, floating charge, pledge, lien, conditional sale agreement, hire or hire purchase agreement, option, restriction as to transfer, use or possession, easement or a subordination to a right of a person or an adverse or competing interest of another person;
  - (e) "**GST**" has the meaning given to that term in the *A New Tax System (Goods and Services Tax) 1999*;
  - (f) "**PPSA**" means the Personal Property Securities Act 2009 (Cth);
  - (g) "**PMSI**" means a purchase money security interest, as defined in the PPSA; "**Price**" means the total price payable as specified in the Product Order Form;
  - (h) "**Proceeds**" has the meaning given to it in section 31 of the PPSA; "**Product Order Form**" means the Product Order Form completed by the Customer;
  - (i) "**Products**" means the items listed in the Product Order Form together with any associated items including but not limited to all associated manuals, tools, maintenance records, spare parts, accessories and attachments;
  - (j) "**Order**" means an order for goods and/or services and/or a request for Swift to supply goods and/or services to the Customer or nominee of the Customer; and
  - (k) "**Swift**" means Swift Metal Services Pty Ltd (ATF the Swift Metal Services Trust) ABN 45 261 851 459.
  - (l) "Terms and Conditions" mean these terms and conditions as published at

www.swiftmetal.com.au from time to time.

### USAGE OF TERMS AND CONDITIONS

2. These Terms and Conditions are incorporated into any contract between Swift and the Customer for the supply of the Products, or any other goods and/or services by Swift to the Customer. They shall apply to the exclusion of all terms and conditions conflicting with or purporting to modify them whether issued before or after the date these Terms and Conditions come into effect (including but not limited to any terms and conditions on any product order form or request form produced by the Customer), except where otherwise agreed by Swift and the Customer in a document signed by both parties.
3. Swift may at any time change these Terms and Conditions by publishing new Terms and Conditions, in which case the new Terms and Conditions will come into effect 14 days after they are published at www.swiftmetal.com.au. The new Terms and Conditions will come into effect notwithstanding that the Customer does not receive notice (including if any notice was accidentally omitted to be given).

### ORDERS

4. Each Order constitutes an offer by the Customer to Swift and is subject to acceptance by Swift.
5. Any Order accepted by Swift shall constitute a contract between the Customer and Swift.
6. The Customer shall not cancel an Order, or delay the Delivery Date without the written consent of Swift. In the event the Customer purports to cancel an Order, or delay the Delivery Date, such attempt may, at Swift's election, be construed as a repudiation of the contract between the parties and the Customer shall pay to Swift all losses, damages, costs, interest, fees, charges including handling charges payable to both Swift and its suppliers (if any) and the expenses incurred or suffered by Swift as a result of the repudiation of the contract.
7. An Order shall not be varied by the Customer unless the variation is in writing and accepted by Swift in writing.

### PAYMENT

8. All prices charged by Swift are subject to change without notice and unless otherwise specified, are exclusive of any GST. Swift's price lists or price catalogues do not constitute an offer by Swift.
9. Subject to the terms of any Credit and that Credit not having been withdrawn, the Customer must pay:
  - (a) a deposit of 30% of the Price upon Swift accepting a Customer's Order; and
  - (b) the balance of the Price on or before the Delivery Date.

10. If the Customer has been granted Credit then the Credit can be withdrawn at any time and any Orders cancelled by Swift in its sole discretion.
11. In the event the Customer cancels an Order, or seeks to delay the Delivery Date for any period longer than 28 days, then the Customer must pay:
  - (a) an amount equal to 70% of the Price, if the Customer cancels the Order, or seeks to delay the Delivery Date for any period longer than 28 days, at any time after the Order has been made (but not within 7 days of the Delivery Date); or
  - (b) an amount equal to 80% of the Price, if the Customer cancels the Order, or seeks to delay the Delivery Date for any period longer than 28 days, at any time within 7 days of the Delivery Date.
12. The Customer must also pay:
  - (a) the Delivery Fee specified in the Product Order Form (if any), at the same time the Price is payable; and
  - (b) GST (at the same time the Price is payable) and all other applicable taxes, duties, levies, penalties and any other government charges payable in relation to the supply of Products (on demand by Swift).
13. If the Customer defaults in the payment of any sum of money due to Swift, Swift may charge interest at the rate of 1.5% per calendar month computed in respect of the amount of which default is made and the period of such default, and may cancel any Orders in existence (without prejudice to any other rights or remedies of Swift).
14. The Customer must make all payments to Swift in accordance with these Terms and Conditions without set-off, deduction or counterclaim.
15. At Swift's discretion, an accounting fee of \$50.00 per month will apply for all accounts which are outside these Terms and Conditions.

#### **DELIVERY OR COLLECTION OF PRODUCTS**

16. The Customer acknowledges that the Delivery Date is an estimate only and should Swift be unable to deliver the Products or make them available for collection by the Customer by the Delivery Date:
  - (a) Swift shall have no liability to the Customer in relation to any loss, damage or expense caused by Swift's failure to deliver the Products or make them available for collection by the Customer;
  - (b) the Delivery Date shall be extended by any amount of time deemed necessary by Swift; and
  - (c) Swift may at its sole discretion cancel or annul any Order without any penalty, expense or claim against Swift.
17. If the Customer is to collect the Products, the Customer must do so from the address and at the time shown in the Product Order Form or upon being notified by Swift that the Products are ready for collection.

#### **TITLE TO THE PRODUCTS**

18. The Products remain the property of Swift (and Swift retains title to the Products) until the Price and any other payment or sum due to Swift has been paid in full by the Customer (notwithstanding that the Customer goes into liquidation or becomes bankrupt).
  19. The Customer must not offer, sell, assign, sublet, mortgage, pledge, Encumber or otherwise deal with the Products in any way which is inconsistent or would detract from Swift's ownership of the Products until the Price and any other payment or sum due to Swift has been paid in full by the Customer. If requested by Swift, the Customer must ensure the Products are clearly identifiable as the property of Swift.
  20. The Products shall be kept at the Customer's address (as specified in the Product Order Form), and shall not be removed from that location without notifying Swift until the Price and any other payment or sum due to Swift has been paid in full by the Customer. Provision of the Products to a third party in any form shall not relieve the Customer of its obligation to pay the Price or to comply with any other obligation under the Terms and Conditions.
  21. In the event that the Customer is in default of its obligations under these Terms and Conditions, any Order or any other contract that exists between the Customer and Swift, Swift will at its election be entitled to the immediate return of the Products and for this purpose may enter the Customer's premises to recover any Products.
- #### **PERSONAL PROPERTY SECURITIES ACT**
22. The Customer agrees that these Terms and Conditions create a security interest (including, where applicable, a PMSI) in Products (and their Proceeds) supplied by Swift to the Customer from time to time.
  23. The Customer agrees to do all things necessary and execute all documents reasonably required by Swift to register the PMSI granted by the Customer under these Terms and Conditions, and ensure that Swift acquires a perfected security interest in the Goods under the PPSA.
  24. The PMSI does not lose its priority as a result of the renewal, refinance, consolidation or restructure of the subject matter of these Terms and Conditions or any purchase money obligations of the Customer.
  25. Until title to Products passes to the Customer, the Customer waives its rights under sections, 95, 118, 120, 121(4), 129, 130, 132(3)(d), 132(4), 135, 142, 143, 157(1) and 157(3) of the PPSA, to the extent that is permitted by law. Swift may also contract out of any other provisions of the PPSA not specified in this clause as determined by Swift from time to time, provided that is also permitted under the PPSA.
  26. Where Swift has rights in addition to those under Part 4 of the PPSA, those rights continue to apply.
  27. The Customer agrees that repossession and retention of Products pursuant to the PPSA will only satisfy so much of the amounts owing by the Customer to Swift as is equivalent to Swift's

estimation of the market value of the Products as at the date of repossession, and the repossession and retention will immediately extinguish any rights or interest the Customer has in the Products.

28. Until title to Products passes to the Customer, the Customer must not give to Swift a written demand, or allow any other person to give to Swift a written demand, requiring Swift to register a financing change statement under the PPSA in respect of the Customer, the Products, or enter into or allow any other person to enter into the personal property securities register a financing change statement under the PPSA in respect of the Products.
29. The Customer will be responsible for payment of any fees (and any other costs) that Swift incurs in relation to investigating, perfecting or registering its security interest in the Products, and those fees and costs may be added as a charge on invoices issued by Swift to the Customer.
30. Money that Swift receives from or on account of the Customer may be applied by Swift in the following order, or in any other order that Swift may determine in its absolute discretion:
  - (a) (non-secured obligations) first, to satisfy any obligation owed by the Customer to Swift that is not secured by a security interest in Products;
  - (b) (secured obligations but not PMSIs) then, to satisfy any obligation owed by the Customer to Swift that is secured by a security interest in Products, but not by a PMSI;
  - (c) (PMSIs satisfied using related proceeds) then, to satisfy any obligation owed by the Customer to Swift that is secured by a PMSI in Products for that obligation and using proceeds from the sale of the Products secured by that PMSI; and
  - (d) (PMSIs satisfied using other sources) then, to satisfy any obligation owed by the Customer to Swift that is secured by a PMSI in Products using funds or proceeds from any source.
31. The Customer must not assign or factor its right and interest in any debt owed by a customer of the Customer to the Customer on account of the proceeds of sale of any Products by the Customer on credit or deferred payment terms without Swift's prior written consent.

#### **DEFAULT**

32. The Customer must pay to Swift any costs, expenses or losses incurred by Swift as a result of the Customer's failure to pay to Swift on the due date all sums outstanding from the Customer to Swift (including, without limitation, any debt collection and legal costs).
33. Upon the occurrence of an Event of Default, Swift may by notice in writing to the Customer:
  - (a) elect that all monies owing by the Customer to Swift under these Terms and Conditions, any Order or any other contract that exists between the

Customer and Swift (including but not limited to any Credit) whatsoever become immediately due and payable in full by the Customer; and/or

- (b) terminate an Order, or all Orders with the Customer.
34. In respect of any terminated Order, the Customer must pay to Swift any and all losses, damages, costs, interest, fees, charges (including handling charges payable to Swift and its suppliers) and all expenses incurred or suffered by Swift as a result of the Customer's default and the subsequent cancellation of the Order. The Customer shall have no recourse whatsoever against Swift as a result of any such cancellation of the Order.
  35. The Customer must give Swift full details of any Event of Default as soon as it becomes aware that the Event of Default has occurred.
  36. Each of these events or circumstances is an **Event of Default**:
    - (a) the Customer fails to comply with these Terms and conditions or the terms of any contract or Order between the Customer and Swift;
    - (b) the Customer being an individual is declared bankrupt or becomes of unsound mind;
    - (c) the Customer enters into any composition or arrangement with its creditors or goes into liquidation (voluntarily or otherwise) or has a receiver or liquidator or trustee or administrator or similar official appointed over all or part of its assets;
    - (d) the Customer ceases or threatens to cease to carry on all, or substantially all of its business or operations;
    - (e) an order being made, or the Customer passing a resolution, or any other step is taken for the Customer's winding up (including but not limited to an application being made to a court for an order for its winding up);
    - (f) the Customer becomes or is declared or is deemed to be insolvent or is unable or deemed to be unable to pay its debts or stops or threatens to stop payments generally;
    - (g) the Customer undergoes a change in its control or ownership not approved by Swift in writing; or
    - (h) an event or circumstance occurs in relation to the Customer which is analogous to any event or circumstance specified in paragraphs (b) to (g).

#### **LIABILITY**

37. The Customer shall inspect all Products immediately upon delivery or collection of the Products. Any claim by the Customer relating to any defect in manufacture of the Products, or defect in work performed by Swift for the Customer, or any shortage or other nonconformity to an Order shall be notified in writing to Swift within 5 days of delivery or collection of the Products. Unless such written

claim is received by Swift within this period, the Customer shall be deemed to have accepted the condition of the Products, conformity of the Products and the completion of the work to the Order. Notwithstanding that a claim has been made by the Customer, the Customer shall pay for the Products and/or work pending determination of the claim by Swift.

38. The parties acknowledge that, under applicable State and Commonwealth law, certain clauses, conditions, guarantees and warranties may be implied in these Terms and Conditions and there are rights and remedies conferred on the Customer in relation to the provision of goods or of services which cannot be excluded, restricted or modified by agreement (**Non-excludable Rights**).

39. Except to the extent of Non-excludable Rights, Swift will not be liable for:

(a) any claim by the Customer or any other person, including without limitation, any claim relating to or arising from all clauses, conditions, guarantees and warranties expressed or implied, and all rights and remedies conferred on the Customer, by statute, the common law, equity, trade, custom or usage or otherwise; and

(b) any representations, warranties, conditions or agreement made by any agent or representative which are not expressly confirmed by Swift in writing, and the liability of Swift for any such matters is hereby excluded.

40. Where (and to the extent) permitted by law the liability of Swift for a breach of a Non-Excludable Right can be limited, Swift's liability is limited, at Swift's option, to one of the following:

(a) replacement of the Products or supply of equivalent products;

(b) repair of the Products;

(c) payment of the costs of replacing the Products or acquiring equivalent products; or

(d) payment of the cost of having the Products repaired.

41. Notwithstanding any other provision, Swift is in no circumstance (whatever the cause) liable in contract, tort (including, without limitation, negligence or breach of statutory duty) or otherwise to compensate the Customer for:

(a) any increased costs or expenses;

(b) any loss of profit, revenue, business, contracts or anticipated savings;

(c) any loss or expense resulting from a claim by a third party; or

(d) any special, indirect or consequential injury loss, damage or expense whatsoever and howsoever arising.

#### **GENERAL**

42. These Terms and Conditions can only be amended, supplemented, replaced or novated by another document signed by the parties.

43. These Terms and Conditions contain the entire agreement between the parties about its subject

matter. Any previous understanding, agreement, representation or warranty relating to that subject matter is replaced by these Terms and Conditions and has no further effect.

44. The rights of Swift are cumulative and are in addition to any other rights of that party.

45. A Customer, to the extent that it is a trustee of a trust, enters into any contract between Swift and the Customer for the supply of the Products both in its individual capacity and in its capacity as trustee of the trust, and all agreements, warranties and obligations of the Customer bind the Customer in both capacities.

46. All contracts between the Customer and Swift (including but not limited to these terms and conditions) are governed by the laws of the State of New South Wales and the parties irrevocably submit to the non-exclusive jurisdiction of the courts of New South Wales.

47. Any provision of these Terms and Conditions which is unenforceable, illegal or void or partly unenforceable, illegal or void is, where possible, to be severed to the extent necessary to make these Terms and Conditions enforceable.