

## **Terms of Trade**

### **1. Definitions**

1.1 "Melbourne Spa Repairs" shall mean Melbourne Spa Repairs, Mornington Peninsula Swim n Spa, Seascape Pool & Spa, and its successors and assigns or any person acting on behalf of and with the authority of Melbourne Spa Repairs.

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

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

1.4 "Services" shall mean all Services &/or Items supplied by Melbourne Spa Repairs to the Client and includes any advice or recommendations.

1.5 "Price" shall mean the price payable for the Services &/or Items as agreed between Melbourne Spa Repairs and the Client in accordance with clause 3 of this contract.

### **2. Acceptance**

2.1 Any instructions received by Melbourne Spa Repairs from the Client for the supply of Services &/or Items and/or the Client's acceptance of Services &/or Items supplied by Melbourne Spa Repairs shall constitute acceptance of the terms and conditions contained herein.

2.2 Where more than one Client has entered into this agreement, the Clients shall be jointly and severally liable for all payments of the Price.

2.3 Upon acceptance of these terms and conditions by the Client the terms and conditions are binding and can only be amended with the written consent of Melbourne Spa Repairs.

2.4 The Client shall give Melbourne Spa Repairs not less than fourteen (13) days prior written notice of any proposed change of ownership of the Client or any change in the Client's name and/or any other change in the Client's details (including but not limited to, changes in the Client's address, phone number, email or business practice). The Client shall be liable for any loss incurred by Melbourne Spa Repairs as a result of the Client's failure to comply with this clause.

### **3. Price And Payment**

3.1 At Melbourne Spa Repairs's sole discretion the Price shall be either:

(a) as indicated on invoices provided by Melbourne Spa Repairs to the Client in respect of Services &/or Items supplied; or  
(b) Melbourne Spa Repairs's quoted Price (subject to clause 3.2 which shall be binding upon Melbourne Spa Repairs provided that the Client shall accept Melbourne Spa Repairs's quotation in writing within seven (7) days.

3.2 Melbourne Spa Repairs reserves the right to change the Price in the event of a variation to Melbourne Spa Repairs's quotation.

3.3 At Melbourne Spa Repairs's sole discretion a deposit may be required.

3.4 At Melbourne Spa Repairs's sole discretion:

(a) payment shall be due on delivery of the Services; or  
(b) payment for approved Clients shall be made by instalments in accordance with Melbourne Spa Repairs's payment schedule.

3.5 Time for payment for the Services &/or Items 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.

3.6 Payment will be made by cash, or by cheque, Paypal or by bank cheque, or by direct credit, or by electronic banking, or by any other method as agreed to between the Client and Melbourne Spa Repairs.

3.7 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.

3.8 The Seller will use its reasonable endeavours to source all Goods ordered by the Customer and/or quoted by the Seller. The Customer

acknowledges that by placing an order with the Seller and The Seller's acceptance of the Customer's order, does not guarantee the Seller's ability to supply the Products. If the Seller cannot provide the agreed quantity of Goods for any reason outside the seller's reasonable control, the Seller will communicate such to the Customer, and not be liable for that shortfall.

3.9 Agreement to pay is between Melbourne Spa Repairs and the Customer only. (eg, not between Melbourne Spa Repairs and customer's Insurer)

3.10 Payment cannot be restricted in any way whatsoever by not allowing Melbourne Spa Repairs into property. See Clause 4.6.

### **4. Delivery Of Services**

4.1 At Melbourne Spa Repairs's sole discretion delivery of the Services &/or Items shall take place when:

(a) the Client takes possession of the Services &/or Items at Melbourne Spa Repairs's address; or

(b) the Client takes possession of the Services &/or Items at the Client's nominated address (in the event that the Services &/or Items are delivered by Melbourne Spa Repairs or Melbourne Spa Repairs's nominated carrier).

4.2 The costs of Delivery are included in the Price.

4.3 The Client shall make all arrangements necessary to take delivery of the Services &/or Items whenever they are tendered for delivery. In the event that the Client is unable to take delivery of the Services &/or Items as arranged then Melbourne Spa Repairs shall be entitled to charge a reasonable fee for redelivery.

4.4 Delivery of the Services &/or Items to a third party nominated by the Client is deemed to be delivery to the Client for the purposes of this agreement.

4.5 The failure of Melbourne Spa Repairs to deliver shall not entitle either party to treat this contract as repudiated.

4.6 Melbourne Spa Repairs shall not be liable for any loss or damage whatever due to failure by Melbourne Spa Repairs to deliver the Services &/or Items (or any of them) promptly or at all.

4.6 Client must allow Melbourne Spa Repairs into property at reasonable times, with unrestricted access to the property in order to provide Delivery of Service any day between 7:00am – 5:30pm

### **5. Risk**

5.1 If Melbourne Spa Repairs retains ownership of the Services &/or Items nonetheless, all risk for the Services &/or Items passes to the Client on delivery.

5.2 The Client shall be liable for the cost of any damaged equipment if that equipment is damaged at an event organised by Melbourne Spa Repairs for the Client.

### **6. Title**

6.1 Melbourne Spa Repairs and the Client agree that ownership of the Services &/or Items shall not pass until:

(a) the Client has paid Melbourne Spa Repairs all amounts owing for the particular Services; and  
(b) the Client has met all other obligations due by the Client to Melbourne Spa Repairs in respect of all contracts between

Melbourne Spa Repairs and the Client.

6.2 Receipt by Melbourne Spa Repairs 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 Melbourne Spa Repairs's ownership or rights in respect of the Services &/or Items shall continue.

6.3 It is further agreed that:

(a) until such time as ownership of the Services &/or Items shall pass from Melbourne Spa Repairs to the Client Melbourne Spa Repairs may give notice in writing to the Client to return the Services &/or Items or any of them to Melbourne Spa Repairs. Upon such notice the rights of the Client to obtain ownership or any other interest in the Services &/or Items shall cease.

(b) if the Client fails to return the Services &/or

Items to Melbourne Spa Repairs then Melbourne Spa Repairs or Melbourne Spa Repairs's agent may enter upon and into land and premises owned, occupied or used by the Client, or any premises as the invitee of the Client, where the Services &/or Items are situated and take possession of the Services.

### **7. Client's Disclaimer**

7.1 The Client hereby disclaims any right to rescind, or cancel the contract with Melbourne Spa Repairs or to sue for damages or to claim restitution arising out of any misrepresentation made to the Client by Melbourne Spa Repairs and the Client acknowledges that the Services &/or Items are bought relying solely upon the Client's skill and judgment.

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

7.1 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.

### **9. Default & Consequences of Default**

9.1 In the event of the Customer being in default of his obligation to pay and the overdue account is then referred to a debt collection agency, and/or law firm for collection the Customer shall be liable for the recovery costs incurred and if the agency charges commission on a contingency basis the Customer shall be liable to pay as a liquidated debt, the commission payable by the Supplier to the agency, fixed at the rate charged by the agency from time to time.

In the event where the agency is Prushka Fast Debt Recovery the applicable commission rate for the amount unpaid is as detailed at

[www.prushka.com.au](http://www.prushka.com.au)

9.2 In the event where the Supplier or the Supplier's agency refers the overdue account to a lawyer the Customer shall also pay as a liquidated debt the charges reasonably made or claimed by the lawyer on the indemnity basis.

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

9.3 Without prejudice to any other remedies Melbourne Spa Repairs may have, if at any time the Client is in breach of any obligation (including those relating to payment), Melbourne Spa Repairs may suspend or terminate the supply of Services &/or Items to the Client and any of its other obligations under the terms and conditions. Melbourne Spa Repairs will not be liable to the Client for any loss or damage the Client suffers because Melbourne Spa Repairs has exercised its rights under this clause.

9.4 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.

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

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

## **10. Defects, Warranties and Returns, Competition and Consumer Act 2010 (CCA)**

10.1 The Customer must inspect the Goods on delivery and must within seven (13) days of delivery notify the Seller in writing of any evident damage, shortage in quantity, or failure to comply with the description or quote. The Customer must notify any other alleged defect in the Goods as soon as reasonably possible after any such defect becomes evident. Upon such notification the Customer must allow the Seller to inspect the defect.

10.2 Under applicable State, Territory and Commonwealth Law (including, without limitation the CCA), certain statutory implied guarantees and warranties (including, without limitation the statutory guarantees under the CCA) may be implied into these terms and conditions (Non-Excluded Guarantees).

10.3 The Seller acknowledges that nothing in these terms and conditions purports to modify or exclude the Non-Excluded Guarantees.

10.4 Except as expressly set out in these terms and conditions or in respect of the Non-Excluded Guarantees, the Seller makes no warranties or other representations under these terms and conditions including but not limited to the quality or suitability of the Goods. The Seller's liability in respect of these warranties is limited to the fullest extent permitted by law.

10.5 If the Customer is a consumer within the meaning of the CCA, the Seller's liability is limited to the extent permitted by section 64A of Schedule 2.

10.6 If the Seller is required to replace the Goods under this clause or the CCA, but is unable to do so, the Seller may refund any money the Customer has paid for the Goods.

10.13 If the Customer is not a consumer within the meaning of the CCA, the Seller's liability for any defect or damage in the Goods is:

- (a) limited to the value of any express warranty or warranty card provided to the Customer by the Seller at the Seller's sole discretion;
- (b) limited to any warranty to which the Seller is entitled, if the Seller did not manufacture the Goods;
- (c) otherwise negated absolutely.

10.8 Subject to this clause 10, returns will only be accepted provided that:

- (a) the Customer has complied with the provisions of clause 10.1; and
- (b) the Seller has agreed that the Goods are defective; and
- (c) the Goods are returned within a reasonable time at the Customer's cost (if that cost is not significant); and
- (d) the Goods are returned in as close a condition to that in which they were delivered as is possible.

10.9 Notwithstanding clauses 10.1 to 10.8 but subject to the CCA, the Seller shall not be liable for any defect or damage which may be caused or partly caused by or arise as a result of:

- (a) the Customer failing to properly maintain or store any Goods;
- (b) the Customer using the Goods for any purpose other than that for which they were designed;
- (c) the Customer continuing the use of any Goods after any defect became apparent or should have become apparent to a reasonably prudent operator or user;
- (d) the Customer failing to follow any instructions or guidelines provided by the Seller;
- (e) fair wear and tear, any accident, or act of God.

10.10 The Seller may in its absolute discretion accept non-defective Goods for return

10.11 Notwithstanding anything contained in this clause if the Seller is required by a law to accept a return then the Seller will only accept a return on the conditions imposed by that law

## **11. Security And Charge**

11.1 Despite anything to the contrary contained herein or any other rights which Melbourne Spa Repairs may have howsoever:

(a) where the Client and/or the Guarantor (if any) is the owner of land, realty or any other asset capable of being charged, both the Client 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 Melbourne Spa Repairs or Melbourne Spa Repairs's nominee to secure all amounts and other monetary obligations payable under these terms and conditions. The Client and/or the Guarantor acknowledge and agree that Melbourne Spa Repairs (or Melbourne Spa Repairs'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 Melbourne Spa Repairs elect to proceed in any manner in accordance with this clause and/or its sub-clauses, the Client and/or Guarantor shall indemnify Melbourne Spa Repairs from and against all Melbourne Spa Repairs's costs and disbursements including legal costs on a solicitor and own client basis.

(c) the Client and/or the Guarantor (if any) agree to irrevocably nominate constitute and appoint Melbourne Spa Repairs or Melbourne Spa Repairs's nominee as the Client's and/or Guarantor's true and lawful attorney to perform all necessary acts to give effect to the provisions of this clause 11.1.

### **12. Cancellation**

12.1 Melbourne Spa Repairs may cancel any contract to which these terms and conditions apply or cancel delivery of Services &/or Items at any time before the Services &/or Items are delivered by giving written notice to the Client. On giving such notice Melbourne Spa Repairs shall repay to the Client any sums paid in respect of the Price. Melbourne Spa Repairs shall not be liable for any loss or damage whatever arising from such cancellation.

12.2 In the event that the Client cancels delivery of Services &/or Items the Client shall be liable for any loss incurred by Melbourne Spa Repairs (including, but not limited to, any loss of profits) up to the time of cancellation.

### **13. Privacy Act 1988**

13.1 The Client and/or the Guarantor/s agree for Melbourne Spa Repairs to obtain from a credit reporting agency a credit report containing personal credit information about the Client and Guarantor/s in relation to credit provided by Melbourne Spa Repairs.

13.2 The Client and/or the Guarantor/s agree that Melbourne Spa Repairs may exchange information about the Client and the Guarantor/s with those credit providers either named as trade referees by the Client or named in a consumer credit report issued by a credit reporting agency for the following purposes:

- (a) to assess an application by the Client; and/or
- (b) to notify other credit providers of a default by the Client; and/or
- (c) to exchange information with other credit providers as to the status of this credit account, where the Client is in default with other credit providers; and/or
- (d) to assess the credit worthiness of Client and/or Guarantor/s.

13.3 The Client consents to Melbourne Spa Repairs being given a consumer credit report to collect overdue payment on commercial credit (Section 18K(1)(h) Privacy Act 1988).

13.4 The Client agrees that personal credit information provided may be used and retained by Melbourne Spa Repairs for the following purposes and for other purposes as shall be agreed between the Client and Melbourne Spa Repairs or required by law from time to time:

- (a) provision of Services; and/or
- (b) marketing of Services &/or Items by Melbourne Spa Repairs, its agents or distributors

in relation to the Services; and/or

(c) analysing, verifying and/or checking the Client's credit, payment and/or status in relation to provision of

Services; and/or

(d) processing of any payment instructions, direct debit facilities and/or credit facilities requested by the Client; and/or

(e) enabling the daily operation of Client's account and/or the collection of amounts outstanding in the Client's account in relation to the Services.

13.5 Melbourne Spa Repairs may give information about the Client to a credit reporting agency for the following purposes:

(a) to obtain a consumer credit report about the Client; and/or

(b) allow the credit reporting agency to create or maintain a credit information file containing information about the Client.

### **13. General**

13.1 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.

13.2 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.

13.3 Melbourne Spa Repairs shall be under no liability whatever to the Client for any indirect loss and/or expense (including loss of profit) suffered by the Client arising out of a breach by Melbourne Spa Repairs of these terms and conditions.

13.4 In the event of any breach of this contract by Melbourne Spa Repairs the remedies of the Client shall be limited to damages which under no circumstances shall exceed the Price of the Services.

13.5 The Client shall not be entitled to set off against or deduct from the Price any sums owed or claimed to be owed to the Client by Melbourne Spa Repairs. (eg, a part missing or unfinished that constitutes less than 10% of the total amount of the Price)

13.6 Melbourne Spa Repairs may license or sub-contract all or any part of its rights and obligations without the Client's consent.

13.13 Melbourne Spa Repairs reserves the right to 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 Melbourne Spa Repairs notifies the Client of such change.

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

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

13.10 Disputes: Any dispute between the Seller and the Customer will be discussed between the parties in the spirit of goodwill.