

**1. Definitions**

- 1.1 “hsy” shall mean hsy autoparts Pty Ltd, its successors and assigns or any person acting on behalf of and with the authority of hsy autoparts Pty Ltd.
- 1.2 “Customer” shall mean the Customer (or any person acting on behalf of and with the authority of the Customer) as described on any quotation, work authorisation or other form as provided by hsy to the Customer.
- 1.3 “Guarantor” means that person (or persons) who agrees to be liable for the debts of the Customer on a principal debtor basis.
- 1.4 “Parts” shall mean all parts and accessories supplied by hsy to the Customer (and where the context so permits shall include any supply of Services as hereinafter defined) and are as described on the invoices, quotation, order form or any other forms as provided by hsy to the Customer.
- 1.5 “Services” shall mean all Services supplied by hsy to the Customer and includes any advice or recommendations (and where the context so permits shall include any supply of Parts as defined above).
- 1.6 “Price” shall mean the Price payable for the Parts as agreed between hsy and the Customer in accordance with clause Price and Payment of this contract.

**2. The Commonwealth Trade Practices Act 1974 (“TPA”) and Fair Trading Acts (“FTA”) and application of these terms and conditions to consumers**

- 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.
- 2.2 Clause Defects (Defects), clause Returns (Returns) and clause Warranty (Warranty) may **NOT** apply to the Customer where the Customer is purchasing Parts or Services not for resale or hire where the Price of the Parts or Services does not exceed \$40,000, or where the Price of the Parts or Services does exceed \$40,000 and are of a kind ordinarily acquired for personal, domestic or household use or consumption, or where the Customer is in any other way a consumer within the meaning of the TPA or the FTA of the relevant state or territories of Australia.

**3. Acceptance**

- 3.1 Any instructions received by hsy from the Customer for the supply of Parts and/or the Customer’s acceptance of Parts supplied by hsy shall constitute acceptance of the terms and conditions contained herein.
- 3.2 Where more than one Customer has entered into this agreement, the Customers shall be jointly and severally liable for all payments of the Price.
- 3.3 Upon acceptance of these terms and conditions by the Customer the terms and conditions are binding and can only be amended with the written consent of hsy.
- 3.4 The Customer shall give hsy not less than fourteen (14) days prior written notice of any proposed change of ownership of the Customer or any change in the Customer’s name and/or any other change in the Customer’s details (including but not limited to, changes in the Customer’s address, facsimile number, or business practice). The Customer shall be liable for any loss incurred by hsy as a result of the Customer’s failure to comply with this clause.
- 3.5 Parts are supplied by hsy only on the terms and conditions of trade herein to the exclusion of anything to the contrary in the terms of the Customer’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 hsy’s sole discretion the Price shall be either:
  - (a) as indicated on invoices provided by hsy to the Customer in respect of Parts supplied; or
  - (b) hsy’s current Price at the date of delivery of the Parts according to hsy’s current price list; or
  - (c) hsy’s quoted Price (subject to clause hsy reserves the right to change the Price in the event of a variation to hsy’s quotation.) which shall be binding upon hsy provided that the Customer shall accept hsy’s quotation in writing within thirty (30) days.
- 4.2 hsy reserves the right to change the Price in the event of a variation to hsy’s quotation. Any variation from the plan of scheduled Services or specifications of the Parts (including, but not limited to, any variation as a result of fluctuations in currency exchange rates or increases to hsy in the cost of materials and labour) will be charged for on the basis of hsy’s quotation and will be shown as variations on the invoice.
- 4.3 At hsy’s sole discretion a deposit may be required.
- 4.4 At hsy’s sole discretion:
  - (a) payment shall be due on delivery of the Parts; or
  - (b) payment for approved Customers shall be made by instalments in accordance with hsy’s payment schedule; or
  - (c) payment for approved Customers shall be due thirty (30) days following the end of the month in which the invoice is dated.
- 4.5 Time for payment for the Parts 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 end of the month in which the invoice is dated.
- 4.6 Payment will be made by cash, or by cheque, or by bank cheque, or by credit card – Diners excluded (plus a surcharge of up to two and a half percent (2.5%) of the Price), or by direct credit, or by any other method as agreed to between the Customer and hsy.
- 4.7 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.

4.8 The Customer shall not be entitled to set off against, or deduct from the Price, any sums owed or claimed to be owed to the Customer by hsy nor to withhold payment of any invoice because part of that invoice is in dispute.

## 5. Delivery of Parts

5.1 At hsy's sole discretion delivery of the Parts shall take place when:

- (a) the Customer takes possession of the Parts at hsy's address; or
- (b) the Customer takes possession of the Parts at the Customer's nominated address (in the event that the Parts are delivered by hsy or hsy's nominated carrier); or
- (c) the Customer's nominated carrier takes possession of the Parts in which event the carrier shall be deemed to be the Customer's agent.

5.2 At hsy's sole discretion the costs of delivery are:

- (a) included in the Price; or
- (b) in addition to the Price and, where applicable, charged to the Customer's account.

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

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

5.5 hsy may deliver the Parts by separate instalments. Each separate instalment shall be invoiced and paid in accordance with the provisions in these terms and conditions.

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

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

## 6. Risk

6.1 If hsy retains ownership of the Parts nonetheless, all risk for the Parts passes to the Customer on delivery.

6.2 Where the Customer expressly requests hsy to leave Parts outside hsy's premises for collection or to deliver the Parts to an unattended location then such Parts shall be left at the Customer's sole risk and it shall be the Customer's responsibility to ensure the Parts are insured adequately or at all.

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

## 7. Title

7.1 hsy and the Customer agree that ownership of the Parts shall not pass until:

- (a) the Customer has paid hsy all amounts owing for the particular Parts; and
- (b) the Customer has met all other obligations due by the Customer to hsy in respect of all contracts between hsy and the Customer.

7.2 Receipt by hsy 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 hsy's ownership or rights in respect of the Parts shall continue.

7.3 It is further agreed that:

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

## 8. Defects

8.1 The Customer shall inspect the Parts on delivery and shall within seven (7) days of delivery (time being of the essence) notify hsy of any alleged defect, shortage in quantity, damage or failure to comply with the description or quote. The Customer shall afford hsy an opportunity to inspect the Parts within a reasonable time following delivery

if the Customer believes the Parts are defective in any way. If the Customer shall fail to comply with these provisions the Parts shall be presumed to be free from any defect or damage. For defective Parts, which hsy has agreed in writing that the Customer is entitled to reject, hsy's liability is limited to either (at hsy's discretion) replacing the Parts or repairing the Parts except where the Customer has acquired Parts 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 Parts, or repair of the Parts, or replacement of the Parts.

## **9. Returns**

**9.1** Returns will only be accepted provided that:

- (a) the Customer has complied with the provisions of clause The Customer shall inspect the Parts on delivery and shall within seven (7) days of delivery (time being of the essence) notify hsy of any alleged defect, shortage in quantity, damage or failure to comply with the description or quote. The Customer shall afford hsy an opportunity to inspect the Parts within a reasonable time following delivery if the Customer believes the Parts are defective in any way. If the Customer shall fail to comply with these provisions the Parts shall be presumed to be free from any defect or damage. For defective Parts, which hsy has agreed in writing that the Customer is entitled to reject, hsy's liability is limited to either (at hsy's discretion) replacing the Parts or repairing the Parts; and
- (b) hsy has agreed in writing to accept the return of the Parts; and
- (c) the Parts are returned at the Customer's cost within fourteen (14) days of the delivery date; and
- (d) hsy will not be liable for Parts which have not been stored or used in a proper manner; and
- (e) the Parts are returned in the condition in which they were delivered and with all packaging material, brochures and instruction material in as new condition as is reasonably possible in the circumstances.

**9.2** hsy may (at their sole discretion) accept the return of Parts for credit but this may incur a handling fee of up to twenty percent (20%) of the value of the returned Parts plus any freight costs.

**9.3** Non-stocklist items, Parts made to the Customer's specifications or imported at the Customer's instruction, are under no circumstances acceptable for credit or return.

## **10. Warranty**

**10.1** For Parts not manufactured by hsy, the warranty shall be the current warranty provided by the manufacturer of the Parts. hsy 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 Parts.

## **11. Default and Consequences of Default**

**11.1** 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 a half percent (2.5%) per calendar month (and at hsy's sole discretion such interest shall compound monthly at such a rate) after as well as before any judgment.

**11.2** In the event that the Customer's payment is dishonoured for any reason the Customer shall be liable for any dishonour fees incurred by hsy.

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

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

**11.5** If any account remains overdue after thirty (30) days then an amount of the greater of twenty dollars (\$20.00) or ten percent (10%) 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.

**11.6** Without prejudice to hsy's other remedies at law hsy shall be entitled to cancel all or any part of any order of the Customer which remains unfulfilled and all amounts owing to hsy shall, whether or not due for payment, become immediately payable in the event that:

- (a) any money payable to hsy becomes overdue, or in hsy's opinion the Customer will be unable to meet its payments as they fall due; or
- (b) the Customer 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 Customer or any asset of the Customer.

## **12. Security and Charge**

**12.1** Despite anything to the contrary contained herein or any other rights which hsy may have howsoever:

- (a) where the Customer and/or the Guarantor (if any) is the owner of land, realty or any other asset capable of being charged, both the Customer 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 hsy or hsy's nominee to secure all amounts and other monetary obligations payable under these terms and conditions. The Customer and/or the Guarantor acknowledge and agree that hsy (or hsy'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 hsy elect to proceed in any manner in accordance with this clause and/or its sub-clauses, the Customer and/or Guarantor shall indemnify hsy from and against all hsy's costs and disbursements including legal costs on a solicitor and own client basis.
- (c) the Customer and/or the Guarantor (if any) agree to irrevocably nominate constitute and appoint hsy or hsy's nominee as the Customer's and/or Guarantor's true and lawful attorney to perform all necessary acts to give effect to the provisions of this clause Despite anything to the contrary contained herein or any other rights which hsy may have howsoever.

### 13. Cancellation

- 13.1 hsy may cancel any contract to which these terms and conditions apply or cancel delivery of Parts at any time before the Parts are delivered by giving written notice to the Customer. On giving such notice hsy shall repay to the Customer any sums paid in respect of the Price. hsy shall not be liable for any loss or damage whatsoever arising from such cancellation.
- 13.2 Cancellation by the Customer of orders for Parts made to the Customer's specifications, imported at the Customer's instruction, or non-stocklist items will definitely not be accepted, once the order has been placed.

### 14. Privacy Act 1988

- 14.1 The Customer and/or the Guarantor/s (herein referred to as the Customer) agree for hsy to obtain from a credit reporting agency a credit report containing personal credit information about the Customer in relation to credit provided by hsy.
- 14.2 The Customer agrees that hsy may exchange information about the Customer with those credit providers either named as trade referees by the Customer or named in a consumer credit report issued by a credit reporting agency for the following purposes:
  - (a) to assess an application by the Customer; and/or
  - (b) to notify other credit providers of a default by the Customer; and/or
  - (c) to exchange information with other credit providers as to the status of this credit account, where the Customer is in default with other credit providers; and/or
  - (d) to assess the creditworthiness of the Customer.The Customer understands that the information exchanged can include anything about the Customer's creditworthiness, credit standing, credit history or credit capacity that credit providers are allowed to exchange under the Privacy Act 1988.
- 14.3 The Customer consents to hsy being given a consumer credit report to collect overdue payment on commercial credit (Section 18K(1)(h) Privacy Act 1988).
- 14.4 The Customer agrees that personal credit information provided may be used and retained by hsy for the following purposes (and for other purposes as shall be agreed between the Customer and hsy or required by law from time to time):
  - (a) the provision of Parts; and/or
  - (b) the marketing of Parts by hsy, its agents or distributors; and/or
  - (c) analysing, verifying and/or checking the Customer's credit, payment and/or status in relation to the provision of Parts; and/or
  - (d) processing of any payment instructions, direct debit facilities and/or credit facilities requested by the Customer; and/or
  - (e) enabling the daily operation of Customer's account and/or the collection of amounts outstanding in the Customer's account in relation to the Parts.
- 14.5 hsy may give information about the Customer to a credit reporting agency for the following purposes:
  - (a) to obtain a consumer credit report about the Customer;
  - (b) allow the credit reporting agency to create or maintain a credit information file containing information about the Customer.
- 14.6 The information given to the credit reporting agency may include:
  - (a) personal particulars (the Customer's name, sex, address, previous addresses, date of birth, name of employer and driver's licence number;
  - (b) details concerning the Customer's application for credit or commercial credit and the amount requested;
  - (c) advice that hsy is a current credit provider to the Customer;
  - (d) advice of any overdue accounts, loan repayments, and/or any outstanding monies owing which are overdue by more than sixty (60) days, and for which debt collection action has been started;
  - (e) that the Customer's overdue accounts, loan repayments and/or any outstanding monies are no longer overdue in respect of any default that has been listed;
  - (f) information that, in the opinion of hsy, the Customer has committed a serious credit infringement (that is, fraudulently or shown an intention not to comply with the Customers credit obligations);
  - (g) advice that cheques drawn by the Customer for one hundred dollars (\$100) or more, have been dishonoured more than once;
  - (h) that credit provided to the Customer by hsy has been paid or otherwise discharged.

### 15. General

- 15.1 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.
- 15.2 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 Melbourne.

- 15.3* hsy shall be under no liability whatsoever to the Customer for any indirect and/or consequential loss and/or expense (including loss of profit) suffered by the Customer arising out of a breach by hsy of these terms and conditions.
- 15.4* In the event of any breach of this contract by hsy the remedies of the Customer shall be limited to damages which under no circumstances shall exceed the Price of the Parts.
- 15.5* hsy may license or sub-contract all or any part of its rights and obligations without the Customer's consent.
- 15.6* The Customer agrees that hsy 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 hsy notifies the Customer of such change.
- 15.7* 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.
- 15.8* The failure by hsy to enforce any provision of these terms and conditions shall not be treated as a waiver of that provision, nor shall it affect hsy's right to subsequently enforce that provision.