

# LOTUS COMMERCIAL PTY LTD TERMS AND CONDITIONS

These Terms and Conditions are incorporated into every supply of goods and/or services to the Customer by Lotus Commercial Pty Ltd ABN 83 002 694 608. By instructing Lotus Commercial to provide any goods or services after receiving a copy of these Terms and Conditions (or after receiving a document into which these Terms and Conditions are incorporated by reference), the Customer agrees to be bound by these Terms and Conditions.

## IMPORTANT NOTES:

While the Customer will be appointing Lotus Commercial to carry out the Services to the exhaust equipment at the Service Address(es), the Customer acknowledges that it must continue to monitor, clean and service the equipment in accordance with the requirements in these Terms and Conditions and the Service Guide.

These Terms and Conditions include important terms such as **automatic renewal** of the contract term, **indemnities** and **limitations of liability**.

## DEFINITIONS

**Agreement** means the Terms and Conditions, together with the Quotation, as may be amended from time to time by Lotus Commercial.

**Authorised Person** means the individual(s) listed in the Quotation authorised by the Customer to request changes or amendments to the agreed Services and Quotation.

**Claim** means any cost, expense, action, proceeding, claim, demand, remedy, damage or loss.

**Customer** means the individual or entity referred to in the Quotation.

**Further Term** is defined in clause 2(b).

**Induction and Compliance Requirements** means the requirements with which Lotus Commercial personnel or representatives must comply in order to gain access to the Service Address and perform the Services.

**Lotus Commercial** means Lotus Commercial Pty Ltd ABN 83 002 694 608.

**Lotus Commercial Pool Filter** means any exchange filter supplied by Lotus Commercial, as described in the Quotation.

**Proof of Service Report** means the record kept by Lotus Commercial of the attendance on any Service Address in accordance with this Agreement.

**Quotation** means a quotation provided by Lotus Commercial to the Customer.

**Service Address** means each address of the Customer listed in the Quotation.

**Service Frequency** means the recommended service frequency set out in the Quotation.

**Service Guide** means the Lotus Commercial document listing industry best practice standards and guidelines and available on [www.lotuscommercial.com.au](http://www.lotuscommercial.com.au).

**Services** means all services provided by Lotus Commercial to the Customer, including any services described in the Quotation.

**Term** means 12 months, unless otherwise stated in the Quotation and/or acceptance of the proposal.

**Terms and Conditions** means this document.

## 1. QUOTATIONS AND AGREEMENT

- (a) All Quotations are made on and subject to these Terms and Conditions.
- (b) Unless expressly agreed by Lotus Commercial, previous dealings between Lotus Commercial and any Customer will not vary or replace these Terms and Conditions.
- (c) Lotus Commercial may withdraw or vary a Quotation at any time before the Customer accepts the Quotation in writing.
- (d) In providing a Quotation to the Customer, Lotus Commercial will rely on the accuracy and completeness of all information provided by Customer. If any such information is or becomes inaccurate or incomplete, or otherwise changes, Lotus Commercial reserves the right to vary a Quotation and the Customer agrees to be bound by any such varied Quotation.
- (e) This Agreement prevails over any terms and conditions of trade, purchase order, invoice or any other document of the Customer whether or not any inconsistency arises.

## 2. TERM

- (a) This Agreement will commence on the date that Lotus Commercial agrees to provide the Services referred to in a Quotation accepted by the Customer, and will continue for the Term and any Further Term unless otherwise terminated in accordance with this Agreement.
- (b) At the end of the Term and any further term, this Agreement will automatically renew for successive 12 month terms (each, a **Further Term**) until terminated in accordance with clause 13 of this Agreement (including under clause 13(a) which allows for termination on 30 days' notice during any Further Term).
- (c) At renewal, the Service rates will be updated in accordance with the highest of the following indexes: CPI (Consumer Price Index) or WPI (Wage Price Index), as published by the Australia Bureau of Statistics at the time of renewal.

## 3. LOTUS COMMERCIAL' OBLIGATIONS

- (a) Lotus Commercial will provide the Services in a proper and workmanlike manner at each Service Address.
- (b) Lotus Commercial will use its reasonable endeavours to provide the Services in accordance with the Service Frequency.

## 4. CUSTOMER'S OBLIGATIONS

- (a) The Customer must provide Lotus Commercial, its employees, agents and contractors with full access to every Service Address and the relevant equipment upon which the Services will be performed at the time set out in the Quotation.
- (b) The Customer must provide Lotus Commercial with complete and accurate information regarding the type and frequency of activities carried out at each Service Address. The Customer acknowledges that Lotus Commercial will rely on this information in recommending a Service Frequency.

## LOTUS COMMERCIAL PTY LTD TERMS AND CONDITIONS

- (c) While Lotus Commercial may recommend a frequency of Services, and send reminders and other notifications to the Customer from time to time, the Customer is solely responsible to arrange for the Services and to determine its obligations pursuant to all occupational health and safety, food handling, fire safety and any other regulatory requirements and obligations.
- (d) The Customer, or the Customer's agents, employees, or contractors must, on request by Lotus Commercial, sign any document to verify that Lotus Commercial has attended a Service Address on any date.

### 5. MONITORING AND SERVICE GUIDE

- (a) The Customer acknowledges that the equipment at each Service Address must be regularly monitored, cleaned and serviced in accordance with the Service Guide to check that the Service Frequency at all times remains appropriate for each Service Address. The Customer undertakes to carry out such regular monitoring, cleaning and servicing during the Term.
- (b) The Customer will immediately notify Lotus Commercial: (i) of any excessive or increased deposits of grease or other combustible material on the equipment at each Service Address; and (ii) if the Customer's monitoring, cleaning and servicing of the equipment at the Service Address(es) indicates that the Service Frequency may need to be increased.

### 6. SERVICES

- (a) Lotus Commercial is entitled, acting reasonably, to refuse to perform the Services if: (i) Lotus Commercial cannot gain access to a Service Address; or (ii) the Customer, its representatives or any other party denies or unreasonably delays permission for Lotus Commercial to perform the Services; or (iii) Lotus Commercial, or its employees, agents or contractors, decide, that it would be unsafe to perform the Services.
- (b) If, as a result of an act or omission by the Customer, Lotus Commercial refuses to perform the Services under clause (a) above, the Customer must, without any, set off, credit or reduction, make payment to Lotus Commercial in accordance with the Quotation for the Services that would have been provided had the circumstances in clause (a) above not arisen.
- (c) If the Customer wishes to re-schedule the service date for Lotus Commercial to perform any of the Services, then an Authorised Person must provide Lotus Commercial with not less than 2 business days' notice in writing of the proposed change. If the Customer does not provide Lotus Commercial with 2 business days' notice in writing, the Customer will be deemed to have received the Services on the service date and the Customer must pay Lotus Commercial in accordance with the Quotation, without any, setoff, credit or reduction.
- (d) The Services Frequency does not constitute a promise or representation by Lotus Commercial as to intervals at which Lotus Commercial will provide any Service to the Customer.
- (e) If the Customer wishes to increase or decrease the Service Frequency, an Authorised Person must submit a written request to Lotus Commercial.
- (f) If the Customer wishes to decrease the Service Frequency, and Lotus Commercial reasonably believes that such decrease may result in excessive soiling of the Commercial, Lotus Commercial may increase its rates for the Services. The Customer will not make any Claim against Lotus Commercial related to any matter resulting directly/or indirectly from a decrease to the Service Frequency at the Customer's request (except to the extent that Lotus Commercial has caused or contributed to such Claim).

### 7. CUSTOMER WARRANTIES

The Customer warrants that:

- (a) it has read and understood this Agreement;
- (b) it has supplied Lotus Commercial with accurate and complete information about the Induction and Compliance Requirements;
- (c) all information supplied by or on behalf of the Customer to Lotus Commercial in connection with the Services is true and accurate and not misleading;
- (d) it has not relied on any representation or statement made by or on behalf of Lotus Commercial, unless clearly and expressly stated in this Agreement; and
- (e) the supply of the Services by Lotus Commercial to the Customer will not make Lotus Commercial liable to any Claim.

The Customer acknowledges that in entering into this Agreement, Lotus Commercial has relied on the above warranties and on all information supplied by or on behalf of the Customer to Lotus Commercial.

### 8. COMMERCIAL

- (a) If the Customer requests supply of Lotus Commercial Pool Commercial, the Customer acknowledges that any Commercial supplied by Lotus Commercial in exchange for the Customer's Commercial (**Customer Commercial**) need not be identical, and need only reasonably correspond with the classification, condition and number of the Customer Commercial.
- (b) Upon termination of this Agreement, the Customer shall retain ownership of any Lotus Commercial Pool Filter installed at the Service Address immediately prior to termination, and Lotus Commercial will retain ownership of any Commercial removed from the Service Premises by Lotus Commercial.

### 9. RECORDS AND NOTICES

If requested by the Customer:

- (a) Lotus Commercial will provide the Customer with Proof of Service Reports, but subject to payment for Services being up-to-date.
- (b) Lotus Commercial will provide the Customer with a cleaning service certificate within 7 days of receiving payment for the Services

### 10. PAYMENT & RATES

- (a) The Customer must pay for the Services at the rates set out in the Quotation, and as otherwise required under this Agreement.

## LOTUS COMMERCIAL PTY LTD TERMS AND CONDITIONS

- (b) If the cost to Lotus Commercial of complying with Induction and Compliance Requirements increases before or during provision of the Services, Lotus Commercial reserves the right to increase the cost of the Services on account of any such increase, and the Customer agrees to make payment for such increase.
- (c) Lotus Commercial reserves the right to charge the Customer for reimbursement of all credit card fees, bank fees, merchant fees and any other similar fee.

### 11. GST

- (a) On or after the provision of the Services, Lotus Commercial must issue the Customer with a tax invoice for the Services.
- (b) Each tax invoice must be in a form and substance that will constitute a tax invoice (as defined in *A New Tax System (Goods and Services Tax) Act 1999* (Cth)).
- (c) If GST (as defined in *A New Tax System (Goods and Services Tax) Act 1999* (Cth)) is imposed on any supply made under or in connection with these terms and conditions (a taxable supply) the party obliged to pay for the taxable supply will pay additional consideration of an amount equal to the GST payable on or for the taxable supply.

### 12. DISPUTES

If a dispute arises in connection with the supply of any Services or otherwise, the Customer agrees to immediately pay to Lotus Commercial any undisputed amount in relation to the Services performed.

### 13. TERMINATION

- (a) Either party may terminate this Agreement during any Further Term by giving the other party 30 days written notice.
- (b) Without limiting or otherwise prejudicing any other rights under this Agreement or at law, the Customer may immediately terminate this Agreement by notice in writing if:
  - (i) Lotus Commercial commits a material breach (other than a breach causing no material harm) of any material provision of this Agreement and fails to remedy the breach within 30 days of receiving written notice to do so; or
  - (ii) Lotus Commercial becomes insolvent, enters into liquidation or receivership, becomes subject to any form of external administration, or makes a composition or arrangement with its creditors generally.
- (c) Without limiting or otherwise prejudicing any other rights under this Agreement or at law, Lotus Commercial may immediately terminate this Agreement by notice in writing and refuse to supply the Services to the Customer if any of the following occur:
  - (i) circumstances entitling Lotus Commercial to refuse to provide Services under clause 6(a) occur more than once;
  - (ii) any warranty given by the Customer is or becomes false or materially inaccurate;
  - (iii) Lotus Commercial does not accept any proposed changes to the Service Frequency requested by the Customer, and the Customer refuses to continue with the existing Service Frequency;
  - (iv) a payment is rejected under any authority for direct debit or credit card payment provided by the Customer to Lotus Commercial;
  - (v) the Customer ceases, suspends or threatens to cease or suspend the conduct of its business or disposes of or threatens to dispose of its assets other than in the ordinary course of business;
  - (vi) the Customer is unable to, or states that it is unable, or fails to pay its debts as and when they fall due;
  - (vii) the Customer is a company and passes a resolution to be wound up or otherwise is the subject of a winding up application or liquidation or a receiver, manager, administrator is appointed over any of the buyer or its assets;
  - (viii) the Customer commits an act of bankruptcy or has a controller or trustee appointed in respect of the Customer's estate or any part of the Customer's property or assets; or
  - (ix) Lotus Commercial believes, acting reasonably, that any of the above will, or is likely to, occur.
- (d) If a party provides notice of termination for any reason, the Customer acknowledges that this Agreement continues until such relevant notice period has expired and agrees that Lotus Commercial is entitled to payment for the Services performed during that notice period, or scheduled during that notice period but not performed through no fault of Lotus Commercial.
- (e) **Early termination.** If the Customer terminates this Agreement prior to the final date of the first Term, Lotus Commercial will be entitled to an early termination fee equivalent to 20% of the annual value of Service rates as per the accepted Quotation.

### 14. INDEMNITY

- (a) Subject to clause 14(b), the Customer will indemnify Lotus Commercial (and keep Lotus Commercial indemnified) against all fines, penalties and Claims (including legal and any other expenses) in connection with any breach of this Agreement by the Customer.
- (b) The amount of the indemnity under clause 14(a) will be reduced to the extent that Lotus Commercial could, by taking reasonable steps, have avoided or mitigated any loss or damage for which Lotus Commercial claims an indemnity, provided that the amount of the indemnity is also increased by the cost of the taking of any such reasonable steps.
- (c) Without limiting the liability of the Customer under the indemnity above, Lotus Commercial may at its sole discretion by itself or in conjunction with the Customer defend, settle or compound any Claim brought or made against it by any person in connection with any breach of this Agreement by the Customer and the Customer agrees that the indemnity extends to any cost or expense incurred by Lotus Commercial in conducting that defence or in settling or compounding the Claim.
- (d) It is not necessary for any cost or expense to be incurred before an indemnity is enforced under this Agreement.

### 15. LIMITATION OF LIABILITY

## LOTUS COMMERCIAL PTY LTD TERMS AND CONDITIONS

- (a) Any representation, warranty, condition or undertaking that would be implied in this Agreement by legislation, common law, equity, trade, custom or usage is excluded to the fullest extent permitted by law.
- (b) If any statute implies any term, condition or warranty, and that statute prohibits provisions in a contract excluding or modifying the application of, exercise of, or liability under, such a term, condition or warranty, then that term, condition or warranty will be taken to be included. However, the liability of Lotus Commercial for any breach of such a term, condition or warranty will be limited, if permitted by the statute, at the option of Lotus Commercial, to any one or more of the following:
  - (i) if the breach relates to goods:
    - (A) replacing the goods, supplying equivalent goods or repairing the goods; or
    - (B) to the extent required by the relevant statute, paying the cost of replacing the goods, acquiring equivalent goods or having the goods repaired; and
  - (ii) if the breach relates to Services:
    - (A) re-supplying the Services; or
    - (B) to the extent required by the relevant statute, paying the cost of re-supplying the services.
- (c) The Customer is solely responsible for determining the appropriate frequency of Services required at the Service Address, and Lotus Commercial will not be liable to the Customer for any loss or damage suffered because or in relation to the Service Frequency.
- (d) Subject to this clause 15, a party will not be liable to the other party for:
  - (i) any losses or damages of any kind caused by or resulting from any wrongful, wilful or negligent act or omission of the other party, or any of its officers, employees, agents or contractors; or
  - (ii) any indirect, incidental, special or consequential damages, including loss of profits or anticipated loss.
- (e) Subject to this clause 15, the maximum aggregate liability of Lotus Commercial for all Claims or other liabilities arising under or in relation to this Agreement, including liability for breach, in negligence or in tort or for any other common law or statutory action, is limited to the sum of the amounts paid by the Customer to Lotus Commercial under this Agreement.

### 16. CONSUMER GUARANTEES

- (a) Consumer legislation contains certain guarantees for the supply of goods or services that cannot be excluded, restricted or modified, such as: (i) non-excludable guarantees that goods will be of acceptable quality and fit for the purpose for which they are commonly acquired or for a purpose made known to Lotus Commercial and based on which the goods are supplied; and (ii) non-excludable warranties that services will be provided with due care and skill and will be fit for the purpose for which they are commonly acquired or for a purpose made known to Lotus Commercial and based on which the services are supplied.
- (b) Nothing in this Agreement is intended to exclude or restrict the application of any guarantees provided under consumer legislation.

### 17. GENERAL

- (a) **(Whole Agreement)** This Agreement is the entire agreement in relation to the Services, and supersedes and excludes all prior and other discussions, representations (contractual or otherwise) and arrangements relating to the supply of Services.
- (b) **(Delegation and Subcontracting)** Lotus Commercial may delegate the performance of the work necessary to complete the Services by engaging or appointing employees or contractors suitably qualified to perform the Services.
- (c) **(Privacy)** The Customer consents to the terms of the Privacy Policy of Lotus Commercial available at [www.lotuscommercial.com.au](http://www.lotuscommercial.com.au).
- (d) **(Notices)** All notices and consents will be given in writing by personal service, post, facsimile transmission or email at the addresses of the parties as set out in the Quotation or to such other address as a party may designate by written notice.
- (e) **(Assignment)** This Agreement is binding upon and for the benefit of the successors in title of the parties but must not be assigned by the Customer without the prior written consent of Lotus Commercial. Lotus Commercial may assign its rights and obligations under this Agreement at its sole discretion.
- (f) **(Governing Law)** This Agreement is governed and construed in accordance with the laws for the time being in force in the state in which the Services are performed and the parties agree to the jurisdiction of the Courts and Tribunals of that State.
- (g) **(Severance)** To the extent that any provision of this Agreement is found by any court or competent authority to be invalid, unlawful or unenforceable in any jurisdiction, that provision will be deemed not to be a part of this Agreement, it will not affect the enforceability of the remainder of this Agreement nor will it affect the validity, lawfulness or enforceability of that provision in any other jurisdiction.