



**TERMS AND CONDITIONS OF SALE**

**Interpretation** In these conditions unless a contrary intention is obvious:

**“Evapco Australia”** means Evapco Australia Pty Ltd, ABN 85 138 737 390;

**“Buyer”** means the person or entity that is purchasing the Goods that are to be supplied by Evapco Australia;

**“Goods”** means the goods sold to the Buyer by Evapco Australia and any related services provided by Evapco Australia;

**“Intellectual Property”** means Evapco Australia’s business names, trade names, trademarks, product names, copyright, patents, designs, industrial processes, trade secrets, know how and other intellectual property rights and any development in such intellectual property rights;

**“Order”** means the document containing details of the Goods the Buyer wishes to purchase from Evapco Australia in accordance with clause 2;

**“Purchase Price”** means the list price for the Goods as charged by Evapco Australia at the date of delivery or such other price as may be agreed by Evapco Australia and the Buyer prior to delivery of the Goods;

**“Additional Charges”** includes all installation charges, delivery, handling and storage charges, goods and services tax, stamp duty, interest, legal and other costs of recovery of unpaid money and all other government imposts and all money, other than the Purchase Price, payable by the Buyer to Evapco Australia arising out of the sale of the Goods;

**“Terms”** means these terms and conditions of sale.

**“Warranty”** means the Manufacturer’s Express Warranty that applies to the Goods.

**“Submittal Documents”** means the documents Evapco Australia supplies to Buyer that indicate the Order has been released for Production and provide details concerning the Goods that Evapco Australia is supplying to the Buyer.

**“Invoice”** means the document supplied by Evapco Australia to Buyer setting forth the purchase price for the Goods and the manner and date by which Buyer must pay for the Goods.

**1. Binding Contract** - These Terms are part of a binding contract between Evapco Australia and the Buyer with respect to all matters addressed herein in the event that (i) Buyer places an Order with Evapco Australia, or (ii) a person with apparent or actual authority to bind Buyer has indicated its agreement to the Evapco Australia Application for Approved Buyer Status. These Terms, the Submittal Documents, the Invoice and the Warranty together constitute the entire Contract between the parties (the “Contract”), and it is agreed that there are no agreements, warranties or representations, express or implied that govern the parties’ relationship other than the Contract. Any terms or conditions of any purchase order form, shipping instructions or other document issued in connection with the purchase or delivery of the Goods that contains terms which conflict with the provisions of the Contract will be void and of no effect. The Contract and these Terms may not be amended or assigned except by supplementary agreement approved and signed by an officer of Evapco Australia and the Buyer.

**2. Orders** – All orders must be placed by Buyer in writing. Evapco Australia will accept orders by facsimile transmission or email, provided the order is signed by or purports to be given by an authorised representative of the Buyer. Buyer agrees that Evapco Australia is entitled to rely on an order that is signed by or appears to have been sent by or on behalf of Buyer. An order is deemed to have been accepted by Evapco Australia if Evapco Australia provides Submittal Documents to the Buyer indicating that the order has been released for production (which may be electronic mail, facsimile or letter), or if the Goods are delivered, whichever is the earlier. Acceptance of any order by Evapco Australia is subject to the provisions of clause 3 and to the availability of the Goods.

**3. Supply Subject to Availability** – Buyer acknowledges and agrees that Evapco Australia’s obligation to supply the Goods is subject to their availability. If Evapco Australia has accepted the order and is unable to supply the Goods specified in the order, Evapco Australia may provide an alternate offer for Buyer’s consideration. If Evapco Australia does not make an alternate offer that is accepted by Buyer, Evapco Australia must refund any monies paid by Buyer for the unavailable product and this will be the sole and exclusive remedy of Buyer.

**4. Delivery** – Buyer shall identify an appropriate location where Evapco Australia can deliver the Goods at the Buyer’s cost unless such transportation has been pre-arranged by the Buyer. Unless otherwise agreed, delivery is deemed to take place when the Goods are loaded onto a truck or other common carrier at Evapco Australia’s premises or other location agreed to by the Parties, whether or not such transportation was organised by the Buyer or Evapco Australia. Signature of equipment pick-up or loading by any agent, employee or representative of the independent carrier shall be conclusive proof of delivery.

Unless otherwise agreed, risk passes on delivery to the Buyer. Evapco Australia is not responsible for insurance during transit, provided, however, that if necessary Evapco Australia will assist Buyer in recovering any transit damages from the carrier or the carrier’s insurer if Evapco Australia selected such carrier. Evapco Australia is further not responsible for unloading, hosting or storage subsequent to delivery.

All Additional Charges are payable by the Buyer in addition to the Purchase Price of the Goods.

Buyer must pay Evapco Australia the delivery costs specified in the Order. Unless the Order specifies otherwise, Evapco Australia will arrange for delivery of the Goods to Buyer.

**5. Delivery Dates** - All delivery or shipment dates quoted to Buyer by Evapco Australia for the supply of Goods are estimates given in good faith only and Evapco Australia will not be liable for any failure or delay in delivery of the Goods.

**6. Payment (General)** – Buyer must pay the Purchase Price of the Goods and all other monies payable to Evapco Australia by EFT transaction prior to Delivery unless otherwise agreed by Evapco Australia.



**7. Payment (Approved Buyer)** – If Buyer has a credit account with Evapco Australia, Buyer must pay the Price and all other monies within **30 days** from end of month in which Evapco Australia issues an Invoice.

**8. Payment Default** - If Buyer does not pay monies owing to Evapco Australia by the due date (including freight and assembly fees if applicable), without prejudice to Evapco Australia's other rights and remedies (including those set forth in Paragraph 17):

(a) Buyer will pay interest to Evapco Australia on the unpaid amount at an annualised rate that is four percentage points above the rate quoted by Evapco Australia's bank on commercial overdrafts of \$100,000.00 from the due date until all amounts owing are received by Evapco Australia; and

(b) at the option of Evapco Australia, Evapco Australia may withhold delivery of Goods or cancel an order (including orders accepted by Evapco Australia and including orders that are not the subject of the default) and the supply of any services supplied by Evapco Australia to Buyer from time to time until such time as full payment is made by Buyer.

**9. Permits, Licences and Fee** - Buyer is responsible for and will furnish at its own expense, all permits, licenses, fees and similar permissions and charges required by law or local practice in connection with the installation, erection and operation of the Goods, including temporary and permanent structures. Buyer must procure approval of all plans and specifications if required from the relevant authorities.

**10. Specifications**- The parties agree that any explanatory or descriptive matter submitted by Evapco Australia is informative only and not necessarily exact in dimensions, details, specification or otherwise. The Buyer must satisfy itself that the specifications are suitable for its purposes prior to purchasing the Goods. To the extent permitted by law, Evapco Australia is not liable for any loss or damage suffered as a result of the Buyer not complying with this obligation. Subject to the Buyer's agreement, Evapco Australia may change the construction and design of the Goods.

**11. Foundations & Grillages** - Buyer is responsible for all costs related to the supply and installation of vibration isolation, waffle pad(s), foundations, supporting structure and/or grillages in accordance with the general arrangement drawings and other instructions furnished by Evapco Australia. Buyer is responsible for depth of footings, size or dimensions and character of materials, and Evapco Australia shall have no obligation in connection therewith.

**12. Proper Law** - The Contract shall be construed and operate as a contract in conformity with the laws of the State of New South Wales.

**13. Obligations** - If the Buyer defaults in due observance of any or all of its obligations under these Terms, then Evapco Australia may, without prejudice, take such steps as it may deem necessary to mitigate the damages suffered.

**14. Delay** - In the event Buyer requests that Evapco Australia delay a shipment, any payments due upon shipment shall become due as if shipment had been effected on the shipment date specified in the Submittal Documents. Partial shipments shall permit pro rata partial payments in respect thereof. Evapco Australia will only accommodate storage at its facility for 14 days at no cost to the Buyer. If the Buyer requires storage beyond 14 days, and Evapco Australia can store the unit at its facility, beginning on the 15<sup>th</sup> day of storage Buyer shall pay Evapco Australia a storage fee equal to 0.25% of the Purchase Price per week (such charges shall NOT be prorated for partial week storage). If Evapco Australia cannot store the goods beyond 14 days at its facility, Evapco Australia can arrange for the Goods to be transported to, and stored at, a storage yard at the Buyer's cost. The Buyer will receive notice of the costs involved prior to relocation of Goods to the storage yard, but the goods will be relocated unless Buyer makes other arrangements prior to the 15<sup>th</sup> day of storage. If the Goods are relocated, the Buyer shall be liable to pay for costs associated with transport to and unloading of Goods at the storage yard. Storage charges will be assessed beginning on the 15<sup>th</sup> day of delayed shipment at the actual storage fee charged by the third party storage yard. Storage charges shall apply on a per week basis and will not be prorated. If Buyer does not advise their shipping/storage preference prior to the 14<sup>th</sup> day of delay, Evapco Australia may relocate the Goods to a storage yard and later generate an invoice for the aforementioned transportation, unloading and storage charges. Evapco Australia may require the Buyer's acknowledgement and a corresponding purchase order for transportation and storage prior to releasing stored Goods for shipment, or may require payment of all storage related charges, prior to shipping the Goods.

**15. Cancellation** - In the event any order is cancelled by the Buyer after such order has been accepted by Evapco Australia and released for production Buyer agrees to pay on demand Cancellation Charges and all other loss and damage suffered by Evapco Australia as a result of the Buyer's cancellation or breach. Unless the Parties reach a different agreement, the applicable Cancellation Charges shall be as follows: (i) 100% of Purchase Price if production is complete, (ii) 50% of Purchase Price if production has started but not been completed, and (iii) 0% of Purchase Price if production has not started.

**16. Title and Risk** – Though risk of loss passes to Buyer upon delivery as defined herein, title and ownership in the Goods remains with Evapco Australia until all monies owing by Buyer are paid in full. Evapco Australia may take possession of Goods if they are not paid for in full by the due date. For the avoidance of doubt and in the absence of express payments being made by Buyer, the parties agree that the oldest debts are to be paid first.

Until the date of payment:

(a) the Buyer has the right to sell the Goods in the ordinary course of business and:

- (i) where the Buyer is paid by the third party, the Buyer must hold the whole of the proceeds of the sale on trust for Evapco Australia; or
- (ii) where the Buyer has not been paid by the third party, the Buyer, at Evapco Australia's option, agrees to assign its claims against the third party to Evapco Australia upon Evapco Australia giving written notice in writing to that effect;

(b) until the Goods have been sold by the Buyer in the ordinary course of the Buyer's business, the Buyer holds the Goods as bailee for Evapco Australia;

**17. Default** – The Buyer is deemed to be in default immediately upon the happening of any of the following events: (i) if any payment to Evapco Australia is not made promptly on or before the due date for payment, (ii) if the Buyer ceases to carry on business, (iii) if the Buyer is unable to pay its debts as they fall due or if any cheque or bill of exchange drawn by the Buyer payable to Evapco Australia is dishonoured.

In the event of a default by the Buyer, then without prejudice to any other rights which Evapco Australia may have at law or under these Terms and Conditions:

(a) Evapco Australia or its agents may without notice to the Buyer enter the Buyer's premises or any premises under the control of the Buyer for the purposes



of recovering the Goods;

- (b) Evapco Australia may recover and resell the Goods;
- (c) if the Goods cannot be distinguished from similar Goods which the Buyer has or claims to have paid for in full, Evapco Australia may in its absolute discretion seize all goods matching the description of the Goods and hold same for a reasonable period so that the respective claims of Evapco Australia and the Buyer may be ascertained. Evapco Australia must promptly return to the Buyer any goods the property of the Buyer and Evapco Australia is in no way liable or responsible for any loss or damage to the Goods or for any loss, damage or destruction to the Buyer's business howsoever arising from the seizure of the Goods.
- (d) In the event that the Buyer uses the Goods in some manufacturing or construction process of its own or some third party, then the Buyer must hold such part of the proceeds of sale of such manufacturing or construction process as relates to the Goods in trust for Evapco Australia. Such part will be an amount equal in dollar terms to the amount owing by the Buyer to the Evapco Australia at the time of the receipt of such proceeds. The Buyer will pay Evapco Australia such funds held in trust upon the demand of Evapco Australia.
- (e) The Buyer must pay to Evapco Australia all reasonable costs and disbursements incurred by Evapco Australia in pursuing any recovery action, or any other claim or remedy against the Buyer, including debt recovery fees and legal fees incurred by Evapco Australia on a solicitor client basis and as a liquidated sum.

**18. Personal Property Securities Act 2009 ("PPSA")** - Defined terms in this clause have the same meaning as given to them in the PPSA. Evapco Australia and Buyer acknowledge that these Terms constitute a Security Agreement and give rise to a Purchase Money Security Interest ("PMSI") in favour of Evapco over the Goods supplied or to be supplied to the Buyer as Grantor pursuant to the Terms. The Goods supplied or to be supplied under these Terms fall within the PPSA classification of "Other Goods" acquired by the Buyer pursuant to these Terms. Evapco Australia and the Buyer acknowledge that Evapco, as Secured Party, is entitled to register its interest in the Goods supplied or to be supplied to the Buyer as Grantor under the Terms on the PPSA Register as Collateral.

To the extent permissible at law, the Buyer:

- (a) waives its right to receive notification of or a copy of any Verification Statement confirming registration of a Financing Statement or a Financing Change Statement relating to a Security Interest granted by the Buyer, as Grantor, to Evapco Australia.
- (b) agrees to indemnify Evapco Australia on demand for all costs and expenses, including legal costs and expenses on a solicitor / client basis, associated with the:
  - (i) registration or amendment or discharge of any Financing Statement registered by or on behalf of Evapco Australia; and
  - (ii) enforcement or attempted enforcement of any Security Interest granted to Evapco Australia by the Buyer.
- (c) agrees that nothing in sections 130 and 143 of the PPSA will apply to the Terms or the Security under the Terms;
- (d) agrees to waive its right to do any of the following under the PPSA:
  - (i) receive notice of removal of an Accession under section 95;
  - (ii) receive notice of an intention to seize Collateral under section 123;
  - (iii) object to the purchase of the Collateral by the Secured Party under section 129;
  - (iv) receive notice of disposal of Collateral under section 130;
  - (v) receive a Statement of Account if there is no disposal under section 132(4);
  - (vi) receive a Statement of Account under section 132(3)(d) following a disposal showing the amounts paid to other Secured Parties and whether Security Interests held by other Secured Parties have been discharged.
  - (vii) receive notice of retention of Collateral under section 135;
  - (viii) redeem the Collateral under section 142; and
  - (ix) reinstate the Security Agreement under section 143.

All payments received from the Buyer must be applied in accordance with section 14(6)(c) of the PPSA.

**19. Warranty** – The Manufacturer's Express Warranty is the only warranty that applies to the Goods, subject to the limitations provided therein.

**20. Exclusion of Liability** - To the extent permitted by law, all other terms, warranties and conditions whether statutory or otherwise, express or implied or oral or written, as to the equipment supplied and its state, quality, fitness or otherwise for purpose and merchantability are expressly excluded. To the extent permitted by law, Evapco Australia's liability in respect of a breach of any term, warranty or condition of this contract (whether implied by statute or otherwise) will be limited, at the option of Evapco Australia:

in relation to goods, to;

- (a) replacing the Goods or the supply of equivalent Goods;
- (b) the repair of the Goods;
- (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; and

in relation to services, to:

(a) the supply of the services again; and

(b) the payment of the cost of having the services supplied again.

To the extent permitted by law, all other warranties whether implied or otherwise, not set out in these Terms or in specific warranties accompanying the Goods, are excluded and Evapco Australia is not liable in contract, tort (including, without limitation, negligence or breach of statutory duty) or otherwise to compensate the Buyer for:

(a) any increased costs or expenses;

(b) any loss of profit, revenue, business, contracts or anticipated savings;

(c) any loss or expense resulting from a claim by a third party; or

(d) any special, indirect or consequential loss or damage of any nature whatsoever.

To the extent permitted by law, Evapco Australia shall not be responsible for any injuries or damages of any kind whatsoever under tort or otherwise to the extent the injuries or damage are caused by misuse of the Goods by Buyer or any third party.

**21. Indemnity** - To the full extent permitted by law, Buyer will indemnify Evapco Australia and keep Evapco Australia indemnified from and against any liability and any loss or damage Evapco Australia may sustain, as a result of any breach, act or omission, arising directly or indirectly from or in connection with any breach of any of these Terms by Buyer or its representatives.

**22 Sub-contractors** - Evapco Australia may engage affiliates, related companies, or independent sub-contractors to perform its obligations or a portion of its obligations under the Contract.

**23. Trusts** - If Buyer is a trustee, it enters into these Terms both in its own capacity and in its capacity as trustee of the relevant trust. Buyer warrants that it has disclosed to Evapco Australia the existence of all trusts of which it is a trustee and that it is entitled to enter into this agreement under the relevant trust.

**24. GST** - All sums specified by Evapco Australia as consideration for a supply of goods or services under this agreement is specified exclusive of GST unless the contrary is clear and the amount of that consideration will be increased by an additional amount equal to the GST on that taxable supply. If an amount is payable as compensation or reimbursement for an expense, the consideration must be calculated after excluding any amount for which the supplier is entitled to an input tax credit as recipient of the item to which the expense loss or liability relates.

**25. Intellectual Property** - The Goods may contain Intellectual Property rights that belong to Evapco Australia. Property, right and title in that Intellectual Property will remain with Evapco Australia despite the Buyer acquiring the Goods. The Buyer agrees to do all things reasonably required and execute all documents to ensure Evapco Australia retains ownership in the Intellectual Property.

The Buyer must not pass any Intellectual Property to third parties without Evapco Australia's prior written approval.

The Buyer agrees to indemnify and keep indemnified Evapco Australia against any claim for infringement of Intellectual Property where the claim arises out of information supplied by the Buyer or as a result of Evapco Australia complying with the Buyer's order.

**26. Force Majeure** - Evapco Australia is not liable for delay in performing, or non-performance, of any of its obligations under these Terms caused by unforeseeable circumstances beyond Evapco Australia's reasonable control (including, without limitation, acts of God, civil or military authority, accidents, earthquakes, strikes, the elements, labour disputes, shortage of suitable part or components or other materials, mechanical breakdown, fire, flood, tempest and war) and in such circumstances, Evapco Australia will be entitled to a reasonable extension of time for the performance of its obligations.

**27. General** - Any conditions found to be void, unenforceable or illegal may, to that extent be severed from these Terms. No waiver of any of these Terms or failure to exercise a right or remedy by Evapco Australia will be considered to imply or constitute a further waiver by Evapco Australia of the same or any other term, condition, right or remedy. The Buyer must keep confidential all information including these Terms, the price of the supply of the Goods, and any information which Evapco Australia may reasonably consider is confidential, unless the Buyer is required by law to disclose such information or the information has become public information or with prior written consent of Evapco Australia.