

# Ace Mercury Rising Pty Ltd T/A Whiteside Pool Heating – Terms & Conditions of Trade

- 1. Definitions**
  - 1.1 "WSPH" shall mean Ace Mercury Rising Pty Ltd T/A Whiteside Pool Heating its successors and assigns or any person acting on behalf of and with the authority of Ace Mercury Rising Pty Ltd T/A Whiteside Pool Heating.
  - 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 WSPH to the Customer.
  - 1.3 "Guarantor" means that person (or persons), or entity, who agrees to be liable for the debts of the Customer on a principal debtor basis.
  - 1.4 "Goods" shall mean Goods supplied by WSPH 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, work authorisation or any other forms as provided by WSPH to the Customer.
  - 1.5 "Services" shall mean all Services supplied by WSPH to the Customer and includes any advice or recommendations (and where the context so permits shall include any supply of Goods as defined above).
  - 1.6 "Price" shall mean the price payable for the Goods as agreed between WSPH and the Customer 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 WSPH from the Customer for the supply of Goods and/or the Customer's acceptance of Goods supplied by WSPH 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 WSPH.
  - 3.4 The Customer shall give WSPH 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 WSPH as a result of the Customer's failure to comply with this clause.
  - 3.5 Goods are supplied by WSPH 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 WSPH's sole discretion the Price shall be either:
    - (a) as indicated on invoices provided by WSPH to the Customer in respect of Goods supplied; or
    - (b) WSPH's quoted Price (subject to clause 4.2) which shall be binding upon WSPH provided that the Customer shall accept WSPH's quotation in writing within thirty (30) days.
  - 4.2 WSPH reserves the right to change the Price in the event of a variation to WSPH's quotation.
  - 4.3 At WSPH's sole discretion a deposit may be required.
  - 4.4 At WSPH's sole discretion payment:
    - (a) shall be due and cleared one (1) day before delivery of the Goods or commencement of the Services; or
    - (b) payment shall be due immediately upon completion of work or delivery of Goods; or
    - (c) payment for pre-approved trade Customers only shall be due seven (7) days following the date of the invoice.
  - 4.5 At WSPH's sole discretion full payment or the majority of the remaining balance is immediately due and payable after one (1) day of commencing the Services.
  - 4.6 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 one (1) day before delivery of the Goods or commencement of the Services.
  - 4.7 Payment will be made in order of preference by direct deposit, Credit card (plus a surcharge of up to two and one half percent (2.5%) of the Price), bank cheque, or by any other method as agreed to between the Customer and WSPH. Personal cheques must be pre-approved by WSPH.
  - 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 WSPH's sole discretion delivery of the Goods shall take place when:
    - (a) the Customer takes possession of the Goods at WSPH's address; or
    - (b) the Customer takes possession of the Goods at the Customer's nominated address (in the event that the Goods are delivered by WSPH or WSPH's nominated carrier).
  - 5.2 At WSPH's sole discretion the costs of delivery are:
    - (a) included in the Price; or
    - (b) in addition to the Price; or
    - (c) for the Customer's account.
  - 5.3 The Customer shall make all arrangements necessary to take delivery of the Goods whenever they are tendered for delivery.
  - 5.4 The failure of WSPH to deliver shall not entitle either party to treat this contract as repudiated.
  - 5.5 WSPH shall not be liable for any loss or damage whatsoever due to failure by WSPH to deliver the Goods (or any of them) promptly or at all, where due to circumstances beyond the control of WSPH.
- 6. Risk**
  - 6.1 If WSPH retains ownership of the Goods nonetheless, all risk for the Goods passes to the Customer on delivery.
  - 6.2 If any of the Goods are damaged or destroyed following delivery but prior to ownership passing to the Customer, WSPH is entitled to receive all insurance proceeds payable for the Goods. The production of these terms and conditions by WSPH is sufficient evidence of WSPH's rights to receive the insurance proceeds without the need for any person dealing with WSPH to make further enquiries.
  - 6.3 In the event that a defect in the Goods or Services (that is not apparent upon delivery of the Goods or completion of the Services), causes consequential damage to any item, or injury to any person, then WSPH's liability is limited to replacing or repairing the defected Goods or parts for the Service. The Customer acknowledges and agrees it is their responsibility to ensure they are adequately insured or at all for this event.
  - 6.4 The Customer acknowledges and agrees that the presence of plant/tree root growth and/or blockages generally indicates damaged pipes. Accordingly the Customer agrees that these pipes cannot be fixed by simply removing plant/tree root growth or cleaning the drain, therefore no warranty is provided against this situation arising again in the future and in respect of any work carried out in relation thereto.
- 7. Customer's Responsibilities**
  - 7.1 It is the Customer's responsibility to ensure that no persons enter the worksite, below the worksite, or within six (6) metres of the worksite, or where any ladder or roof work is being undertaken. The Customer also acknowledges and agrees that WSPH shall not be liable for any loss, damages, or costs (including those related to personal injury) however arising resulting from the Customer's failure to comply with this clause.
- 8. Title**
  - 8.1 WSPH and the Customer agree that ownership of the Goods shall not pass until:
    - (a) the Customer has paid WSPH all amounts owing for the particular Goods; and
    - (b) the Customer has met all other obligations due by the Customer to WSPH in respect of all contracts between WSPH and the Customer.
  - 8.2 Receipt by WSPH 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 WSPH's ownership or rights in respect of the Goods shall continue.
  - 8.3 It is further agreed that:
    - (a) where practicable the Goods shall be kept separate and identifiable until WSPH shall have received payment and all other obligations of the Customer are met; and
    - (b) until such time as ownership of the Goods shall pass from WSPH to the Customer WSPH may give notice in writing to the Customer to return the Goods or any of them to WSPH. Upon such notice the rights of the Customer to obtain ownership or any other interest in the Goods shall cease; and
    - (c) WSPH shall have the right of stopping the Goods in transit whether or not delivery has been made; and
    - (d) if the Customer fails to return the Goods to WSPH then WSPH or WSPH's agent may enter upon and into land and premises owned, occupied or used by the Customer, or any premises as the invitee of the Customer, where the Goods are situated and take possession of the Goods; and
    - (e) the Customer is only a bailee of the Goods and until such time as WSPH has received payment in full for the Goods then the Customer shall hold any proceeds from the sale or disposal of the Goods, up to and including the amount the Customer owes to WSPH for the Goods, on trust for WSPH; and
    - (f) the Customer shall not deal with the money of WSPH in any way which may be adverse to WSPH; and
    - (g) the Customer shall not charge the Goods in any way nor grant nor otherwise give any interest in the Goods while they remain the property of WSPH; and
    - (h) WSPH can issue proceedings to recover the Price of the Goods sold notwithstanding that ownership of the Goods may not have passed to the Customer; and
    - (i) until such time that ownership in the Goods passes to the Customer, if the Goods are converted into other products, the parties agree that WSPH will be the owner of the end products.
- 9. Defects**
  - 9.1 The Customer shall inspect the Goods on delivery and shall within three (3) days of delivery (time being of the essence) notify WSPH of any alleged defect, shortage in quantity, damage or failure to comply with the description or quote. The Customer shall afford WSPH an opportunity to inspect the Goods within a reasonable time following delivery if the Customer believes the Goods are defective in any way. If the Customer shall fail to comply with these provisions the Goods shall be presumed to be free from any defect or damage. For defective Goods, which WSPH has agreed in writing that the Customer is entitled to reject, WSPH's liability is limited to either (at WSPH's discretion) replacing the Goods or repairing the Goods except where the Customer has acquired Goods as a consumer within the meaning of the Trade Practices Act 1974 (Cwth) 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.
  - 9.2 Goods will not be accepted for return other than in accordance with 9.1 above.
- 10. Warranty**
  - 10.1 Subject to the conditions of warranty set out in clause 10.2 WSPH warrants that if any defect in any workmanship of WSPH becomes apparent and is reported to WSPH within twelve (12) months of the date of delivery (time being of the essence) then WSPH will either (at WSPH's sole discretion) replace or remedy the workmanship.
  - 10.2 The conditions applicable to the warranty given by clause 10.1 are:
    - (a) the warranty shall not cover any defect or damage which may be caused or partly caused by or arise through:
      - (i) failure on the part of the Customer to properly maintain any Goods; or
      - (ii) failure on the part of the Customer to follow any instructions or guidelines provided by WSPH; or
      - (iii) any use of any Goods otherwise than for any application specified on a quote or order form; or
      - (iv) the continued use of any Goods after any defect becomes apparent or would have become apparent to a reasonably prudent operator or user; or
      - (v) fair wear and tear, any accident or act of God.
    - (b) the warranty shall cease and WSPH shall thereafter in no circumstances be liable under the terms of the warranty if the workmanship is repaired, altered or overhauled without WSPH's consent.
    - (c) in respect of all claims WSPH shall not be liable to compensate the Customer for any delay in either replacing or remedying the workmanship or in properly assessing the Customer's claim.
    - (d) the warranty shall not cover the repair or replacement of any consequential damage to the Customers premises caused by defects that are not evident at the time of completion of the installation.
  - 10.3 For Goods not manufactured by WSPH, the warranty shall be the current warranty provided by the manufacturer of the Goods. WSPH shall not be bound by any manufacturers warranty or suppliers warranty should they fail to honour it, nor shall WSPH be responsible for any term, condition, representation or warranty other than that which is given by the manufacturer of the Goods.
  - 10.4 The conditions applicable to the warranty given on Goods and or Services supplied or provided by WSPH are contained on the "Installation and/or Operating Instructions" that will be supplied with the Goods and or Services.
- 11. Default & 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 one half percent (2.5%) per calendar month (and at WSPH'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 WSPH.
  - 11.3 If the Customer defaults in payment of any invoice when due, the Customer shall indemnify WSPH from and against all costs and disbursements incurred by WSPH in pursuing the debt including legal costs on a solicitor and own Customer basis and WSPH's collection agency costs.
  - 11.4 Without prejudice to any other remedies WSPH may have, if at any time the Customer is in breach of any obligation (including those relating to payment), WSPH may suspend or terminate the supply of Goods to the Customer and any of its other obligations under the terms and conditions. WSPH will not be liable to the Customer for any loss or damage the Customer suffers because WSPH 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 WSPH's other remedies at law, the Customer shall be entitled to cancel all or any part of any order of the Customer which remains unfulfilled and all amounts owing to WSPH shall, whether or not due for payment, become immediately payable in the event that:
    - (a) any money payable to WSPH becomes overdue, or in WSPH'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 WSPH 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 WSPH or WSPH'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 WSPH (or WSPH'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 WSPH elect to proceed in any manner in accordance with this clause and/or its sub-clauses, the Customer and/or Guarantor shall indemnify WSPH from and against all WSPH's costs and disbursements including legal costs on a solicitor and own Customer basis.
    - (c) the Customer and/or Guarantor (if any) agree to irrevocably nominate constitute and appoint WSPH or WSPH'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 12.1.
- 13. Cancellation**
  - 13.1 WSPH 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 Customer. On giving such notice WSPH shall repay to the Customer any sums paid in respect of the Price. WSPH shall not be liable for any loss or damage whatsoever arising from such cancellation.
  - 13.2 In the event that the Customer cancels delivery of Goods the Customer shall be liable for any loss incurred by WSPH (including, but not limited to, any loss of profits) up to the time of cancellation, and a cancellation fee shall apply, the amount of the greater of twenty-five percent (25%) or one hundred and fifty dollars (\$150).
  - 13.3 In the event that the Customer postpones delivery of the Goods or Services to be undertaken, then a deposit shall become immediately due and payable. The Customer acknowledges and agrees that the quoted Price may vary as per clause 4.2, the longer the Goods or Services are postponed for.
- 14. Privacy Act 1988**
  - 14.1 The Customer and/or the Guarantor/s agree for WSPH to obtain from a credit reporting agency a credit report containing personal credit information about the Customer and Guarantor/s in relation to credit provided by WSPH.
  - 14.2 The Customer and/or the Guarantor/s agree that WSPH may exchange information about the Customer and the Guarantor/s 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 credit worthiness of Customer and/or Guarantor/s.
  - 14.3 The Customer consents to WSPH 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 WSPH for the following purposes and for other purposes as shall be agreed between the Customer and WSPH or required by law from time to time:
    - (a) provision of Goods; and/or
    - (b) marketing of Goods by WSPH, its agents or distributors in relation to the Goods; and/or
    - (c) analysing, verifying and/or checking the Customer'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 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 Goods.
  - 14.5 WSPH 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; and/or
    - (b) allow the credit reporting agency to create or maintain a credit information file containing information about the Customer.
- 15. Unpaid WSPH's Rights**
  - 15.1 Where the Customer has left any item with WSPH for repair, modification, exchange or for WSPH to perform any other Service in relation to the item and WSPH has not received or been tendered the whole of the Price, or the payment has been dishonoured, WSPH shall have:
    - (a) a lien on the item;
    - (b) the right to retain the item for the Price while WSPH is in possession of the item;
    - (c) a right to sell the item.
  - 15.2 The lien of WSPH shall continue despite the commencement of proceedings, or judgment for the Price having been obtained.
- 16. Construction Contracts Act 2004**
  - 16.1 At WSPH's sole discretion, if there are any disputes or claims for unpaid Goods and/or Services then the provisions of the Construction Contracts Act 2004 may apply.
  - 16.2 Nothing in this agreement is intended to have the effect of contracting out of any provisions of the Construction Contracts Act 2004 of Western Australia, except to the extent permitted by the Acts where applicable.
- 17. General**
  - 17.1 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.
  - 17.2 These terms and conditions and any contract to which they apply shall be governed by the laws of Western Australia and are subject to the jurisdiction of the courts of Western Australia.
  - 17.3 WSPH 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 WSPH of these terms and conditions.
  - 17.4 In the event of any breach of this contract by WSPH the remedies of the Customer shall be limited to damages which under no circumstances shall exceed the Price of the Goods.
  - 17.5 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 WSPH nor to withhold payment of any invoice because part of that invoice is in dispute.
  - 17.6 WSPH may license or sub-contract all or any part of its rights and obligations without the Customer's consent.
  - 17.7 The Customer agrees that WSPH 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 WSPH notifies the Customer of such change.
  - 17.8 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.
  - 17.9 The failure by WSPH to enforce any provision of these terms and conditions shall not be treated as a waiver of that provision, nor shall it affect WSPH's right to subsequently enforce that provision.