

# CUSTOMER TERMS AND CONDITIONS

## 1. DEFINITIONS

In these Terms:

**"ACL"** means the Australian Consumer Law Schedule of the *Competition and Consumer Act*;

**"Agreement"** means this Customer Agreement incorporating the Terms for the provision of goods or services by Polishoe to the Customer;

**"Anticipated Delivery Date"** means the anticipated date for delivery of the ASPM as specified in Item 5 of the Schedule;

**"ASPM"** means Automatic Shoe Polishing Machine or Machines to be supplied by Polishoe to the Customer;

**"ASPM Payment Structure"** means the price for the ASPM and for services payable by Customer or other arrangement as specified in Item 3 of the Schedule;

**"ASPM Position"** means any preliminary works which must be completed at the Premises in readiness for the provision of the goods and services, as specified in Item 7 of the Schedule;

**"Confidential Information"** means any and all information of a party that:

- (a) is by its nature confidential or proprietary;
- (b) is provided by the party to the other party, or that the other party creates or becomes aware of in the course of conducting using or occupying the Premises; and
- (c) the other party knows or ought to know is confidential or proprietary,
- (d) financial and accounting information;
- (e) marketing information (including the status and details of research and development of goods and services, price and cost data, future plans and marketing strategies);
- (f) in the case of the Customer, information about and relating to its patrons;
- (g) health information, sensitive information, personal information and any other information subject to Privacy laws; and
- (h) all other commercial, financial, legal and technical information,

whether written, oral or in other recorded or tangible form and whether provided before, on, or after the date of these Terms.

**"consumer"** is as defined in the ACL and in determining if the Customer is a consumer, the determination is made if the Customer is a consumer under the Agreement;

**"Customer"** means the person, jointly and severally if more than one, acquiring ASPM, other goods or services from Polishoe;

**"GST"** means the Goods and Services tax as defined in *A New Tax System (Goods and Services Tax) Act 1999* as amended;

**"Intellectual Property"** means all copyright, trade marks, designs, specifications, confidential information (whether registrable or not) owned or licensed by Polishoe in respect of the goods or services, or their operation, location or design;

**"Maintenance Contract"** means a servicing and maintenance agreement between Polishoe and the Customer in relation to servicing and maintaining ASPM;

**"PPSA"** means the Personal Property Securities Act 2009 as amended;

**"Price List"** means any price list issued by Polishoe from time to time in relation to the price payable for goods or services in relation to ASPM;

**"services"** means services of providing the ASPM specified in Item 2 of the Schedule to be supplied by Polishoe to the Customer and other services provided by Polishoe to the Customer;

**"Premises"** means the site specified in Item 6 of the Schedule where the goods are to be delivered and the services provided; and

**"Terms"** means these Terms and Conditions of Sale.

## 2. BASIS OF AGREEMENT

- 2.1 Unless otherwise agreed by Polishoe in writing, these Terms apply exclusively to the Agreement and cannot be varied or replaced by any other terms, including the Customer's terms and conditions of purchase (if any).
- 2.2 This Agreement may include additional terms specified in Polishoe's Quotation. The specific terms of the Quotation will prevail over these Terms to the extent of any inconsistency.
- 2.3 The Customer must provide Polishoe with its specific requirements, if any, in relation to the ASPM or services.
- 2.4 These Terms commence operation on the date listed on the front page of these Terms for the duration listed in Item 4 of the Schedule.

## 3. TRUST BOUND

- 3.1 Where the Customer acts as trustee of a trust, the Customer will be bound both personally and in its capacity as trustee.

## 4. PRICING

- 4.1 The Customer must pay the ASPM Payment Structure for the ASPM and/or services.

- 4.2 Unless otherwise agreed in writing, the ASPM Payment Structure:

- (a) excludes taxes, duties or imposts on or in relation to the goods and services, including (without limitation) GST or other broad-based consumption tax or value-added tax;
- (b) excludes the cost of freight, delivery, insurance and other charges arising from the point of dispatch of the ASPM from Polishoe to the Premises; and
- (c) excludes the cost of transport and accommodation for any of Polishoe's personnel required in connection with the provision of any services.

- 4.3 In addition to payment of the ASPM Payment Structure, the Customer must pay to Polishoe any amounts specified in clause 4.2.

- 4.4 Unless otherwise agreed in writing, the Price excludes the costs payable by the Customer to third party providers, such as the Customer's nominated electrician, engineer or installer.

## 5. PRICING VARIATIONS

- 5.1 If:

- (a) there is any change in the costs incurred by Polishoe in relation to the ASPM or services (including but not limited to changes in personnel or materials costs); or
  - (b) the Customer fails to give Polishoe adequate instructions, or
  - (c) the Customer delays in the provision of instructions; or
  - (d) there is any change required to the position of ASPM at the Premises based on the layout of the Premises,
- then Polishoe may vary any quoted price to take account of any such change, by notifying the Customer.

- 5.2 Prices are quoted and payable in Australian dollars.

## 6. PAYMENT

- 6.1 Any payment required to be made by the Customer to Polishoe must be made by cash, cheque, bank cheque, credit card or EFT, although payment by cheque will not be deemed to be made until the proceeds of the cheque have cleared.
- 6.2 If there is a payment by the Customer to Polishoe, the Customer must pay an administration fee of 2% of the payment amount where payment is made by credit card.

## 7. PAYMENT DEFAULT

- 7.1 If the Customer fails to make any payments due to Polishoe, then all money which would become payable by the Customer to Polishoe at a later date on any account, becomes immediately due and payable without the requirement of any notice to the Customer, and Polishoe may, without prejudice to any of its other accrued or contingent rights:
  - (a) charge the Customer interest on any sum due at the prevailing rate pursuant to the Penalty Interest Rates Act 1983 (Vic) plus 2% for the period from the due date until the date of payment in full;

- (b) charge the Customer for, and the Customer must indemnify Polishoe from, all costs and expenses (including without limitation all legal costs and expenses) incurred by Polishoe resulting from the default, or in taking action to enforce compliance with the Agreement, or to recover any goods, or to recover any sum due;
- (c) cease or suspend supply of any further goods or services to the Customer;
- (d) by written notice to the Customer, terminate any uncompleted Agreement with the Customer.
- 7.2 Clauses 7.1(c) and 7.1(d) may also be relied upon, at Polishoe's option:
- (a) where the Customer is a natural person and becomes bankrupt or enters into any scheme of arrangement or any assignment or composition with or for the benefit of his or her creditors or any class of his or her creditors generally; or
- (b) where the Customer is a corporation and it enters into any scheme of arrangement or any assignment or composition with or for the benefit of its creditors or any class of its creditors generally, or has a liquidator, administrator or similar functionary appointed in respect of its assets, or any action is taken for, or with the view to, the liquidation (including provisional liquidation), winding up or dissolution without winding up of the Customer.
- 8. PASSING OF PROPERTY**
- 8.1 Until Polishoe receives full payment in cleared funds for all goods, including ASPM, if applicable,, and services supplied by it to the Customer, as well as all other amounts owing to Polishoe by the Customer:
- (a) title and property in all goods remains vested in Polishoe and does not pass to the Customer;
- (b) the Customer must hold the goods as fiduciary bailee and agent for Polishoe;
- (c) to the extent that it is possible to do so, the Customer must keep the goods separate from its own goods and maintain Polishoe's labelling and packaging;
- (d) the Customer is not permitted to on-sell the goods; and
- (e) in addition to its rights under the PPSA, Polishoe may without notice, enter the Premises or any premises where it suspects the goods are and dismantle, detach and remove them (notwithstanding that the goods may have been attached to other goods not the property of Polishoe) and for this purpose the Customer irrevocably licences Polishoe to enter such premises and also indemnifies Polishoe from and against all costs, claims, demands or actions by any party arising from such action.
- 9. PERSONAL PROPERTY SECURITIES ACT**
- 9.1 Notwithstanding the foregoing or anything to the contrary contained in these Terms, the parties agree that the PPSA applies to these Terms.
- 9.2 For the purposes of the PPSA:
- (a) terms used in this clause 9 that are defined in the PPSA have the same meaning as in the PPSA;
- (b) these Terms are a security agreement;
- (c) Polishoe has a security interest in all present and future goods supplied by Polishoe to the Customer and the proceeds of the goods;
- (d) Polishoe has a Purchase Money Security Interest that secures the Customer's obligation to pay in full the debt owed by the Customer to Polishoe in relation to the goods;
- (e) the security interest is a continuing interest irrespective of whether there may be monies owing or obligations owing by the Customer at a particular time; and
- (f) the Customer must do whatever is necessary in order to give a valid security interest over the Goods which is able to be registered by Polishoe on the Personal Property Securities Register.
- 9.3 The security interest arising under this clause attaches when the ASPM is dispatched from Polishoe's premises. The parties have not agreed that any security interest arising under this clause 9 attaches at any later time.
- 9.4 Where permitted by the PPSA, the Customer waives any rights to receive the notifications, verifications, disclosures or other documentation specified under sections 95, 118, 121(4), 130, 132(3)(d), 132(4), 135 and 157 of the PPSA.
- 9.5 To the extent permitted by the PPSA, the Customer agrees that:
- (g) the provisions of Chapter 4 of the PPSA which are for the benefit of the Customer or which place obligations on Polishoe will only apply to the extent that they are mandatory or Polishoe agrees to their application; and
- (h) where Polishoe has rights in addition to those in Chapter 4 of the PPSA, those rights will continue to apply.
- 9.6 The Customer must immediately upon Polishoe's request:
- (i) do all things and execute all documents necessary to give effect to the security interest created under this Agreement; and
- (j) procure from any person considered by Polishoe to be relevant to its security position such agreements and waivers (including as equivalent to those above) as Polishoe may at any time require.
- 9.7 Polishoe may allocate amounts received from the Customer in any manner Polishoe determines, including in any manner required to preserve any Purchase Money Security Interest that it has in goods supplied by Polishoe.
- 10. RISK AND INSURANCE**
- 10.1 Unless otherwise agreed in writing, the risk in the ASPM and all insurance responsibility for theft, damage or otherwise related to ASPM will pass to the Customer immediately on the ASPM being delivered to the Premises.
- 10.2 The Customer assumes all risk and liability for loss, damage or injury to persons or to property of the Customer or any damage to ASPM, or third parties arising out of the use or possession of any of the goods sold, including ASPM, or services supplied by Polishoe, unless recoverable from Polishoe on the failure of any statutory guarantee under the ACL.
- 10.3 The Customer must ensure that the ASPM is covered by the Customer's public liability insurance and must provide Polishoe a certificate of currency upon request by Polishoe.
- 11. ACKNOWLEDGEMENTS**
- 11.1 The Customer acknowledges that:
- (a) it has not relied on any service involving skill and judgment, or on any advice, recommendation, information or assistance provided by Polishoe in relation to the goods or services or their use or application.
- (b) It has not made known to Polishoe, either expressly or by implication, the purpose for which it requires the goods or services and it has the sole responsibility of satisfying itself that the goods or services are suitable for the Customer's use.
- 12. CUSTOMER'S OBLIGATIONS**
- 12.1 The Customer must ensure the accuracy of any specifications and requirements in respect of the ASPM and services and give Polishoe any necessary information relating to the ASPM within a reasonable time.
- 12.2 The Customer must provide clear instructions in relation to details required in relation to the Premises, as listed in item 7 of the Schedule.
- 12.3 The Customer must:
- (a) make sure that ASPM position is as per Annexure "A";
- (b) make the Premises available to Polishoe by the Anticipated Delivery Date to enable delivery of the ASPM;
- (c) allow Polishoe, its servants and agents unencumbered and uninterrupted access to the ASPM at all reasonable times to deliver, install, dismantle, detach, remove, inspect, test, adjust, maintain, repair or replace them; and
- (d) provide Polishoe with clean, safe and proper access to and at the Premises.
- 12.4 The Customer must also ensure that the display screen of ASPM is always clean.

- 12.5 The Customer acknowledges that in order to provide the services, Polishoe may need to access the Premises prior to delivery to assess it for delivery and other purposes.
- 13. DELIVERY**
- 13.1 Unless otherwise agreed:
- (a) Polishoe will arrange for the delivery of the ASPM to the Customer; and
  - (b) delivery of the ASPM will be deemed to have occurred at the point of unloading the ASPM at the Premises.
- 13.2 The Customer must provide reasonable and proper access to the Premises for the purpose of delivery. The Customer indemnifies Polishoe against any loss or damage suffered by Polishoe, its sub-contractors or employees as a result of delivery, except where the Customer is a consumer and Polishoe has not used due care and skill.
- 13.3 Polishoe may make part delivery of goods or provision of services. Polishoe may invoice the Customer for any goods or services delivered.
- 13.4 If the Customer is to collect the ASPM itself, then the Customer must arrange, at its own cost, for the collection of the ASPM from Polishoe's premises within 7 days of notification that the ASPM is ready. If the Customer does not collect the ASPM within this time, then the Customer is deemed to have taken delivery of the ASPM from such date and is liable for storage charges payable weekly on demand.
- 13.5 Any period or date for delivery of the ASPM or provision of services stated by Polishoe is an estimate only and is not a contractual commitment.
- 13.6 Polishoe will use its reasonable endeavours to meet any estimated dates for delivery of the ASPM but will not be liable for any loss or damage suffered by the Customer or any third party for failure to meet any estimated date.
- 13.7 If Polishoe cannot complete the services by any estimated date, it will complete the services within a reasonable time.
- 14. DELAYS IN DELIVERY**
- 14.1 The Customer must notify Polishoe of any anticipated delays in the availability or readiness of the Premises for the Anticipated Delivery Date.
- 14.2 If the Premises is not ready by the Anticipated Delivery Date or the Customer has not notified Polishoe to vary the Anticipated Delivery Date, then the Customer is deemed to have taken delivery of the ASPM from such date and is liable for storage charges payable weekly on demand.
- 15. SERVICING AND MAINTENANCE**
- 15.1 The Customer is responsible for providing power protection for the ASPM in accordance with the manufacturers' instructions and warranty requirements.
- 15.2 If the Customer has agreed to a Maintenance Contract (terms of which can be agreed to in writing via contract or exchange of emails) with Polishoe, Polishoe will provide service and maintenance work and technical support for the ASPM at the times and in the manner specified in that Maintenance Contract.
- 15.3 If the Customer has not agreed to a Maintenance Contract, any servicing and maintenance of the ASPM requested by the Customer from time to time will be provided in accordance with Polishoe's usual service and maintenance charges as contained in its current price list.
- 15.4 Unless otherwise agreed, all service and maintenance work will be carried out during normal business hours. If the Customer requires the service and maintenance work to be carried out after hours, on weekends or public holidays, additional costs will be incurred and are payable by the Customer.
- 15.5 The Customer must inform Polishoe immediately of any malfunction in the ASPM, and include a description of the malfunction. The Customer must undertake reasonable steps in line with any instructions from Polishoe aimed at remedying the error or identifying the cause of the malfunction.
- 15.6 Unless otherwise specified the Customer must pay for any spare, component or replacement parts provided to the ASPM. Damaged or replaced parts will become Polishoe's property.
- 15.7 Polishoe reserves the right to apply technical amendments to the ASPM to enhance or maintain its functionality.
- 15.8 Polishoe reserves the right to replace defective ASPM or defective parts of the ASPM with parts and components of similar quality, grade and composition where an identical part or component is not available.
- 15.9 ASPM presented for repair may be replaced by refurbished ASPM of the same type rather than being repaired. Refurbished parts may be used to repair the ASPM.
- 16. LIABILITY**
- 16.1 Except as the Terms specifically state, or as contained in any express warranty provided in relation to the goods or services, these Terms do not include by implication any other term, condition or warranty in respect of the quality, merchantability, acceptability, fitness for purpose, condition, description, assembly, manufacture, design or performance of the goods or services, or any contractual remedy for their failure.
- 16.2 If the Customer is a consumer, nothing in these Terms restricts, limits or modifies the Customer's rights or remedies against Polishoe for failure of a statutory guarantee under the ACL.
- 16.3 If clause 16.2 does not apply, then other than as stated in the Terms or any written warranty statement, Polishoe is not liable to the Customer in any way arising under or in connection with the sale, use of, storage or any other dealings with the ASPM or services of Polishoe by the Customer or any third party.
- 16.4 Polishoe is not liable for:
- (a) any indirect or consequential losses or expenses suffered by the Customer or any third party, howsoever caused, including but not limited to loss of turnover, profits, business or goodwill or any liability to any other party, other than if the Customer is a consumer, then to the extent the loss was reasonably foreseeable;
  - (b) any loss or damage suffered by the Customer in relation to any services provided by third parties including the Customer's nominated electrician, engineer or installer.
- 16.5 Nothing in the Terms is to be interpreted as excluding, restricting or modifying the application of any State or Federal legislation applicable to the sale of goods or supply of services which cannot be so excluded, restricted or modified.
- 17. VARIATION AND CANCELLATION**
- 17.1 If Polishoe is unable to deliver or provide the ASPM or its services, then it may, by written notice to the Customer and without any liability to the Customer:
- (a) make changes to the ASPM and services supplied, provided that the end performance of the goods or services is not materially prejudiced; or
  - (b) cancel the Customer's order (even if it has already been accepted).
- 17.2 No purported cancellation or suspension of an order by the Customer is binding on Polishoe.
- 17.3 Notwithstanding clause 17.2, if Polishoe accepts the Customer's cancellation of an order, Polishoe may, in its discretion:
- (a) charge the Customer for the cost of any items ordered or made prior to the cancellation of the order; or
  - (b) retain any deposit moneys paid under the Payment Terms.
- 18. RETURNS**
- 18.1 Subject to clause 18.3, Polishoe will not be liable for any shortages, damage or non-compliance with the Design Parameters unless:
- (a) the Customer notifies Polishoe with full details within 7 days of delivery specifying the defect or non-compliance; and
  - (b) Polishoe is given the opportunity to inspect the ASPM and investigate the complaint before any further dealing.
- 18.2 If the Customer fails to give the notice as required in clause 18.1, it is deemed to have accepted the goods and will be bound to pay for them.
- 18.3 Where Polishoe accepts any claim for shortages, damage or non-compliance with the Design Parameters, Polishoe may, at its option, repair or replace the ASPM, re-supply the services, or refund the price of the ASPM or services.
- 18.4 Subject to clause 18.6, Polishoe will not, under any circumstances, accept goods for return that:
- (a) have not been used, stored, installed or operated in accordance with Polishoe's instructions or any legislative requirements;
  - (b) have been specifically produced, imported, exported or acquired to fulfil any Agreement; or
  - (c) have been altered in any way.
- 18.5 Subject to clause 18.6, the Customer must obtain Polishoe's prior written approval for the return of ASPM and pay all freight charges associated with return.
- 18.6 If the Customer is a consumer, nothing in this clause limits any remedy available for a failure of the guarantees in sections 56 and 57 of the ACL.
- 19. INTELLECTUAL PROPERTY**

- 19.1 The Customer acknowledges that it has no proprietary right or interest in the Intellectual Property.
- 19.2 The Customer must not register or record or attempt to register or record anywhere in the world the Intellectual Property or any part thereof or anything similar to it or aid or abet anyone else to do so.
- 19.3 Unless otherwise specified, any Intellectual Property provided to the Customer by Polishoe remains Polishoe's exclusive property and must be returned to Polishoe on demand and must not be copied or communicated to any third party without Polishoe's express written consent.
- 19.4 The Customer must not at any time (and must not direct any other party to) create, sell, manufacture or process any goods or services using or taking advantage of the Intellectual Property.
- 20. FORCE MAJEURE**
- 20.1 Polishoe is not liable in any way howsoever arising under the Agreement to the extent that it is prevented from acting by events beyond its reasonable control, including but not limited to:
- (a) industrial disputes, strikes, lockouts;
  - (b) accident or breakdown;
  - (c) import or export restrictions and embargoes;
  - (d) acts of God, explosion, flood, tempest or fire;
  - (e) acts or threats of terrorism, act of war, sabotage, insurrection, civil disobedience or requisition;
  - (f) difficulties in obtaining raw materials, labour, fuel, parts or machinery.
- 20.2 If an event of force majeure occurs, Polishoe may suspend or terminate the Agreement by written notice to the Customer.
- 21. ADVERTISING**
- 21.1 Unless otherwise agreed in writing between the Customer and Polishoe, the Customer acknowledges and agrees that Polishoe will be able to place any advertisements on ASPM as it sees fit and all revenue earned from such advertisements will be the sole property of Polishoe.
- 22. RESTRAINT**
- 22.1 The Customer, and any of its directors, will not, without the prior written consent of Polishoe, for the periods and within the areas set out in clause 22.1(b):
- (a) be involved (in any capacity of direct or indirect authority or control whether solely or jointly including, without limiting the generality of the foregoing, as a promoter, financial backer, member, shareholder, unitholder, director, consultant, adviser, contractor, principal, agent, manager, employee, beneficiary, partner, associate, trustee or otherwise) in any person, enterprise, corporation, firm, association, trust, joint venture or syndicate which is engaged, interested or concerned in any capacity whatsoever in or carrying on a business which is either similar in nature to the business of Polishoe and or ASPM or could reasonably be regarded as competing for business with them;
  - (b) solicit customers, business, patronage or orders for, or provide any services competitive with the services provided by Polishoe or divert, entice or take away any such customers, business, patronage or orders or attempt to do so;
- 22.2 The time and territorial parameters to which clause 22.1(a) applies are as follows:
- (a) during this Agreement: anywhere;
  - (b) for the period ending:
    - (i) eighteen months;
    - (ii) twelve months; or
    - (iii) six months;
- after the expiry, surrender, assignment or termination of this Agreement anywhere in Australia.
- 22.3 The parties agree that any combination of the acts referred to in clause 22.1(a) for the separate periods and within the separate areas referred to in clause 22.1(b) would be unfair and calculated to damage the business of Polishoe.
- 22.4 The parties agree that each separate covenant and restraint in this Agreement is reasonable and that valuable consideration has been received therefore both directly and indirectly by the parties to be restrained by these covenants and that each party affected by this clause has been responsible for and approves its drafting.
- 22.5 The parties agree that the word "involved" in clause 22.1 will be given the widest possible interpretation and will include management without salary, advising or influencing a competitive business on a continuing basis whether for direct remuneration or benefit or otherwise, or establishing or being interested in or influencing a competitive business through any association or arrangement with any person, relative, nominee or trust in or over which any interest or influence (absolute or partial) is held.
- 22.6 If any of the several separate covenants and restraints set out in this clause 22 are or become invalid or unenforceable for any reason then that invalidity or unenforceability shall not affect the validity or enforceability of any of the other separate covenants and restraints.
- 23. MISCELLANEOUS**
- 23.1 Polishoe can terminate this Agreement upon providing 30 days' written notice to the Customer. In the event of termination by Polishoe, the Customer must organise for Polishoe to pick up ASPM within a reasonable time at the cost to Polishoe.
- 23.2 The Customer can terminate this Agreement only if
- (a) There is a breach of this Agreement by Polishoe; and
  - (b) The breach has not been remedied within the reasonable time provided as part of a written notice from the Customer to Polishoe outlining the breach, how to remedy it and the time for such remedy.
- 23.3 The law of Victoria from time to time governs the Terms.
- 23.4 The Customer undertakes to keep all Confidential Information confidential.
- 23.5 Polishoe's failure to enforce any of these Terms shall not be construed as a waiver of any of Polishoe's rights.
- 23.6 If any Term is unenforceable it must be read down so as to be enforceable or, if it cannot be read down, the term must be severed from the Terms without affecting the enforceability of the remaining terms.
- 23.7 A notice must be in writing and handed personally or sent by facsimile, email or prepaid mail to the last known address of the addressee. Notices sent by pre-paid post are deemed to be received upon posting. Notices sent by facsimile or email are deemed to be received on confirmation of successful transmission.