3.2 Unless agreed otherwise in writing by Sunbather, Products are sold “ex works” and the Buyer bears all risk of loss or damage to the Products from whatever cause shall be borne by the Buyer from the time the Products are collected by the Buyer from Sunbather warehouse or are dispatched by Sunbather to the Buyer at the Buyer’s cost.

3.3 Until the Buyer pays all amounts it owes to Sunbather for an Order:

(i) the Buyer must keep all Products insured against theft, damage and destruction on behalf of Sunbather; and
(ii) the Buyer must keep all Products free of any charge, lien, or security interests created under these Terms and Conditions, the Buyer agrees that sections 95, 96 and 97A of the PPSA are not excluded by the purchase of the Products from Sunbather.

3.4 The Buyer may on-sale the Products prior to payment in full of the purchase price as long as:

(i) all Products and any proceeds previously supplied by the Supplier to the Buyer; and
(ii) Reseller will ensure that its personnel will perform Services and other work as agreed between the Parties; and
(iii) the Product(s) is/are used for the purpose and within the specification it/they were designed and approved for; and
(iv) the Buyer acknowledges that the security interest over Products or their proceeds is a continuing and subsisting interest created under these Terms and Conditions, the Buyer agrees that sections 95, 96 and 97A of the PPSA are not excluded by the purchase of the Products from Sunbather.

3.5 If the Buyer does not pay for any Products on the due date, Sunbather is irrevocably entitled to:

(i) to enter the Buyer’s premises and/or the premises of the Buyer’s customers or contractors and remove all Products; and
(ii) to stop or impound the Products

3.6 Sunbather will invoice any replacement Product at full price until such time as the original Product is returned to Sunbather. The Buyer shall be responsible for all handling, storage fees, freight, duty or other related charges for the return of the original Product to Sunbather.

3.7 No claim shall be deemed accepted by Sunbather until proof of purchase has been provided, and Sunbather shall not be responsible for any claim made by the Buyer or the Buyer’s customers which have not been properly submitted and issued a written warranty claim approval. Sunbather’s warranty is valid if the following conditions are met:

(i) the failure occurred within the period stated in Clause 6.4 above;
(ii) the warranty claim is made within the time permitted to the Buyer in accordance with the clause above;
(iii) the Product(s) is/are used for the purpose and within the specification it/they were designed, for which Sunbather is responsible for the warranty;
(iv) the failure is the result of a product defect;
(v) the claim is presented to Sunbather no later than the warranty period of the Product(s) in question;
(vi) the failure is the result of a defect of Sunbather’s manufacture or material;
(vii) the failure is the result of a defect of Sunbather’s design;
(viii) the claim is presented to Sunbather before the warranty period of the Product(s) in question.

3.9 In the event that the Buyer fails to provide effective access, Sunbather may, at its absolute discretion, refuse, amend the terms of the Order, or withdraw permission at any time.

4.2 The Buyer acknowledges that the security interest is a continuing and subsisting interest created under these Terms and Conditions, the Buyer agrees that sections 95, 96 and 97A of the PPSA are not excluded by the purchase of the Products from Sunbather.

4.3 The Buyer acknowledges that the security interest over Products or their proceeds is a continuing and subsisting interest created under these Terms and Conditions, the Buyer agrees that sections 95, 96 and 97A of the PPSA are not excluded by the purchase of the Products from Sunbather.

CLAUSE 3 – TITLE AND PROPERTY IN GOODS

3.1 Title to the Products shall be retained by Sunbather and shall not pass to the Buyer until payment in full of the purchase price (including any retention sums) and all other sums due under any other contract between the Buyer and Sunbather. Installation of Products and maintenance and repairs to Products are performed by Sunbather at the Buyer’s cost.

3.2 Unless agreed otherwise in writing by Sunbather, Products are sold “ex works” and the Buyer bears all risk of loss or damage to the Products from whatever cause shall be borne by the Buyer from the time the Products are collected by the Buyer from Sunbather warehouse or are dispatched by Sunbather to the Buyer at the Buyer’s cost.

3.3 Until the Buyer pays all amounts it owes to Sunbather for an Order:

(i) the Buyer must keep all Products insured against theft, damage and destruction on behalf of Sunbather; and
(ii) the Buyer must keep all Products free of any charge, lien, or security interests created under these Terms and Conditions, the Buyer agrees that sections 95, 96 and 97A of the PPSA are not excluded by the purchase of the Products from Sunbather.

3.4 The Buyer may on-sale the Products prior to payment in full of the purchase price as long as:

(i) all Products and any proceeds previously supplied by the Supplier to the Buyer; and
(ii) Reseller will ensure that its personnel will perform Services and other work as agreed between the Parties; and
(iii) the Product(s) is/are used for the purpose and within the specification it/they were designed and approved for; and
(iv) the Buyer acknowledges that the security interest over Products or their proceeds is a continuing and subsisting interest created under these Terms and Conditions, the Buyer agrees that sections 95, 96 and 97A of the PPSA are not excluded by the purchase of the Products from Sunbather.

3.5 If the Buyer does not pay for any Products on the due date, Sunbather is irrevocably entitled to:

(i) to enter the Buyer’s premises and/or the premises of the Buyer’s customers or contractors and remove all Products; and
(ii) to stop or impound the Products

3.6 Sunbather will invoice any replacement Product at full price until such time as the original Product is returned to Sunbather. The Buyer shall be responsible for all handling, storage fees, freight, duty or other related charges for the return of the original Product to Sunbather.

3.7 No claim shall be deemed accepted by Sunbather until proof of purchase has been provided, and Sunbather shall not be responsible for any claim made by the Buyer or the Buyer’s customers which have not been properly submitted and issued a written warranty claim approval. Sunbather’s warranty is valid if the following conditions are met:

(i) the failure occurred within the period stated in Clause 6.4 above;
(ii) the warranty claim is made within the time permitted to the Buyer in accordance with the clause above;
(iii) the Product(s) is/are used for the purpose and within the specification it/they were designed, for which Sunbather is responsible for the warranty;
(iv) the failure is the result of a product defect;
(v) the claim is presented to Sunbather no later than the warranty period of the Product(s) in question;
(vi) the failure is the result of a defect of Sunbather’s manufacture or material;
(vii) the failure is the result of a defect of Sunbather’s design;
(viii) the claim is presented to Sunbather before the warranty period of the Product(s) in question.

3.9 In the event that the Buyer fails to provide effective access, Sunbather may, at its absolute discretion, refuse, amend the terms of the Order, or withdraw permission at any time.
(i) the replacement of the Goods;
(ii) the supply of equivalent Goods;
(iii) the payment of the cost of replacing the Goods or of acquiring equivalent Goods; or the payment of the cost of having the Goods repaired.

9.2 To the extent permitted by law, except as set out in clause 5. Sunbather excludes all statutory or implied conditions and warranties and any other liability it may have to the Buyer (including liability for indirect or consequential loss) that may arise under statute or at law including without limitation for breach of contract, in tort (including negligence) or under any other cause of action.

CLAUSE 10 – INTELLECTUAL PROPERTY RIGHTS

10.1 The Buyer agrees to protect all confidential information and intellectual property rights (including, but not limited to, patents, trademarks, trade secrets, know-how and any other proprietary data) of Sunbather or the manufacturers. The Buyer shall not:
(i) copy, make available or misappropriate such intellectual property;
(ii) disclose any Sunbather confidential information other than to its employees and agents on a need-to-know basis and if required for normal use and maintenance of the Products.

10.2 Failure to comply with this clause will result in a default under these Terms and Conditions and may result in legal action taken by Sunbather.

CLAUSE 11 – PRICE, PAYMENT, DISCOUNT AND QUOTATION

11.1 Unless otherwise agreed in writing with the Buyer, payment by the Buyer will be made before delivery from Sunbather’s warehouse on the following terms. In respect of Services where no Services are provided, the Buyer will pay a deposit amount as agreed with Sunbather for the Products on acceptance of Order and the balance upon notification that Products are available for collection/dispatch from Sunbather’s warehouse.

11.2 In respect of Services, unless otherwise agreed in writing with Sunbather, the Buyer will pay a service call out fee upfront to secure their booking, with the balance of the service invoiced and payable on the day of the service. In respect of Installations, unless otherwise agreed in writing with Sunbather, the Buyer will pay a deposit amount as agreed with Sunbather for the Products on acceptance of Order and the balance on the day of the installation.

11.3 In the event that any order is cancelled, Sunbather reserves the right, at their discretion, to withhold all or a portion of the monies paid to recover any costs associated with Sunbather time and production materials.

11.4 Unless otherwise stated in writing by Sunbather, all prices are in Australian dollars and exclude any applicable taxes and other imposed charges, including but not limited to, goods and services tax and duties. Sunbather will issue a tax invoice and the Buyer must reimburse Sunbather for any GST payable by it on each taxable supply it makes to the Buyer at the same time and in the same manner as the invoice price of the Products is payable.

11.5 Unless otherwise agreed in writing on the quotation by Sunbather, all Sunbather quotations made to existing or potential the Buyers are firm for thirty (30) days from the date of issue. Where there is any delay in delivery of Products or supply of Services for reasons beyond the control of Sunbather for a period of 90 days from date of acceptance of an Order, Sunbather may adjust the price to reflect the increase to Sunbather in the cost of materials, labour and equipment occasioned by such delay and the Buyer agrees to pay such increased price. Sunbather’s standard price list is subject to change at any time at Sunbather’s discretion. Verbal quotations are subject to written confirmation.

CLAUSE 12 – DEFAULT

12.1 The Buyer is in default if:
(i) it fails to make a payment to Sunbather by its due date;
(ii) being a natural person it commits an act of bankruptcy;
(iii) being a company it has an administrator, receiver and manager, provisional liquidator, liquidator or controller appointed over its assets or any resolution or order of creditors has been made against it; or
(iv) it has any execution levied against its property.

12.2 In the event of a default, Sunbather will be entitled, without the obligation to give notice to the Buyer and in addition to any other rights, to:
(i) payment of interest on all overdue accounts at the rate of 2% above the prevailing rate imposed by the Penalty Interest Rates Act 1983;
(ii) the commission it may have to pay to any recovery agent arising from such default or in recovering overdue amounts;
(iii) its actual costs on an indenitely basis incurred in relation to such default or in recovering overdue amounts or in otherwise seeking compliance with these Terms and Conditions;
(iv) immediate payment for Products, the payment which would otherwise not have been due and payable;
(v) disallow any discounts, rebates or commissions otherwise claimable by the Buyer.
(vi) Sunbather may recover any unpaid sum plus the interest, recovery agent’s, and legal costs referred to in (a), (b) and (c) from the Buyer by way of liquidated damages.

CLAUSE 13 – PACKING AND SHIPPING

13.1 Sunbather shall pack the Products in accordance with its standard practice, ready for delivery.

13.2 Unless otherwise stated in any Order accepted by Sunbather, delivery terms shall be ex works Sunbather’s warehouse.

13.3 The Buyer must notify Sunbather of any damaged Product or short delivery of Product by email or facsimile within two business days after delivery to the Buyer. The Buyer must also provide full details hereunder, if such performance is prevented or delayed, in part or in whole, by reason of force majeure, or acts of government, or the consequence thereof included but not limited to, fire, flood, typhoon, earthquakes or by reason of riots, wars, hostilities, government restrictions, strike, lockout, trade embargoes, boycotts of goods, ship shortage, manufacturer’s bankruptcy, delays or damages or transportation or any other cause beyond Sunbather’s control. Sunbather may, at its discretion, fully inform the Order within a reasonable time from the removal of the cause preventing or delaying the performance of any of its obligations hereunder or under an Order and rescind unconditionally and without liability, such terms in whole or in part thereof.

CLAUSE 14 – ASSIGNMENT

14.1 The Buyer may not assign the Order, any interest therein, or any claim in relation to an Order either voluntarily or by operation of law without the prior written consent of Sunbather. Assignment without Sunbather’s written consent is ineffective and void. Sunbather has an absolute right to withhold consent to any assignment in Sunbather’s sole discretion. No such consent shall be deemed to relieve the Buyer of its obligations to fully comply with the requirements of these Terms and Conditions.

14.2 The Terms and Conditions of any Order assigned by the Buyer with consent of Sunbather shall be identical to those applicable to an assigned Order and shall be and remain binding on the assignee.

14.3 Sunbather reserves the right to sub-contract with any other Sunbather approved person for the performance of any part of this contract.

CLAUSE 15 – APPLICABLE LAW AND VENUE

15.1 These Terms and Conditions and any Order to which these Terms and Conditions apply are governed by and construed exclusively under the laws of Victoria, Australia. The Buyer and Sunbather hereby submit to the sole and exclusive jurisdiction and venue in which any legal proceeding involving these Terms and Conditions including the Order to which they apply may be instituted and conducted.

15.2 In the event of a dispute arising between the Buyer and Sunbather concerning an Order or the Products and/or Services covered by an Order, the parties agree to good faith endeavours to resolve the dispute in a period of not more than 14 days after the aggrieved party gives written notice with full particulars of the dispute to the other party. During the period of good faith discussions neither party may institute legal proceedings against the other, except only in respect of urgent interlocutory relief if the dispute is not resolved by agreement in that period or such longer period as the parties may agree in writing, either party is thereafter at liberty to institute legal proceedings for resolution pursuant to clause 15.1 hereof.

CLAUSE 16 – ORDER OF PRECEDENCE

16.1 In the event of any inconsistency in relation to the terms of an Order, such inconsistency shall be resolved by giving precedence in the following sequence:

(i) Sunbather specifications for the Product(s) and/or those of any relevant manufacturer;
(ii) these Terms and Conditions.

CLAUSE 17 – INDEMNIFICATION

17.1 The Buyer shall indemnify and hold Sunbather harmless to the full extent of any loss, damage, expense, incurred by the Buyer, legal fees and court costs on a solicitor client basis, for any failure or alleged failure of the Buyer to comply with these Terms and Conditions. With respect to the Products and/or Services delivered under an Order, the Buyer agrees to indemnify and save harmless Sunbather, its agents and employees, from and against all loss, expenses, costs, damages and liability incurred, directly or indirectly, as a result of or in connection with handling, installation, use by the Buyer, its agents, employees or customers of the Products that is inconsistent with usage instructions or directions provided by Sunbather, by the original manufacturer, or is contrary to recognised or accepted usage or standards As a result, the Buyer agrees and at its own expense, to defend all claims, suits and actions against Sunbather, its agents and employees in such an instance.

CLAUSE 18 – SUPERIOR FORCE

18.1 Sunbather shall not be responsible for any default or delay in the performance of any of its obligations hereunder to the extent that such performance is prevented or delayed, in part or in whole, by reason of force majeure, or acts of government, or the consequence thereof included but not limited to, fire, flood, typhoon, earthquakes or by reason of riots, wars, hostilities, government restrictions, strike, lockout, trade embargoes, boycotts of goods, ship shortage, manufacturer’s bankruptcy, delays or damages or transportation or any other cause beyond Sunbather’s control. Sunbather may, at its discretion, fully inform the Order within a reasonable time from the removal of the cause preventing or delaying the performance of any of its obligations hereunder or under an Order and rescind unconditionally and without liability, such terms in whole or in part thereof.

CLAUSE 19 – ENTIRE AGREEMENT

19.1 These Terms and Conditions, including any accepted Order to which these Terms and Conditions apply, and any attachments hereto, constitute the entire understanding and agreement between the parties with respect to the subject matter hereof and supersede all prior representations and understandings, whether oral or written. However, nothing herein shall be construed as a limitation or exclusion of any right or remedy available to Sunbather by law. Sunbather and the Buyer agree that the U.N. Convention for contracts for the international sale of goods shall not apply to any purchase and sale of Products and/or Services as set out by these Terms and Conditions.

19.2 To avoid doubt, any terms and conditions accompanying an Order provided by a the Buyer or supplied by the company in possession of the Products or in recovering overdue amounts;

CLAUSE 20 – HOURS OF OPERATION

20.1 Sunbather conducts business at its various business premises between 8.30 AM and 5.00 PM (according to the time zone in which each of its relevant business premises is located) Monday to Friday excluding gazetted public holidays and any other closures at Sunbather’s discretion.

20.2 All services, other repairs, maintenance and warranty work are carried out exclusively at the various premises of Sunbather during these hours unless an alternative or on-site location is agreed in advance by Sunbather on such terms and conditions as it may determine.