

CONDITIONS OF SALE - Daikin Australia Pty Limited

1. Definitions

"Agreement" means the agreement for supply of Equipment between Daikin Australia and the Customer of which these "Conditions of Sale" form part.

"Daikin Australia" means Daikin Australia Pty Limited, its agents and assigns.

"Charges" includes all monies payable by the Customer to Daikin Australia in relation to the supply of Equipment.

"Confirmation of Order" means a written document which sets out a description of the Equipment, the Charges and other necessary terms and which may include details of the Customer's offer to purchase the Equipment.

"Customer" includes the Customer's agents and permitted assigns.

"Equipment" means the good agreed to be supplied and includes parts and supplies which may subsequently be supplied under any warranty given in relation to the Equipment.

"Ex Works" has the same meaning as is ascribed to that term in Incoterms 1990.

"Manufacturer" means the manufacturer of the Equipment or any parts thereof, its agents and assigns.

"Persons" includes corporations, partnerships and unincorporated associations.

"Warranty Documentation" means the printed card containing the terms of the Daikin Australia Warranty which is supplied with the Equipment or is offered generally by Daikin Australia to purchasers of like Equipment at the date of the Agreement.

Words importing the singular number shall include the plural and vice versa.

2. Conditions

2.1 These Conditions of Sale apply to all agreements for the supply of Equipment by Daikin Australia and are varied or excluded only where such variation or exclusion is in writing and signed by a director or general manager of Daikin Australia and either is expressed to be a variation of these Conditions of Sale or is so inconsistent with them as to allow no other interpretation than that they have been intentionally varied.

2.2 Where the Customer has agreed to purchase Equipment from Daikin Australia upon the basis of these Conditions of Sale, these Conditions of Sale shall be incorporated into every subsequent agreement for purchase of Equipment (including all purchases of consumables by the Customer for use with the Equipment in so far as applicable) by the Customer from Daikin Australia unless specifically varied or excluded in the manner prescribed by Condition 2.1.

3. Quotations and Entry into Agreement

3.1 No brochure, catalogue, price list, internet page, quotation or other communication published or forwarded by Daikin Australia to the Customer, whether in writing or not, shall constitute anything other than an invitation by Daikin Australia to the Customer to do business. Any purchase order placed by the Customer with Daikin Australia constitutes only an offer to purchase Equipment. Notwithstanding any prior communication between Daikin Australia and the Customer, there shall be no obligation by Daikin Australia to accept an offer to purchase Equipment made by a Customer. The Customer's order may be accepted either by issue to the Customer of a Confirmation of Order or by delivery of the Equipment.

3.2 In the event of any inconsistency between the Customer's purchase order or other request and Daikin Australia's Conditions of Sale, the terms of the Daikin Australia's Conditions of Sale shall prevail unless the variation is accepted in writing by Daikin Australia.

3.3 No quotation or other invitation to do business forwarded or other document published by Daikin Australia to the Customer constitutes a representation by Daikin Australia to the Customer that the Equipment detailed in the quotation or publication or the prices set out in it shall be available to the Customer. Any quotation or other publication may be altered or withdrawn by Daikin Australia at any time.

4. Return of Equipment

If any Equipment is delivered to the Customer which does not comply with the Customer's order, it shall be deemed to have been accepted by the Customer unless notice of noncompliance is received by Daikin Australia within seven (7) days of delivery.

5. Functionality and Performance

5.1 All information, specifications or other data provided by Daikin Australia in relation to the Equipment represent approximations only and should not be used for construction purposes. All drawings and specifications shall remain the sole property of Daikin Australia and must not be copied or divulged to any third party without the prior consent of Daikin Australia. Small deviations or slight variations from such information, specifications or data which do not substantially affect the functionality of the Equipment will not entitle the Customer to either reject the Equipment upon delivery or make any claim in respect thereof.

5.2 Any information provided by Daikin Australia in relation to the performance of Equipment represents only a guide as to the performance of the Equipment under standard industry operating conditions. Factors which may affect performance of the Equipment may be obtained from Daikin Australia on request.

5.3 Daikin Australia reserves the right to make reasonable modifications of any kind to the Equipment prior to its delivery.

5.4 Daikin Australia does not warrant that the Equipment supplied by Daikin Australia will, as installed, comply with the Building Code of Australia or any other similar standard or code. The Customer is solely responsible for ensuring that the Equipment, as installed, complies with any relevant code or standard.

6. Charges

6.1 Account Customers shall pay to Daikin Australia all Charges within thirty days from the end of the month of invoice, unless otherwise agreed in writing, without reduction or deferment on account of any claim, counterclaim or setoff.

6.2 The Customer acknowledges that the cost of transportation and freight for the Equipment is not included in the Charges and the Customer shall pay a reasonable additional fee for such costs. All other charges such as duty and other related expenses shall (unless otherwise agreed in writing) be paid by the Customer.

6.3 Should the Customer fail to pay any amount when due to Daikin Australia, the Customer shall be liable to pay to Daikin Australia without demand interest thereon at the rate of 3% above the indicator lending rate from time to time and charged by Daikin Australia's bankers as nominated by Daikin Australia at the relevant time. Interest payable hereunder shall be compounded monthly and calculated from the due date for payment to the date upon which payment is actually made.

6.4 Notwithstanding anything else appearing in the Agreement, all Charges shall immediately become due if the Customer fails to make any payment when due, becomes subject to the bankruptcy laws or enters into any composition with its creditors or enters into liquidation or suffers a receiver or receiver and manager to be appointed to all or part of its assets.

7. Property in Equipment Purchased

7.1 No legal or equitable title to the Equipment shall pass to the Customer until payment in full has been made by the Customer not only of all Charges for all Equipment the subject of the Agreement (unless waived in writing by Daikin Australia) but also until payment has been made of all Charges for all Equipment previously supplied by Daikin Australia to the Customer.

7.2 Subject to Condition 7.4, until the legal and equitable title to the Equipment passes to the Customer, the Customer shall:

- hold the Equipment as bailee of Daikin Australia returnable at will and without prior demand by Daikin Australia;
- upon demand by Daikin Australia immediately deliver up the Equipment to Daikin Australia; and

c) and hereby authorises Daikin Australia to enter upon the premises upon which the Equipment are stored for the purpose of taking possession thereof.

7.3 The Customer shall be liable for any damage arising from or in connection with the recovery of possession of the Equipment by Daikin Australia.

7.4 Until title of the Equipment passes to the Customer, the Customer will not purport to assign any right or interest therein to any other person other than by sale of the Equipment in the usual course of business (upon which title will pass to the purchaser).

8. Delivery and Risk

8.1 The Equipment is sold on an Ex Works basis. Delivery of the Equipment will occur when the Equipment is placed at the disposal of the Customer at Daikin Australia's premises and risk of loss or damage to the Equipment then passes to the Customer.

8.2 Delivery dates represent only an estimation of the date of delivery of the Equipment and are not binding on Daikin Australia. Time is not of the essence of the Agreement unless it is expressly stated to do so.

8.3 If Daikin Australia determines that it is or may be unable to deliver the Equipment within a reasonable time or at all, Daikin Australia may at its sole discretion terminate the Agreement. In the event of termination the Customer shall have no claim against Daikin Australia for any damage, loss or expense whatsoever.

8.4 Daikin Australia reserves the right to deliver the Equipment by instalments and to invoice the Customer for each instalment of Equipment delivered where, in the opinion of Daikin Australia, it is reasonable to do so.

8.5 Failure by the Customer to pay any instalment, or any other amount when due, shall entitle Daikin Australia to withhold or delay delivery of any remaining Equipment.

8.6 If Daikin Australia is unable to effect delivery for reasons outside its control or if Daikin Australia has agreed to make delivery and the Customer is unwilling or unable to accept delivery, Daikin Australia may store the Equipment and charge the Customer for all costs and expenses associated with such storage and delayed delivery, including, if applicable, any additional financing costs incurred by Daikin Australia by reason of a fixed price having been agreed for the Equipment with the Customer or otherwise. Where delivery to the Customer's premises is delayed by reason of the Customer's fault or unpreparedness or other reason outside the control of Daikin Australia and the time for payment by Daikin Australia to the Manufacturer is linked to the anticipated time for such delivery, then Daikin Australia in its discretion may at any time after such anticipated time deem delivery to have occurred for the purposes of payment from the Customer in accordance with the Agreement.

8.7 If Daikin Australia is commissioning the Equipment, the commissioning will be deemed to be completed successfully when Daikin Australia so certifies to the Customer at which time the Customer will be deemed to accept the Equipment.

9. Equipment Warranty and Limitation of Liability

a) The Customer is entitled to:

i) all the rights that by the Trade Practices Act, 1974 (or other State or Territory law having a similar purpose) cannot be lawfully excluded from the Agreement, to the extent those rights cannot be excluded;

ii) in addition to the rights under condition 9(a)(i), the warranties that are described and referred to in the Warranty Documentation (subject to the exclusions and limitations).

b) All implied warranties that are inconsistent with the Customer's entitlement under condition 9 (a) are to that extent excluded.

10. Termination

In addition to the rights of termination provided in the above conditions, Daikin Australia may terminate the Agreement upon the occurrence of any of the following events.

a) Failure by the Customer to perform any obligation of this Agreement where such failure is not rectified within thirty (30) days of notice from Daikin Australia requesting rectification.

b) A receiver or receiver and manager of the Customer's assets, income or business or any part thereof is appointed or a mortgagee goes into possession thereof.

c) The Customer fails to pay its debts as they shall fall due or ceases or threatens to cease to carry on business.

d) The Customer purports to assign its rights under the Agreement.

e) Any event occurs outside the reasonable control of Daikin Australia which in Daikin Australia's estimate makes it impracticable or impossible for Daikin Australia to fulfil its obligations under the Agreement.

11. Force Majeure

11.1 Daikin Australia will not be liable for any loss or damage suffered by the Customer due to any delay or any breach or default under the Agreement in circumstances where such delay, breach or default results from causes beyond Daikin Australia's reasonable control including but not limited to any breach or default under the Agreement by the Customer, compliance with any laws, regulations, orders, acts, instructions or priority requests of governments, acts of God, fires, floods, weather, strikes, lockouts, factory shutdown or alterations, embargoes, wars, riots, delay or shortage in transportation or inability to obtain labour, manufacturing facilities, electricity, oil or other materials from Daikin Australia's or the Manufacturer's usual sources.

11.2 Any delay resulting from such cause shall immediately extend the date for the performance by Daikin Australia of any obligation under the Agreement by the period of delay in which event the Customer shall take, if necessary, steps to secure payment for the Equipment.

12. Miscellaneous

12.1 Any indulgence, latitude or extension of time which Daikin Australia may show towards the Customer in relation to any of the provisions of the Agreement or any matter or thing relating thereto or arising therefrom shall not in any way prejudice or interfere with Daikin Australia's rights under the Agreement and shall not be claimed to constitute a waiver thereof.

12.2 The Customer acknowledges that no oral terms or representations form part of the Agreement unless they have been reduced to writing prior to entering into the Agreement.

12.3 Any notice to be given to a party shall be in writing and shall be sent by post, telex or facsimile to the address of that party as shown in the Quotation, Purchase Order or Confirmation of Order or as subsequently notified by that party to the party giving the notice and shall be deemed to have been given at the time it would have been received in the normal course of post if forwarded by post and if otherwise given at the time it was actually received.

12.4 The Agreement shall be governed by the laws of New South Wales and the parties agree to submit the jurisdiction of the Courts of that State.

13. Dispute Resolution

13.1 Prior to the institution of any legal proceedings, or any referral to arbitration, any dispute, controversy or claim arising out of or relating to this Agreement or the breach, termination or invalidity of it shall first be the subject of mediation administered by the Australian Commercial Disputes Centre Limited ("ACDC").

13.2 In the event that the dispute, controversy or claim has not been resolved within twenty eight (28) days after the appointment of the mediator (or such other period as agreed to in writing between the parties), the dispute, controversy or claim, at the election of either party, may be submitted to arbitration, administered by ACDC. The arbitrator shall not be the same person as the mediator and shall be agreed between the parties from a panel suggested by ACDC, or, failing agreement, an arbitrator appointed by ACDC.

13.3 Any mediation or arbitration meetings and proceedings shall be held in Sydney.