

AQUAHEAT NEW ZEALAND LIMITED / AQUAHEAT FACILITY SERVICES LIMITED

TERMS AND CONDITIONS OF TRADE

Effective 01 February 2018

1 Application of Terms

- 1.1 All Goods and/or Services provided to the Customer by Supplier are subject to the following terms and conditions ("**Terms**"). These Terms, together with any letter of offer, works requisition, quotation and/or similar order form or Supplier invoice, in each case supplied by Supplier (each being "**Supplemental Terms**"), constitute the entire agreement between the Customer and Supplier for the Goods provided and/or Services performed. Each accepted order will constitute a separate agreement for the supply of the relevant Goods and/or Services. All Goods and/or Services provided to the Customer by Supplier are subject to these Terms.
- 1.2 Supplier may amend these Terms from time to time by notice to Customer in writing (including by email) and by publication on Supplier's website at www.aquaheat.co.nz. A notice of the fact of amendments directing the Customer to Supplier's website shall be sufficient notice for the purposes of these Terms. The change will take effect from the time specified. By continuing to receive any Goods and/or Services or by placing any order the Customer shall be deemed to have accepted the updated Terms.
- 1.3 If the Customer orders or accepts any Goods or Services, the Customer will be deemed to have accepted these Terms without qualification. To the extent that the Customer executes any Supplemental Terms, if the Customer is a company or trust, each director or trustee (as the case may be) of the Customer warrants that he/she is authorised to enter into the relevant Supplemental Terms on behalf of the Customer and has the full power, capacity and authority to execute, deliver and perform its obligations in accordance with these Terms.
- 1.4 Nothing in these Terms affects any rights that the Customer may have as a "consumer" under the Fair Trading Act 1986 ("**FTA**") and the Consumer Guarantees Act 1993 ("**CGA**"). A Customer will not be a "consumer" if the Customer acquires the Goods and/or Services, or holds itself out as acquiring the Goods and/or Services, in trade.
- 1.5 If these Terms or any Supplemental Terms are a "construction contract" or relate to "construction work" (in each case as defined in the Construction Contracts Act 2002), the provisions of that Act will take priority over these Terms or Supplemental Terms (as applicable) if there is any conflict or inconsistency between these Terms or any Supplemental Terms and that Act.
- 1.6 Where Supplier and the Customer are subject to a Use-of-System Agreement (available at <http://www.horizonnetworks.nz/information-disclosure-regulation>) or the terms of the Electricity Industry Participation Code 2010 ("**Code**"), in the event of any inconsistency between these Terms or any Supplemental Terms and the Use-of-System Agreement or the Code (as applicable), the Use-of-System Agreement or the Code (as applicable) shall prevail in respect of any activity regulated by the Use-of-System Agreement or the Code. Otherwise these Terms shall apply.
- 1.7 If there is any conflict or inconsistency between these Terms and any Supplemental Terms then, unless otherwise expressly provided in these Terms to the contrary, the Supplemental Terms will prevail over these Terms.

2 Definitions

- 2.1 In these Terms (and in any Supplemental Terms unless specified otherwise):
- "**Supplier**" means Aquaheat New Zealand Limited or Aquaheat Facility Services Limited and includes any trading division as part of Aquaheat New Zealand Limited or Aquaheat Facility Services Limited that supplies Goods and/or Services to the Customer (and includes its successors and assignees).
- "**Customer**" means the Customer named on any Supplemental Terms entered into with Supplier or otherwise any person, firm, company or other entity buying the Goods and/or Services from Supplier.
- "**Goods**" means all goods, machinery, product, plant, equipment or chattels provided by Supplier to the Customer, including as expressly identified in any Supplemental Terms.

"**Services**" means all labour, construction, design, installation and engineering work and all other services provided by Supplier to the Customer, including as expressly identified in any Supplemental Terms.

"**Supplemental Terms**" includes any letter of works, requisition order, quotation, purchase order, Supplier invoice or similar supplied by Supplier in connection with the Services. For the avoidance of doubt, any letter of works, requisition order, purchase order, invoice or similar not supplied by Supplier will not constitute Supplemental Terms.

"**Trade**" means any trade, business, industry, profession, occupation, activity of commerce, or undertaking relating to the supply or acquisition of goods or services.

- 2.2 Headings are used as a matter of convenience only and shall not affect the interpretation of these Terms.

- 2.3 A reference to a person includes a corporation, association, firm, company, trust, partnership or individual.

3 Price and Quotations

- 3.1 Unless otherwise expressly stated in any Supplemental Terms, all prices stated to apply in respect to the supply of any Goods and/or Services will be those applying at the date of delivery and will include freight charges. In the absence of any quoted price for any particular Goods and/or Services set out in any Supplemental Terms, Supplier's invoiced price for such Goods and/or Services shall apply.
- 3.2 Unless otherwise expressly stated in any Supplemental Terms, the quoted or invoiced price of all Goods and/or Services excludes any amount payable in respect of GST (and any other taxes and duties assessed or levied in connection with the supply of Goods to the buyer), which will be paid by the Customer to Supplier in addition to the stated price. Where the payment of such taxes and duties is the responsibility of Supplier at law, the price shall be increased by the amount of such taxes and duties.
- 3.3 Where GST or other taxes or duties are expressly included in any quotation given by Supplier, any increase in the amount of GST or other taxes and duties beyond the control of Supplier between the date of the quotation and the date of delivery of the Goods shall be the responsibility of the Customer and the price shall be increased accordingly provided that the increase is notified to the Customer prior to the Goods being supplied.
- 3.4 Any prices stated to be quotations are based on the cost of labour, materials and equipment, customs duty, insurance, freight and variable and fixed expenses and, where appropriate, rates of currency exchange operating at the date of quotation. Any increase in the cost to Supplier (whether of the supply, production, delivery or otherwise of the Goods and/or Services), because of a change in specification or delay of the Customer, which may occur between the date of quotation and the date of delivery shall be payable by the Customer provided that the increase is notified to the Customer prior to the Goods or Services being supplied.
- 3.5 Supplier shall only be responsible to comply with the regulations, bylaws, codes and standards specified in the Supplemental Terms and Supplier shall, unless otherwise required by law, be under no liability to the Customer whatsoever for any failure to meet any other regulations, bylaws, codes and standards. In the event of there being any changes in the regulations, bylaws, codes and standards with which Supplier is obliged to comply after the date of the Supplemental Terms, then any additional costs in meeting any such changes shall be to the account of the Customer provided that the increase is notified to the Customer prior to the Goods or Services being supplied.
- 3.6 Any variation in the quantity of Goods or the specification of Goods supplied to the Customer, which is requested by the Customer after the date of the quotation shall be at the Customer's expense. The Goods shall be priced at either the price stated to be applicable to the original quantity under the relevant Supplemental Terms or (if no price is specified in the Supplemental Terms) the Supplier's current list price at the time the request is received from the Customer.
- 3.7 For a quotation to be binding on Supplier, it must be accepted in writing by the Customer within the period specified in the quotation or the date otherwise expressly stated in any other Supplemental Terms.

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- 3.8 Dimensions and specifications contained in a quote or referred to or in any catalogues or other publications maintained or issued by Supplier are estimates only. Unless otherwise expressly specified in any Supplemental Terms or agreed in writing, it is not a condition that any Goods and/or Services will correspond precisely with such dimensions and specifications, and customary tolerances, or in the absence of customary tolerances, reasonable tolerances, shall be allowed.
- 3.9 Should Supplier be obliged pursuant to a quote to match any shade or colour, a light and dark tolerance shall be allowed to such extent as shall be agreed upon by Supplier and the Customer and in the absence of any agreement, a reasonable tolerance shall be allowed.
- 4 Payments**
- 4.1 Payment for Goods and/or Services shall be made on the date stated in the invoice relating to the supply of such Goods and/or Services unless:
- 4.1.1 the payment terms are otherwise notified in any Supplemental Terms; or
- 4.1.2 the parties agree otherwise in writing.
- 4.2 Payment must be made by the applicable due date by way of cleared funds in full without any form of deduction, counterclaim or set off. Receipt of a cheque, bill of exchange, or other negotiable instrument shall not constitute payment until such negotiable instrument is cleared and paid in full.
- 4.3 If the Customer disputes any or all of an amount contained in an invoice, the Customer will:
- 4.3.1 immediately notify Supplier of the dispute and provide reasons for the dispute;
- 4.3.2 pay the undisputed amount of the invoice by the due date specified in the invoice; and
- 4.3.3 negotiate in good faith with Supplier to resolve the dispute in accordance with the disputes procedure set out in clause 13.
- 4.4 If payment is not made by the due date Supplier may, without prejudice to its other rights and remedies (for example, to suspend or cancel further deliveries of Goods or Services to the Customer), charge the Customer default interest (compounding monthly) on the unpaid amount at a rate equal to one and a half times the monthly small to medium-sized enterprise (SME) overdraft rate published by the Reserve Bank of New Zealand over the relevant period (available at <https://www.rbnz.govt.nz/statistics/b3>).
- 4.5 Supplier may deduct or withhold any amount (whether by way of counterclaim, set-off or otherwise) from any money owing by Supplier to the Customer on any account whatsoever. However, the Customer shall not be entitled to withhold payment or to make any deductions from the agreed price without the prior written consent of Supplier.
- 4.6 In the case of export sales, payment shall be made by a confirmed irrevocable letter of credit (unless otherwise agreed). Letters of credit shall, unless otherwise agreed, be established through a first class bank and be irrevocable, confirmed and without recourse available for Supplier's draft at sight and otherwise in a form satisfactory to Supplier.
- 4.7 If Supplier shall at any time deem the credit of the Customer to be unsatisfactory, it may require security for payment and may suspend performance of its obligations until the provision of sufficient security. All reasonable costs and expenses of or incurred by Supplier as a result of such suspension and any recommencement shall be payable by the Customer upon demand.
- 5 Delivery**
- 5.1 If the stated price of any Goods in any quotation includes the costs of delivery to a delivery point agreed with the Customer (if applicable), unless otherwise agreed by Supplier prior to delivery, the price of the Goods includes the costs of delivery of the Goods by the usual methods of transportation used by Supplier, between the hours of 7.30am and 5pm Monday to Friday (excluding statutory holidays). Supplier may, if the Customer requests, arrange for Goods to be delivered by other means or at other times, provided that in such circumstances Supplier shall be entitled to charge the Customer for any additional costs that Supplier may reasonably incur.
- 5.2 Supplier will use reasonable endeavours to procure that the Goods are delivered on the agreed delivery dates (if any). Any time for delivery or installation of the Goods shall be approximate only, time shall not be deemed to be of the essence of these Terms and the Customer will accept the Goods if they are delivered within a reasonable time after any specified time for delivery.
- 5.3 Notwithstanding any obligation on the part of Supplier to carry out any installation work, delivery will be deemed to have been made, and risk with respect to the Goods shall pass to the Customer, when:
- 5.3.1 the Goods arrive at the delivery point agreed with the Customer; or
- 5.3.2 if no place of delivery is agreed on, when the Goods are delivered to Supplier's premises, at which point the Customer is required to collect the Goods from Supplier's premises.
- 5.4 The Customer or its authorised representative must sign Supplier's copy of the delivery docket or packing slip before the Goods are unloaded or collected to evidence delivery (provided that delivery shall still be deemed to have been made on the occurrence of the relevant actions described in this clause 5.4, notwithstanding that a delivery docket or packing slip has not been signed by the Customer).
- 5.5 All claims for errors in delivery, or for Goods damaged in transit only when a delivery point has been agreed, must be made in writing (including by email) to Supplier within five working days of delivery or Goods being collected by the Customer.
- 5.6 Without prejudice to any of Supplier's rights and remedies, if the Customer fails or refuses to take delivery of any Goods at an agreed delivery point or time, or indicates that they will fail or refuse to take or accept delivery and/or permit installation at the time specified in these Terms or any Supplemental Terms or at any other times that Supplier is able to deliver and/or install the Goods or Services, the Goods shall be deemed to have been delivered when Supplier notified the Customer that it was willing and able to deliver them, and Supplier may (without limiting any other rights or remedies Supplier may have) charge the Customer for any expenses or additional costs reasonably incurred by Supplier as a result of the delay including, but not limited to, storage and transportation expenses.
- 5.7 In the case of export sales, delivery on a sale F.O.B., C.I.F., or C.&F. shall, unless otherwise stated, be complete when the Goods effectively pass the ship's rail at the port of shipment or arrive at the airport for dispatch or earlier leave Supplier's custody for shipment to the Customer. Trans-shipment shall be allowed. Delivery may be affected by Supplier at its election by one or more shipments.
- 5.8 If the manufacture, supply or delivery of any Goods and/or Services, or where these Terms provide for the installation of the Goods, the installation or any commissioning or testing of the Goods, is delayed by reason of or as a result of any act, omission, default or request by or on behalf of the Customer, Supplier may, without prejudice to its other rights and remedies, require payment by the Customer of such portion of the price payable to the extent to which Supplier has performed its obligations up to the date such payment is required together with any expenses or additional costs incurred by Supplier as a result of such delay. In the event of such delay continuing beyond a reasonable time, Supplier may without prejudice to its other remedies, terminate the supply or delivery of the Goods and/or Services.
- 6 Installation**
- 6.1 Where these Terms and/or the Supplemental Terms provide for installation of the Goods to be carried out by Supplier, it is the Customer's responsibility to:
- 6.1.1 provide suitable access to the Customer's premises in all weather conditions for the vehicles and equipment that Supplier will need to use in carrying out such installation;
- 6.1.2 provide all necessary services and amenities to enable Supplier to carry out such installation; and
- 6.1.3 ensure that the Customer's premises and foundations are structurally sound and in a proper condition for the installation to proceed.
- 6.2 If the Customer is acquiring Goods and/or Services in trade, it is the Customer's responsibility to:
- 6.2.1 observe and comply with all statutes, regulations and other subordinate legislation in force, or that come into force, in New Zealand in respect of health and safety in employment (including the Health and Safety at Work Act 2015 and all regulations made under that Act) and any reasonable health, safety, security and other requests which Supplier has previously advised the Customer of in writing, provided that Supplier shall also follow all reasonable directions relating to health and safety from the Customer with respect to Supplier access to the Customer premises;

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- 6.2.2 provide all plant materials and services required to be provided by the Customer at such times and in such manner as to cause Supplier no delay in carrying out such installation;
- 6.2.3 provide safe and secure onsite storage for materials and accessories supplied and used by Supplier, its employees and contractors; and
- 6.2.4 maintain adequate insurance against all loss, damage, costs and expenses (including loss of profits and where installation or other work is to be performed by Supplier, its agents or contractors, damage to or destruction of the Customer's premises) which may be suffered or incurred by the Customer and to ensure that Supplier, its agents and contractors are named as additional insured parties under all such insurance policies.
- 6.3 For the avoidance of doubt, clause 6.2 does not apply if the Customer is not in trade.
- 6.4 The Customer shall advise Supplier promptly of any decision or instruction which needs to be made or given prior to Supplier being able to proceed with installation of the Goods.
- 6.5 Supplier will ensure that proof of identification is carried and will provide the Customer with prior notice of access where it can reasonably do so.

7 Risk and Title

- 7.1 Supplier retains legal and equitable title to any Goods supplied to the Customer until full payment is made for the Goods and all other Goods and/or Services supplied by Supplier (even if the Customer incorporates the Goods with other items or the Goods become part of or an accession or accessory to any other objects, products or mass).
- 7.2 Notwithstanding that ownership of any Goods may remain with Supplier, all risk of any loss, damage or deterioration in relation to any Goods supplied shall pass to the Customer on delivery.
- 7.3 Until legal and equitable title to any Goods supplied by Supplier passes to the Customer, the Customer will hold the Goods as Supplier's bailee and, if so required by Supplier, store separately those Goods in respect of which property is retained by Supplier and clearly identify such goods as the property of Supplier. The Goods must be kept in good condition.
- 7.4 Following delivery and until legal and equitable title in the Goods passes to the Customer, the Customer shall keep the goods insured in the name of the Supplier and the Customer for their respective rights and interests (in particular, the insurance shall cover the full replacement value of the Goods) and will produce to Supplier on demand such evidence as the Supplier may require to confirm the existence of such insurance. If the Customer defaults in the performance of its obligations under this clause, Supplier shall be entitled to, but shall not be obligated to, insure the Goods and the cost of effecting such insurance shall be payable by the Customer to Supplier on demand.
- 7.5 If any Goods are damaged or destroyed following delivery but prior to the legal and equitable title passing to the Customer, Supplier shall be entitled, without prejudice to any of its other rights or remedies, to receive all insurance proceeds which are payable in respect thereof (whether or not the purchase price of such goods has become payable) and the production of these Terms by Supplier shall be sufficient evidence of Supplier's right to receive payment of such insurance proceeds without the need for further enquiry by any person dealing with Supplier. Any such insurance proceeds shall be applied by Supplier as follows:
- 7.5.1 first, in payment of the purchase price of the Goods which are damaged or destroyed, if unpaid;
- 7.5.2 secondly, in payment of the outstanding purchase price of any other Goods and/or Services supplied to the Customer by Supplier, whether under these Terms (or Supplemental Terms) or otherwise;
- 7.5.3 thirdly, in payment of any other sums payable to Supplier by the Customer whether under these Terms (or Supplemental Terms) or otherwise; and
- 7.5.4 thereafter any balance shall be paid to the Customer.
- 7.6 Risk of any damage to the Goods arising out of any installation work carried out at the Customer's premises shall be borne by the Customer, except where such damage is caused by the negligence of Supplier, its agents or contractors in carrying out any such installation work in which event such damage shall be the responsibility of Supplier.
- 7.7 The Customer gives or procures irrevocable authority to Supplier to enter any premises occupied by the Customer, or any other party on

which Goods and Services are situated, at any reasonable time after default by the Customer, in order to remove and repossess any Goods, and to sell those Goods if necessary to recover unpaid monies, including in accordance with clause 11.1.3.

8 Security

- 8.1 Unless expressly defined in this section, terms used in these Terms which have a particular meaning in the Personal Property Securities Act 1999 ("PPSA"), shall have the same meaning as in the PPSA.
- 8.2 The Customer grants Supplier a security interest in the Goods supplied by Supplier to the Customer (either before or after the date of these Terms) and all proceeds of the Goods. The security interest is granted by the Customer to Supplier as security for all amounts owing by the Customer to Supplier and for the performance of the Customer's obligations under these Terms.
- 8.3 Supplier has the right to take possession of any Goods in the event of any unpaid amounts outstanding under this contract being overdue, in accordance with clause 11.1.3.
- 8.4 It is expressly agreed that:
- 8.4.1 to the fullest extent possible Supplier and the Customer contract out of the application of sections 114(1)(a), 133 and 134 of the PPSA;
- 8.4.2 the Customer's rights as debtor in sections 116, 120(2), 121, 125, 126, 127, 129 and 131 of the PPSA shall not apply to these Terms;
- 8.4.3 each security interest created by these Terms is continuing notwithstanding any immediate payments, settlement of accounts or anything else;
- 8.4.4 the requirement for Supplier to provide to the Customer a verification statement following the registration by Supplier of a financing statement or a financing change statement under section 148 of the PPSA is waived;
- 8.4.5 Supplier has the right to allocate payments;
- 8.4.6 any notice or other document to be served by the Customer on Supplier shall not be served by facsimile or electronic mail;
- 8.4.7 the Customer has received value from Supplier as at the date of first delivery of the Goods and the Customer has not agreed to postpone the time for the attachment of the security interest granted to Supplier under these Terms nor to subordinate such security interest in favour of any person;
- 8.4.8 no security interest created under these Terms is discharged, nor are the Customer's obligations affected by any amendment to, or the validity or enforceability of, or failure to enforce, these Terms, or anything else whatever that, but for this clause, may have discharged these Terms or affected the Customer's obligations under these Terms, and Supplier is not liable to the Customer in relation to any of these matters, even though the Customer's rights in subrogation or otherwise may be prejudiced as a result;
- 8.4.9 the Customer must not change the Customer's details (including name, address, facsimile, email trading name or business practice) without first notifying Supplier in writing 14 days prior to the date on which the name change becomes effective;
- 8.4.10 the Customer must not give Supplier a written demand, or allow any other person to give Supplier a written demand requiring Supplier to register a financing change statement or lodge a change demand or allow any other person to lodge a change demand, in each case in relation to a financing statement registered by Supplier under the PPSA;
- 8.4.11 the Customer must not enter into or accept, or allow any other person to enter into or accept, a financing change statement in relation to a financing statement registered by reference to it under the PPSA; and
- 8.4.12 the Customer must not consent to or enter into any agreement which permits any supplier or other person to register a security interest in respect of the Goods which ranks in priority to Supplier's rights as first ranking security holder.
- 8.5 All costs of enforcement under these Terms are chargeable to the Customer's account, including the actual legal fees and disbursements on a "solicitor and own client basis" of obtaining any orders required under the PPSA.
- 8.6 The Customer is to promptly execute documents and do such further acts as may be required by Supplier to ensure Supplier is paid all sums

due to Supplier and to otherwise protect the interests of Supplier under these Terms, including to register the security interest granted to Supplier under these Terms under the PPSA and to ensure the security interest is a first ranking perfected security interest over the Goods and any proceeds.

- 8.7 If the Goods subsequently become part of some other product or mass, then nothing in these Terms or the Supplemental Terms can be construed as limiting the application of sections 82 to 86 of the PPSA.

9 Use of Information

9.1 For the purposes of facilitating the administration of Supplier's business, the Customer authorises Supplier:

- 9.1.1 to request all information it may require about the Customer ("Customer Information") from the Customer and the Customer agrees to release such Customer Information to Supplier;
- 9.1.2 to collect Customer Information from any third parties and the Customer authorises those third parties to release such Customer Information to Supplier;
- 9.1.3 to hold all Customer Information given to Supplier by the Customer or any third party to Supplier; and
- 9.1.4 to use all Customer Information for any purpose related to facilitating the administration of Supplier business, including by giving any Customer Information to any other person to facilitate the collection of debts from the Customer.

9.2 The Customer Information will be collected, held and used on the condition that:

- 9.2.1 it will be held securely at Supplier's offices;
- 9.2.2 it will only be accessible by Supplier employees and agents who need access to it for the administration of Supplier business; and
- 9.2.3 the Customer may request access to and correction of any Customer Information at any time.

9.3 Supplier shall comply with its obligations under the Privacy Act 1993 with respect to all Customer Information collected pursuant to these Terms.

10 Confidentiality and intellectual property

10.1 Both parties agree to treat as confidential any information relating to the other party which by its nature, or by the circumstances of its disclosure, is or could reasonably be expected to be regarded as confidential ("Confidential Information"). Neither party will use or disclose any Confidential Information, except so far as may be reasonably necessary to enable that party to fulfil its obligations or exercise its rights under these Terms (and as permitted under clause 9.1) or as required by law.

10.2 All intellectual property in any Goods and/or Services that Supplier provides to the Customer remain the sole and exclusive property of Supplier and copyright in all drawings, specifications and other technical information provided by Supplier in connection with the provision of Goods and/or Services by Supplier is vested in Supplier.

10.3 The Customer warrants that the use by Supplier of any instructions or specifications supplied to Supplier by the Customer will not infringe the intellectual property rights of any other person and the Customer indemnifies Supplier against any losses, damages, liabilities or costs (on a solicitor client basis) that Supplier may suffer or incur in the event of any such infringement.

10.4 If any Goods are to be supplied to the Customer's design, the Customer warrants that the manufacture and supply of such goods by Supplier will not infringe any patent, copyright, registered design or other rights of any other person and the Customer agrees to indemnify Supplier against any liability incurred by Supplier including any costs and expenses in the event of any claim being made that the manufacture or supply of such goods by Supplier infringes any patent, copyright, registered design or other rights of any other person.

11 Default

11.1 If the Customer fails to make payment on any invoice when due (whether under contract or otherwise), is in default in the performance of its obligations under these Terms or any Supplemental Terms, becomes insolvent, commits an act of bankruptcy, is adjudicated bankrupt or makes any composition or arrangement with creditors, does any act which would render it liable to be wound up, goes into liquidation (whether compulsory or voluntary other than for the purpose of and followed by amalgamation or reconstruction) or has a receiver

appointed of any part of its business or assets then, without prejudice to any other rights Supplier has at law or in equity, Supplier reserves the right, and the Customer agrees that Supplier is entitled (to the extent permitted by law):

11.1.1 to treat all sums due or to become due from the Customer as immediately due and payable;

11.1.2 to immediately cancel or suspend the delivery of Goods and the provision of Services which remain unperformed;

11.1.3 by its agents, without prior written notice, to enter onto the Customer's premises where the Goods may be installed or stored and to search for and remove and take possession of any Goods and Supplier shall not be liable in contract, tort (including negligence) or otherwise, for any costs, losses, damages or expenses incurred by the Customer or any third party, and the Customer indemnifies Supplier against any liability Supplier may have to any third party (including, without limitation, legal costs on a solicitor-client basis), as a result of exercising Supplier's rights under this clause 11.1.3; and

11.1.4 to resell or dispose of any or all of the Goods noted in clause 11.1.3 and apply the proceeds in or towards payment of all sums due and all other moneys owing to Supplier by the Customer in such a manner and generally on such terms and conditions as it thinks fit (subject to any requirements under law).

11.2 Any expenses, disbursements and legal costs incurred by Supplier in the enforcement of any rights contained in these Terms for example, recovering any outstanding moneys owed by the Customer, shall be paid by the Customer upon demand, including, but not limited to, any reasonable solicitor's fees or debt collection agency fees and commissions.

11.3 For the avoidance of doubt, nothing in these Terms and Supplemental Terms will have the effect of contracting out of any provision of the Credit (Repossession) Act 1997 if it applies.

12 Exclusion and Limitation of Liability

12.1 Except as expressly provided in these Terms, all warranties, undertakings, inducements, descriptions, conditions (including, but not limited to fitness or suitability for purpose), tolerance to any conditions, merchantability or otherwise or representations whether express, implied, statutory or otherwise relating in any way to the Goods, Services or to these Terms are, to the maximum extent permitted by law, expressly excluded.

12.2 No agent or representative of Supplier is authorised to make any representation, warranties, conditions or agreement not expressly confirmed by Supplier in writing and Supplier is not in any way bound by any such unauthorised statements nor can any such statements be taken to form an agreement or part of an agreement with Supplier collateral to this agreement.

12.3 If the Customer is acquiring Goods and/or Services in trade, where applicable and to the extent permitted by law, the application of the United Nations Convention on Contracts for the International Sale of Goods (known as the Vienna Sales Convention 1980) and the Sale of Goods (United Nations Convention) Act 1994 are excluded.

12.4 If the Customer is acquiring Goods and/or Services in trade, for the purposes of section 5D of the FTA and section 43 of the CGA, Supplier and the Customer acknowledge and agree that, to the extent permitted by law:

12.4.1 the products, Goods and/or Services provided to the Customer under or in connection with these Terms are being provided and acquired in trade;

12.4.2 to the extent that the FTA and/or the CGA applies to the sale of Goods and/or Services to the Customer under these Terms, in respect of all matters under or in connection with these Terms, the parties are contracting out of the CGA and sections 9, 12A and 13 of the FTA;

12.4.3 the parties have each had an opportunity to receive advice from a lawyer prior to contracting under these Terms; and

12.4.4 it is fair and reasonable for the parties to be bound by this clause 12.4.

12.5 Subject to clause 12.6, and except where applicable law, including the FTA (if applicable), expressly requires otherwise, Supplier is not liable in any event for:

12.5.1 any special, indirect or consequential damage, loss or injury of any kind, or for any loss of business, profit, data or anticipated

- savings, suffered by the Customer or any other person, however caused, even if Supplier had been advised of the possibility of such damage, loss or injury, or arising directly or indirectly from any breach of the Supplier's obligations arising under or in connection with these Terms or from any cancellation of these Terms or from any negligence, misrepresentation or other act or omission on the part of Supplier its agents or contractors; or
- 12.5.2 any loss, damage or injury caused to the Customer's agents, contractors, customers, visitors, tenants, trespassers or other persons whomsoever (whether similar to the foregoing or not) arising as aforesaid. The Customer shall indemnify Supplier against any claim by any of the foregoing persons in respect of any loss, damage or injury arising as aforesaid.
- 12.6 Only where the Customer is acquiring Goods and/or Services other than in trade, neither the Customer nor the Supplier will be liable to the other for any special, indirect or consequential damage, loss or injury of any kind, or for any loss of business, profit, data or anticipated savings, including any loss or damage of the type referred to at clause 12.5.1 above.
- 12.7 Where the Terms and/or any Supplemental Terms provide for any testing or commissioning procedure or any other acceptance procedure in respect of the Goods, no claim shall be made by the Customer if the Goods fail to comply with the requirements of these Terms at any time after the successful completion of such testing, commissioning or acceptance procedures, subject however to the warranty in respect of defective materials or workmanship.
- 12.8 Insofar as Supplier may be liable, the maximum liability of Supplier, whether in contract, tort (including negligence), equity, under statute or otherwise for any loss, damage or injury arising directly or indirectly from any breach of Supplier's obligations under these Terms relating specifically to the supply of the Goods and/or Services is, except where applicable law expressly requires otherwise, limited, at the option of Supplier, to Supplier undertaking the actions set out in clause 12.9 or 12.10 (as applicable).
- 12.9 If the breach giving rise to Supplier's liability relates to Goods then Supplier's liability is limited to:
- 12.9.1 the replacement of the Goods or the supply of equivalent Goods;
- 12.9.2 the repair of such Goods (at such place as Supplier may specify and the Customer shall be responsible for shipment of the defective Goods to and from the place or places so specified);
- 12.9.3 the payment of the cost of replacing the Goods or of acquiring equivalent Goods; or
- 12.9.4 the payment of the cost of having the Goods repaired.
- Notwithstanding any other provision to the contrary contained in clause 12.9, and only if the Customer is in trade, the obligations of Supplier pursuant to clause 12.9 shall be limited to the replacement or repair of defective parts only and shall not extend to the costs of labour, services, removal, installation or analyse, which costs shall be to the account of the Customer.
- 12.10 If the breach giving rise to Supplier's liability relates to Services then Supplier's liability is limited to:
- 12.10.1 the supplying of the Services again; or
- 12.10.2 the payment of the cost of having the Services supplied again.
- 12.11 Notwithstanding the above, Supplier shall not be required to take any action under clauses 12.9 and/or 12.10 (as applicable):
- 12.11.1 if any attempt to repair the defective Goods and/or rectify the provisions of the Services is made by any person or persons not authorised by Supplier to effect such repairs or rectification;
- 12.11.2 if the defective Goods have been modified without the approval of Supplier;
- 12.11.3 if the defective Goods have not been stored, maintained, installed, commissioned or operated in a proper manner; or
- 12.11.4 if the Customer is in default in relation to any payment or in the performance of any obligation under these Terms.
- 12.12 Notwithstanding anything hereinbefore contained in this section 12 or contained elsewhere in these Terms the total liability of Supplier (and, if the Customer is not in trade, the Customer), whether in contract or pursuant to any cancellation of these Terms or in tort or otherwise howsoever, in respect of all claims for loss, damage or injury arising from breach of any of Supplier's (or Customer's, if applicable) obligations arising under or in connection with these Terms, from any cancellation of these Terms or from any negligence, misrepresentation or other act or omission on the part of these Terms, its servants, agents or contractors (including, without in any way limiting the foregoing, any loss, damage or injury arising as aforesaid from the carrying out of any Services) shall not in aggregate exceed the lesser of the amount paid by the Customer under these Terms or \$100,000.
- 12.13 If the Customer is acquiring Goods and/or Services in trade, Supplier is not liable for any failure or delay in performing an obligation in these Terms if it is due to a cause reasonably beyond its control. For completeness, this includes but is not limited to, failure to deliver or to carry out any installation or any commissioning or testing of the Goods or for any delay in delivery or in carrying out any installation or any commissioning or testing of the Goods or any failure in the provision of the Services where such failure or delay is occasioned by strike, combination of workmen, lockout, difficulty in procuring components or materials, shortage of labour, lack of skilled labour, delays in transit failure or delay by the Customer in performing any of his obligations hereunder, failure or delays by suppliers or subcontractors, legislative governmental or other prohibitions or restrictions, fire, flood, hostilities, commotions or other causes whatsoever (whether similar in nature or not to the foregoing) beyond Supplier's reasonable control.
- 12.14 If the Customer is not acquiring Goods and/or Services in trade, neither party is liable for any failure or delay in performing an obligation in these Terms if it is due to a cause reasonably beyond its control. For completeness, this includes but is not limited to, failure to deliver or to carry out any installation or any commissioning or testing of the Goods or for any delay in delivery or in carrying out any installation or any commissioning or testing of the Goods or any failure in the provision of the Services where such failure or delay is occasioned by strike, combination of workmen, lockout, difficulty in procuring components or materials, shortage of labour, lack of skilled labour, delays in transit failure or delay by the Customer in performing any of his obligations hereunder, failure or delays by suppliers or subcontractors, legislative governmental or other prohibitions or restrictions, fire, flood, hostilities, commotions or other causes whatsoever (whether similar in nature or not to the foregoing) beyond Supplier's reasonable control.
- 13 Dispute**
- 13.1 In the event of any dispute, difference or question arising out of, or in connection with, these Terms (a dispute) each party must:
- 13.1.1 use its best efforts to resolve the dispute through good faith negotiations and informal dispute resolution techniques;
- 13.1.2 not commence any proceedings relating to the dispute unless it has complied with clauses 13.2 to 13.4 (inclusive), as applicable; and
- 13.1.3 continue to perform its obligations under these Terms as far as possible as if the dispute had not arisen, pending final settlement of the dispute.
- 13.2 Each party will advise the other party of a dispute on the day that the dispute arises. The parties will use their best efforts to resolve the dispute in accordance with clause 13.1.1. If the dispute is not resolved within 10 days the dispute will be escalated within the respective organisations to be resolved within a further 10 days.
- 13.3 If the dispute is not resolved under clause 13.2 then, unless otherwise agreed between the parties, either party may refer the dispute to expert determination by written notice to the other party.
- 13.4 A dispute referred to expert determination will be conducted in accordance with the following process:
- 13.4.1 the expert (Expert) will be appointed by agreement between the parties or, failing agreement within 10 days following the date of referral to expert, by the President (or his or her nominee) of the Arbitrators and Mediators Institute of New Zealand who will be requested to appoint an expert who is suitably qualified and experienced in relation to the subject matter of the dispute;
- 13.4.2 the Expert will act as an expert and agree to act on a confidential basis, and not as an arbitrator, and referral of the dispute to the expert will not be a submission to arbitration for the purposes of the Arbitration Act 1996 (Arbitration Act) and the provisions of the Arbitration Act will not govern that referral;

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- 13.4.3 within 10 days of the Expert accepting the appointment, the parties will send written submissions on the dispute to the Expert and to each other and, within five days of receiving the other party's submission, will submit any written replies they wish to make to the Expert and to each other;
- 13.4.4 the parties will give the Expert all necessary assistance that the Expert reasonably requires to determine the dispute;
- 13.4.5 the Expert will, unless the parties otherwise agree, be directed to deliver a written determination to the parties within 10 days of having received the parties' written submissions under clause 13.4.3;
- 13.4.6 the Expert will have the power to compel either party to produce any information material to the dispute which that party has in its possession and which that party could be required to produce on discovery in a court proceeding to the Expert and to the other party;
- 13.4.7 the Expert's decision will be final and binding and, to the extent it is lawful to do so, the parties waive any right of appeal or review; and
- 13.4.8 the Expert's fees will be at the parties' cost, and the Expert will determine the proportion of those fees that each party will be required to pay, having regard to (amongst other things) the conduct of the parties.
- 13.5 Nothing in this clause 13 will preclude either party from taking immediate steps to seek urgent relief before a New Zealand Court.
- 13.6 If the Customer wishes to make a complaint, they must contact Supplier by phone, email or by completing the online Contact form on the website at <http://www.aquaheat.co.nz>

Each party shall, at its own expense and when requested by another party, promptly sign and deliver, execute, procure, pass and do all such further document, acts, matters, resolutions and things as may be necessary or desirable for effecting the transactions contemplated by this Terms.

14 General

- 14.1 These Terms are intended to be binding and endure to the benefit of Supplier and Supplier's successors and assigns. The Customer must not assign or transfer any of their rights or obligations under these Terms to any other person without the prior written consent of Supplier (which consent shall not be unreasonably withheld). Any assignment, transfer or novation, or purported assignment, transfer or novation, which does not comply with this clause 14.1 is (and shall be treated as) void.
- 14.2 These Terms are subject to, governed by and are to be construed in accordance with the laws of New Zealand. Each party irrevocably submits to the non-exclusive jurisdiction of the New Zealand courts.
- 14.3 If any provision of these Terms is held to be illegal, invalid, unenforceable or of no effect then, to the extent permitted by law the provision or provisions giving rise to such illegality, invalidity, unenforceability or lack of effect shall be severed from these Terms and the remaining provisions of these Terms shall remain in full force and effect.
- 14.4 In these Terms:
- 14.4.1 a reference to a "day" in these Terms means a day other than a Saturday or Sunday on which trading banks are normally open for business in the city or region in which the Goods and/or Services are being, or are to be, delivered;
- 14.4.2 references to "including" shall be construed as "including, without limitation";
- 14.4.3 these Terms must not be construed adversely to a party just because that party prepared them or caused them to be prepared;
- 14.4.4 a word importing the singular includes the plural and vice versa; and
- 14.4.5 a reference to a statute is a reference to a New Zealand statute and includes all regulations under and amendments to that statute and any statute passed in substitution for that statute or incorporating any of its provisions to the extent that they are incorporated.
- 14.5 If, at any time, Supplier does not, or fails to, enforce, exercise, or is delayed in enforcing or exercising, any right, powers or exemptions contained with these Terms, or grants the Customer time or any other indulgence, Supplier will not be construed as having waived that right, power or exemption or its rights to later enforce that right, power or exemption or any subsequent or continuing right, power or exemption (unless such waiver is in writing by Supplier and signed by an authorised individual).