

## KIRBY – CONDITIONS OF SALE

Thank you for choosing Kirby. These Conditions set out the terms applying to your purchases of goods and services from Kirby, and credit terms where applicable.

### **1**      ***Application of these Conditions of Sale***

- 1.1      These Conditions form a binding contract for the sale and/or hire of goods and associated services by Kirby HVAC&R Pty Ltd (ABN 42 624 910 041) (Kirby, us) or another Kirby group company to you as the Customer.
- 1.2      The Conditions incorporate other documents we provide or make available on our website, such as warranties, order forms, quotes, brochures, product descriptions and price lists.
- 1.3      Kirby may amend or vary these Conditions and any other part of the Agreement by updating them on the Kirby website. If you reasonably believe, and we reasonably accept, that a variation has a material adverse effect on you, you may cancel any current or prospective orders or services, without penalty.
- 1.4      These Conditions apply to all goods and services ordered by you and provided by Kirby whether through a printed or online order, a quotation, oral acceptance by Kirby of repeat or future orders, or another format made available by Kirby.

### **2**      ***Price & Payment***

- 2.1      The price payable by you for goods and services and associated items such as freight, delivery and installation shall be as notified from time to time by Kirby, including (without limitation) on our website, in our price lists or as quoted or advised by Kirby upon receipt of an order for goods or services from the Customer. In the absence of specific prices, the prices published on the Kirby Smart@ccess Website at the time of delivery shall apply.
- 2.2      Quotations are usually valid for 30 days unless stated otherwise, after which they may be subject to change without notice. Kirby may at any time alter its price in respect of future orders.
- 2.3      Kirby can change pricing without further notification (excluding quotes). We will endeavour to notify our customers of pricing changes. Notification may occur after prices have changed.
- 2.4      If during a validity period or between the date of the Order from the Customer and delivery of the Goods, there is an increase in the cost of supplying the goods due to reasons beyond Kirby's control, then Kirby will be entitled to increase the price of the goods accordingly.
- 2.5      You must pay the full price (plus GST) for goods and services, without deduction, set-off or counterclaim immediately on receipt of a valid tax invoice at the time of delivery of the goods and services, except when you complete and Kirby has approved the Commercial Credit Application section of the Kirby Customer Application Form, in which case you shall have 30 days from the invoice date to pay.

- 2.6 If you do not use your Kirby credit account for more than 12 months, or Kirby reviews your credit status for any reason, the credit account may be deactivated.
- 2.7 In the event that the Customer fails to pay amounts owing in full by the due date:
- (a) Kirby may at its option require cash on delivery and/or stop the supply of any further goods or services to the Customer, for a period or ongoing; and
  - (b) the Customer shall pay to Kirby interest calculated daily at a rate 3% higher than the National Australia Bank's overdraft rate for amounts exceeding \$100,000, from time to time, from the date the payment is due until such monies are paid in full.
- 2.8 The Customer agrees that a tax invoice from Kirby is binding and conclusive, except in the event of manifest error.
- 2.9 Kirby makes discounts and rebates available from time to time. Kirby may cancel or suspend credit availability, discounts or rebates, in the event that the Customer fails to comply with any of these Conditions.

### **3** *Application for Credit*

- 3.1 In the process of becoming a Customer of Kirby or at any time thereafter, you may apply to have Kirby supply goods and services to you on credit, by completing the Commercial Credit Application section of the application form, or otherwise as advised by Kirby.
- 3.2 Kirby may accept or reject the credit application, for the amount applied for or a different amount, in its absolute discretion and will advise you of its decision.
- 3.3 Kirby may approve the credit application, or at any time the continuing availability of credit, subject to conditions advised to the Customer, which may include the provision of a guarantee in favour of Kirby from a third party on terms acceptable to Kirby. A supply by Kirby of goods or services on credit is not a representation that such conditions do not apply or will not apply at a later date.
- 3.4 You acknowledge and agree that Kirby may exchange information about you (including personal information) that relates to credit provision or these Conditions, with credit reporting agencies such as Equifax or Creditor Watch, which have their own privacy policies.

### **4** *Orders*

- 4.1 Kirby shall have no obligation to accept any order that you submit.
- 4.2 Each order is a representation that you are solvent and able to pay for the order when payment is due;
- 4.3 Orders are binding on the Customer. From the time of placing the order, you are obliged to accept and pay for the goods and services ordered, and cancellation of an order is not effective unless with Kirby's express consent;
- 4.4 Kirby shall use its reasonable endeavours to ensure that advertised goods and services are available and provided to you when requested, but shall not be

liable for any loss or damage caused by any unavailability or delay. You are not entitled to reject the goods or services due to any delay.

- 4.5 The Customer shall indemnify Kirby for any loss, damage, or expense incurred by Kirby should the Customer cancel or refuse to accept or pay for any order or part of any order.
- 4.6 The Customer acknowledges that if the Customer places an order for goods or services that are not offered by Kirby as standard, Kirby may require the Customer to pay a non-refundable deposit of up to 50%.

## **5** *Delivery*

- 5.1 If Kirby accepts an order including delivery of goods, it will arrange delivery at its discretion, at the Customer's cost and risk in all things, and use reasonable endeavours to meet any target delivery date, but has no liability for any delay, failure, or inability to deliver, or for any direct or consequential loss, claim, cost or damage to any property of the Customer or third parties including in particular any food or product loss.
- 5.2 Where Kirby is unable to complete a delivery due to an act or omission of the Customer, Kirby may impose an additional charge for frustrated delivery to cover Kirby's reasonable additional costs.
- 5.3 Kirby may make part deliveries of any order, and this shall not invalidate or vary the Customer's order. If Kirby only delivers part of the goods which are ordered by the Customer, Kirby may invoice the Customer for those goods delivered.
- 5.4 The Customer shall notify Kirby in writing of any defect or shortages in quantity of any goods within seven (7) days of delivery or taking possession, and after that time the Customer will not be entitled to make any claim on Kirby relating to defects or shortages.
- 5.5 If the Customer requests Proof of Delivery ("POD") in writing to Kirby:
- (a) within 120 days of the despatch date of the goods, the POD will be supplied by Kirby free of charge; and
  - (b) beyond 120 days of the despatch date of the goods, Kirby will charge a reasonable administration fee.
- 5.6 In the event that Kirby agrees to accept return of any goods for credit, other than where the return is due to Kirby's breach of these Conditions or of an applicable warranty, Kirby will not be responsible for transport costs and will at its discretion, charge a re-stocking fee not greater than 25% of the price.

## **6** *Retention Of Title and Security*

- 6.1 Title and risk in the goods shall pass to the Customer on the Customer taking possession or delivery but the equitable title in the goods shall not pass to the Customer until full payment is received by Kirby for the goods and any associated services.
- 6.2 The Customer shall in all cases be responsible for the payment of any insurance in respect of the goods from the time of taking possession or delivery. In the event that Kirby contracts for any such insurance the Customer shall reimburse the associated costs to Kirby.

- 6.3 Whilst Kirby retains the equitable title in the goods:
- (a) the Customer may sell or deal in the ordinary course of business with the goods and with the interest of Kirby in the goods and may for those purposes part with possession of the goods, but always subject to the equitable title (and in the case of goods not purchased by the Customer, the full legal title) of Kirby. The proceeds of any such sale or dealing must be held by the Customer separately on trust for Kirby and appropriated solely for the payment of all sums owing to Kirby;
  - (b) the Customer shall ensure that the goods are clearly identifiable as the property of Kirby wherever the goods are located; and
  - (c) other than as permitted by clause (a), the Customer must not charge the goods in any way nor grant nor otherwise give any interest in the goods.
- 6.4 The Customer hereby irrevocably gives to Kirby, its agents and servants, leave and licence without the necessity of giving any notice, to enter on and into any premises occupied by the Customer to search for and remove any of the goods to exercise Kirby's rights and title under these Conditions and at law, without in any way being liable to the Customer or any person or company claiming through the Customer, and if the goods or any of them are wholly or partially attached to or incorporated in premises or any other goods, Kirby may sever the attachment in any way whatsoever as may be necessary to remove the goods. If the Customer parts with possession of the goods as permitted by clause 6.3(a), the Customer must procure the same rights for Kirby in respect of the premises at which the goods are located.
- 6.5 The Customer will be responsible for Kirby's costs and expenses in exercising its rights under clause 6.4.
- 6.6 The Customer agrees that where the goods have been retaken into the possession of Kirby, Kirby has the absolute right to sell or deal with the goods, and if necessary sell the goods with the trademark or name of the Customer on those goods, and the Customer grants an irrevocable licence to Kirby to do so and do all things necessary to sell the goods bearing the name of trademark of the Customer.
- 6.7 Kirby may suspend or terminate the availability of credit in the event of any breach of these Conditions by Customer. Until full payment is received by Kirby the Customer shall be deemed to be a bailee of the goods for and on behalf of Kirby and Kirby shall be entitled to all the rights and remedies of a bailor.

## **7 *Interaction With Gas2go Club Membership Conditions***

- 7.1 Kirby may offer a Customer membership of its Gas2Go Club, which entitles members to participate in Kirby's Gas2Go gas management system. Where the Customer is a member of the Gas2Go Club the Customer acknowledges that it is also bound by the Gas2Go Membership Conditions. To the extent of any inconsistency between the Gas2Go Membership Conditions and these Conditions, the Gas2Go Membership Conditions shall prevail.

## 8 PPSA

- 8.1 In this clause, PPSA means the Personal Property Securities Act 2009 (Cth); PPSR means the Personal Property Securities Register established pursuant to the PPSA; and Security Interest means an interest in personal property, and includes any interest of Kirby which the PPSA treats as a security interest whether or not the transaction concerned, in substance, secures payment or performance of an obligation.
- 8.2 The Customer grants to Kirby a Security Interest in goods supplied by Kirby to the Customer in which Kirby has a legal or equitable interest under these Conditions, and the proceeds of sale of such goods, for the purposes of the PPSA. If the Customer parts with possession of the goods as permitted by clause 5.3(a), the Customer must procure for Kirby the same rights in respect of the goods.
- 8.3 The Customer consents to Kirby registering any Security Interest on the PPSR and agrees to provide all assistance required by Kirby to facilitate this.
- 8.4 The Customer agrees that in relation to goods that are inventory, the Customer will not allow any Security Interest other than Kirby's to arise unless Kirby has perfected its Security Interest prior to the Customer's possession of the goods.
- 8.5 If Chapter 4 of the PPSA applies to the enforcement of the Security Interest arising under or in connection with these Conditions, the Customer agrees:
- (a) to the extent that section 115(1) of the PPSA allows this, the following provisions of the PPSA will not apply to the enforcement of that Security Interest: section 95 to the extent that it requires Kirby to give a notice to the Customer, section 96, section 121(4), section 125 (obligation to dispose of or retain collateral), section 130 to the extent that it requires the Secured Party to give notice to the Customer, paragraph 132(3)(d), subsection 132(4), section 142 and section 143 (reinstatement of security agreement); and
  - (b) to the extent that section 115(7) of the PPSA allows this, the following provisions of the PPSA will not apply to the enforcement of that Security Interest: section 127, section 129(2) and (3), section 132, section 134(2), section 135, section 136(3), (4) and (5) and section 137.
- 8.6 If the Customer makes payment to Kirby at any time whether in connection with these Conditions or otherwise, Kirby may, at its absolute discretion, apply that payment in any manner it sees fit.
- 8.7 The Customer agrees to immediately notify Kirby of any changes to its name or address (as specified in these Conditions).
- 8.8 The Customer agrees to do anything Kirby requests the Customer to do (such as obtaining consents, signing and producing documents, producing receipts and getting documents completed and signed):
- (a) to provide more effective security over the Secured Property;
  - (b) to register in respect of a Security Interest constituted by these Conditions at any time;
  - (c) to enable Kirby to exercise its rights in connection with the Secured Property; and

(d) to show Kirby whether the Customer has complied with these Conditions.

- 8.9 The Customer shall pay on demand by Kirby any losses arising from, and any costs and expenses incurred in connection with, any action taken by Kirby under or in relation to the PPSA, including any registration, or any response to an amendment, demand or a request under section 275 of the PPSA.
- 8.10 The Customer waives the right to receive any notice under the PPSA (including notice of a verification statement) unless the notice is required by the PPSA and cannot be excluded.
- 8.11 Other than as required by law, each party agrees not to disclose information of the kind mentioned in section 275(1) of the PPSA, except in the circumstances required by sections 275(7)(b) to (e) of the PPSA. The Customer agrees that it will only authorise the disclosure of information under section 275(7)(c) or request information under section 275(7)(d), if Kirby approves.

## **9 Customer's Warranty**

- 9.1 The Customer warrants and agrees that the Customer is acquiring the goods for other than personal, domestic, household use or consumption and is therefore not a "consumer" for the purposes of the Competition and Consumer Act 2010 (Cth).
- 9.2 The Customer warrants and agrees that in deciding to purchase goods or services from Kirby, it has not relied on any representation from Kirby, as to their fitness for the Customer's purpose or otherwise, nor on any description or illustration or specification contained in any document produced by Kirby.

## **10 Exclusion Of Liability, Indemnity And Warranty**

- 10.1 Except as provided by the Competition and Consumer Act 2010 (Cth) or as expressly set out in these Conditions, Kirby makes no warranties or other representations concerning goods or services supplied.
- 10.2 To the extent Kirby incurs liability under the Competition and Consumer Act 2010 (Cth) that cannot be excluded, the liability is limited to, as the Customer's exclusive remedy, at Kirby's discretion:
- (a) the replacement of the goods or the supply of equivalent goods; or
  - (b) the repair of the goods; or
  - (c) the payment of the cost of replacing the goods or of acquiring equivalent goods; or
  - (d) the payment of the cost of having the goods repaired.
- 10.3 Subject to this clause 10 and to the extent permitted by law, Kirby shall not be liable for any loss or damage to the Customer (including any consequential loss or damage, third party claims, loss of profits and loss of revenue) of any kind whatsoever even if due to the negligence of Kirby, its employees and/or agents.
- 10.4 The Customer shall indemnify Kirby against any action, suit, demand,

proceeding, loss, damage, cost and/or expense directly or indirectly incurred or suffered by Kirby that is caused by or contributed to by any of the following:

- (a) any defect, malfunction or stoppage of the goods caused or contributed to by the Customer;
- (b) Kirby complying with any instruction of the Customer about the goods;
- (c) any act or omission of the Customer or a third party occurring after the goods have left the control of Kirby;
- (d) failure by the Customer, or any third party associated with the Customer, to:
  - (i) adequately provide or display safety markings or safety information on or with the goods;
  - (ii) comply with any law about the goods or their use (for example, their sale, marketing, labelling or marking);
  - (iii) take any reasonable precaution to bring to the attention of any potential users of the goods any dangers associated with goods;
  - (iv) take any reasonable precaution to detect any matters in relation to which Kirby may become liable in any way (for example, under the CCA);
  - (v) provide correct information to Kirby; or
  - (vi) immediately advise Kirby (in writing) of any changes to the information provided to Kirby.
- (e) the Customer making any statement about the goods (for example, about their performance or characteristics) without Kirby's approval;
- (f) the use (or misuse) or operation of the goods by the Customer or any third party; and
- (g) any negligence or breach of duty by the Customer or any third party or any breach by the Customer of these Conditions.

10.5 If during a period of 12 months from the date of invoice of goods any goods manufactured or supplied by Kirby are found upon inspection by Kirby to be defective in design, material or workmanship under normal use and service and when properly installed, connected and commissioned, Kirby will supply exchange replacement goods or part(s) free of charge to the Customer.

10.6 Any warranty given by Kirby in these Conditions may vary depending on the goods supplied, with such variation to be notified in writing by Kirby, on the relevant brochure, or in Kirby's general warranty conditions available on the website [www.Kirby.com.au](http://www.Kirby.com.au).

## **11** *Cylinder Hire*

11.1 In this clause, Cylinder means the gas cylinder which may be supplied to the

Customer upon purchase of any Gas2Go® or other goods and includes Stillages and other cylinder transportation devices; and Stillage means the stillage or metal pallet which may be supplied to the Customer upon purchase of any Gas2Go® or other goods.

- 11.2 Unless otherwise agreed in writing, the Customer must pay a periodic charge and associated charges, including for refill protection devices or cylinder valve cap replacement, for the hire of a Cylinder as set out in the Cylinder Service Rate Charge Schedule, available upon request from any Kirby branch or by contacting Kirby via its website.
- 11.3 The period of hire shall commence on the date of delivery or collection and cease on the date upon which the Cylinder(s) are returned to Kirby.
- 11.4 The Cylinder service charge covers the provision by Kirby of services associated with the Cylinders, including but not limited to, cost of tracking, inspecting the Cylinder prior to filling, periodic testing and routine maintenance of the Cylinder (painting and labelling).
- 11.5 The Customer must, at its own cost, return all Cylinders to Kirby or its authorised agent at their premises as soon as they are empty. Cylinders are not deemed 'returned' until received by Kirby (or its authorised agent) and Kirby provides to the Customer a written receipt in Kirby's printed format, acknowledging the Cylinder's return.
- 11.6 On receipt of each invoice including Cylinder charges, the Customer is required to verify the total number of Cylinders held that is shown on the face of the invoice. Where there is any discrepancy written notification must be forwarded to Kirby within 14 days of receipt of the invoice, failing which the number of Cylinders stated as being held by the Customer on the invoice shall be conclusive and the Customer will be liable to Kirby for the amount shown on the invoice.
- 11.7 Kirby may charge a deposit upon supply of the Cylinder to the Customer on terms satisfactory to Kirby having regard to the nature of the transaction with the Customer. Once the Cylinder(s) are returned to Kirby in a clean, safe and serviceable condition, Kirby will refund the deposit (or appropriate part thereof) to the Customer.
- 11.8 The Customer may hire out or deal in the ordinary course of business with a Cylinder and may part with possession of the Cylinder, but always subject to the full title of Kirby. Kirby will have the right to charge reasonable fees for transport and administration associated with the collection of any Cylinders from the Customer.
- 11.9 Cylinders remain the property of Kirby (or its supplier) and the Customer shall be a bailee of any Cylinders and shall not sell, offer for sale, mortgage, charge, or create any lien or encumbrance over the Cylinders.
- 11.10 The Customer shall not repair, modify, tamper with, or contaminate Cylinders and shall not permit the Cylinders to be filled by anyone other than Kirby or Kirby's representatives or agents.
- 11.11 Customer shall be responsible for the safe use and storage of all Cylinders and Stillages and shall not use the Cylinders and Stillages for any other purpose other than as a container for gas sold or transportation of a container for gas sold by Kirby.
- 11.12 The Customer shall be responsible for any loss or damage to the Cylinder.



Compensation shall be at Kirby's current replacement cost for a Cylinder as set out in the Cylinder Service Rate Charge Schedule and as varied from time to time by Kirby to reflect the current Cylinder replacement value with such revision notified on an invoice.

- 11.13 A Cylinder will be deemed lost if the Customer reports that a Cylinder is lost to Kirby or the Cylinder has not been returned within 12 months after the Cylinder was supplied to the Customer, whichever is earlier.
- 11.14 Kirby will invoice the Customer for the replacement cost of a lost Cylinder. If the cylinder is returned in good order within 6 months after the loss, the replacement cost amount paid by the Customer will be refunded less the applicable charges for the Cylinder for the extended period. If the Cylinder is returned 6 months or more after the date of the loss no refund of the replacement cost charged will be issued.

## **12 Proper Law And Compliance**

- 12.1 These Conditions shall be governed by the laws of the State of New South Wales and the parties submit to the non-exclusive jurisdiction of the Courts of that State.
- 12.2 The Customer shall comply with all applicable laws and regulations, such as the US Foreign Corrupt Practices Act, the Criminal Code Act 1995 (Cth) and Criminal Code Amendment (Theft, Fraud, Bribery and related Offences) Act 200 (Cth) and all export control laws of Australia, New Zealand, the United States and any other applicable destination and hereby indemnifies and hold harmless Kirby, its directors, officers, servants and agents from any liability arising from the Customer's failure to comply with such laws. The Customer must obtain and maintain all applicable licenses during the term of these Conditions.

## **13 Additional Costs, Taxes, Etc.**

- 13.1 If any duties, taxes, rates or other impost shall be levied in respect of any purchase of goods or hire of the Cylinders, the Customer shall pay such amount in addition to the price (plus GST).
- 13.2 In the event that the Customer shall specifically order Kirby to acquire goods or components from any foreign source the price (plus GST) payable by the Customer may be increased by Kirby at any time whether before or after delivery and despite any quotation that may have been given by Kirby to the Customer to compensate Kirby for any exchange loss which may have occurred as a result of the fall in value of Australian currency as against the relevant foreign currency during the period from the date of the order to the date of the payment.

## **14 Default**

- 14.1 The Customer shall be in default under these Conditions, where:
- (a) the Customer fails for any reason to pay any moneys due to Kirby as and when they fall due; or
  - (b) the Customer fails to perform or observe any of its obligations

under these Conditions; or

(c) the Customer exceeds the limit of any credit account with Kirby; or

(d) the Customer suspends payment of its debts or is presumed to be insolvent within the meaning of the Corporations Act 2001 (Cth) or enters or proposes to enter into any arrangement scheme or composition with its creditors or ceases or threatens to cease carrying on business or is wound up or suffers the appointment of any external administration.

- 14.2 In the event of default by the Customer, the Customer must indemnify Kirby's legal costs, fees, charges, expenses and outgoings on a solicitor and own client basis flowing from the default.

## **15 Capacity**

- 15.1 If the Customer enters into these Conditions as the trustee of a trust, the Customer must inform Kirby of this and provide any further information on request, and the Customer warrants to Kirby that the Customer:
- (a) enters into this agreement in both its capacity as trustee and in its personal capacity;
  - (b) has the right to be indemnified out of trust assets; and
  - (c) will not retire as trustee of the trust or appoint any new or additional trustee without advising Kirby.
- 15.2 If the Customer consists of more than one legal person, including if the Customer enters into these Conditions as a partner, the Customer warrants that each Customer agrees to the entry into these Conditions and that all Customers are jointly and severally bound by these Conditions, and remain so until the Customer requests that a Customer be no longer bound, and Kirby so agrees, such agreement not to be unreasonably withheld.
- 15.3 If the Customer enters into these Conditions as a corporation, the Customer warrants that it is duly registered as an Australian corporate entity, it is compliant and up to date with its notification obligations under the Corporations Act 2001, and there is nothing in its documents of incorporation or otherwise that prevents it entering into and carrying out its obligations under these Conditions.

## **16 Privacy**

- 16.1 The Customer agrees to Kirby collecting, using and disclosing personal information of the Customer and persons associated with the Customer for the purposes set out in these Conditions and in Kirby's Privacy Policy and Privacy Collection Notice, available on the Kirby website. Kirby agrees to comply with the Privacy Act 1988 (Cth) and our Privacy Policy and Privacy Collection Notice.

## **17 General Provisions**

- 17.1 **Customer restructure** - The Customer must notify Kirby in writing of any change in its structure or management including any change in director(s), shareholder, or change of management within 4 business days of the date of such change.
- 17.2 **Severability** - Any part of these Conditions being a whole or part of a clause shall be capable of severance without affecting any other part of these Conditions.
- 17.3 **Waiver** - A single or partial exercise or waiver of a right relating to these Conditions will not prevent any other exercise of that right or any other right.
- 17.4 **SmartAccess Service** – Kirby offers the Customer access to the Kirby Smart@ccess Website, on the basis of the information you provided in the completed Application Form, and subject to compliance with the Kirby Online Customer Service Facility Terms of Use available on the Kirby website as amended from time to time, which form part of these Conditions.
- 17.5 **Intellectual Property** - No right or licence is granted to the Customer under any patent, copyright, register design, know-how or other intellectual property rights except the right to use or resell the goods. If the goods incorporate any design or specification of the Customer, Kirby shall not be liable for any infringement of any intellectual property rights caused by the goods or their use or sale by the Customer.
- 17.6 Unless otherwise agreed in writing, Kirby shall manufacture and/or supply the goods in accordance with its own specification and standards and using parts and manufacturing processes and techniques solely at its own discretion.