

**TERMS OF SUPPLY**  
**AIR LIQUIDE NEW ZEALAND LIMITED**  
**DOCUMENT REFERENCE 2008/1**

**PART 1 - GENERAL**

**1. WORDS USED IN THESE TERMS**

Words used in these terms shall have the following meanings:

- “Air Liquide”** means Air Liquide New Zealand Limited, its successors and assigns.  
**“ALNZ”** means Air Liquide New Zealand Limited, its successors and assigns.  
**“Buyer”** means the person purchasing the goods and services from Air Liquide pursuant to this contract, including that person’s successors and assigns.  
**“Buyer’s Premises”** means the premises on which Goods purchased or hired by the Buyer are located from time to time.  
**“Claim”** includes any claim:
- for loss of profits; or
  - for any consequential, indirect or special loss, damage or injury of any kind suffered by any person arising directly or indirectly from:
    - any breach of Air Liquide’s obligations under this contract; or
    - any cancellation of this contract; or
    - any negligence, misrepresentation or other act or omission by Air Liquide or its employees, agents or contractors; or
  - for compensation, demand, remedy, liability or action.

**“Contract”** means these terms themselves together with any and every invoice or other document evidencing or describing, whether by item or kind or otherwise, any **Goods**.

**“Event of Default”** means an event where:

- any of the Goods are at risk; or
- the Buyer fails to comply with these terms or the terms of any other agreement with Air Liquide; or
- the Buyer commits an act of bankruptcy; or
- the Buyer enters into any composition or arrangement with its creditors; or
- if the Buyer is a company;
  - the Buyer does anything which would make it liable to be put into liquidation; or
  - a resolution is passed or proceedings commenced for the liquidation of the Buyer; or
  - a receiver or statutory or official manager is appointed over all or any of the Buyer’s assets.

**“Goods”** means all gas, gas cylinders and gas dispensing equipment and all other goods or other property which, in each case, are supplied whether or not described by item or kind that enables them to be identified; by Air Liquide to the Buyer and, for the avoidance of doubt, in each case includes all such goods and property so supplied which are or comprise inventory of the buyer.

**“PPSA”** means the Personal Property Securities Act 1999.

**“Services”** means any services provided in connection with the supply of Goods, including services relating to the installation and maintenance of any Goods.

1.1 Singular words include the plural and vice versa. References to clauses, sections or schedules are references to clauses, sections or schedules of this agreement.

1.2 The terms “after-acquired property”, “at risk”, “default”, “inventory”, “lease”, “perfected”, “proceeds”, “purchase money security interest”, “rights”, “security interest” and “sell” have the respective meanings given to them under, or in the context of, the PPSA.

**2. PRICE**

2.1 The price shall be increased by the amount of any GST and other taxes and duties which may be applicable.

2.2 The price shall be that quoted to the Buyer by an authorised agent or representative of Air Liquide, or where no quotation is given, the list price in effect at the date of delivery.

2.3 Any quotation given by Air Liquide shall remain valid for 14 days after the date upon which it is given, unless otherwise agreed by Air Liquide.

2.4 The Buyer is bound to pay the price from the time that an order is placed with Air Liquide. No order may be cancelled without Air Liquide’s prior approval, and then only upon such terms as Air Liquide may specify.

**3. PAYMENT**

3.1 Where the Buyer has a credit facility with Air Liquide at the time that an order is placed, payment is due by the 20th of the month following the date of despatch (unless otherwise agreed in writing). In all other circumstances payment is due on delivery.

3.2 The Buyer may not withhold payment or make any deductions from any moneys owing to Air Liquide without Air Liquide’s prior written consent.

**4. DELIVERY OF GOODS**

4.1 Any time stated for delivery is an estimate only. Air Liquide is not liable for any delay in delivery.

4.2 The Buyer shall pay all costs of delivery unless otherwise agreed.

4.3 Air Liquide may deliver Goods and Services by instalments, and each instalment shall be treated as a separate contract governed by these terms.

- 4.4 If Air Liquide fails to deliver or makes defective delivery of part of the Goods or Services ordered, this does not entitle the Buyer to cancel the contract.
- 4.5 Delivery is deemed to have taken place at the time Goods are unloaded at the Buyer's Premises.
- 4.6 The Buyer shall ensure that Air Liquide has safe and proper access to the Buyer's Premises for the purpose of the delivery of Goods and the provision of Services. The Buyer shall be liable for any loss or damage arising from the Buyer's failure to provide safe and proper access.
- 4.7 Air Liquide shall not be responsible for damage to the Buyer's Premises in the course of delivery, unless such damage is caused by the wilful misconduct of Air Liquide or its servants or agents.
- 4.8 The Buyer shall provide adequate labour and equipment for the loading and unloading of Goods at the Buyer's Premises if requested.
- 4.9 Air Liquide reserves the right to subcontract the supply and/or delivery of the Goods and Services.

## 5. FORCE MAJEURE

In the event of any delay in the delivery or non-delivery of the goods or Services, or non-performance, arising from wars, strikes, lockouts, labour disturbances, accidents, government restrictions, acts of god, manufacturer delays or defaults, or any cause beyond Air Liquide's reasonable control then Air Liquide shall:

- (i) be entitled to cancel or suspend delivery; and
- (ii) not be liable to the Buyer for any delay or non-delivery.

## 6. RISK AND SECURITY INTEREST

6.1 Risk of any loss, damage or deterioration of or to Goods passes to the Buyer on delivery.

6.2 The Buyer grants a security interest to Air Liquide in each and every part of the Goods as security for payment of that part and of each other part or parts of the Goods and for any other amounts owing by the Buyer to Air Liquide from time to time, and for the performance by the Buyer of all the Buyer's other obligations to Air Liquide from time to time, ("Buyer's indebtedness and obligations"). For the purposes of section 36(1)(b) of the PPSA, and to ensure maximum benefit and protection for Air Liquide by virtue of section 36(1)(b)(iii) of the PPSA, the Buyer confirms and agrees that the Buyer intends to and does grant to Air Liquide, as security for the Buyer's indebtedness and obligations, a security interest in all of the Buyer's present and after-acquired property except only for any such property which is or comprises items or kinds of personal property ("excepted property");

- (a) in or to which the Buyer has rights; and
- (b) which has not been supplied by Air Liquide to the Buyer,

other than any excepted property which is or comprises proceeds of any of that present and after-acquired property which has been supplied by Air Liquide to the Buyer.

6.3 While the Goods continue to secure the Buyer's indebtedness and obligations to Air Liquide:

- (a) The Buyer must store them separately and clearly identify them as belonging to Air Liquide.
- (b) Air Liquide authorises the Buyer to sell or lease, in the ordinary course of business of the Buyer, any Goods that are comprised in the Buyer's inventory. This authority is revoked from the time that:
  - (i) an Event of Default occurs; or
  - (ii) Air Liquide notifies the Buyer in writing that this authority is revoked.
- (c) As the Buyer's agent for the purposes of this clause, Air Liquide may enter the premises where Goods are stored and remove them. Air Liquide shall not be responsible for any damage caused in entering and removing the Goods. The Buyer shall indemnify Air Liquide for the costs of any such damage. The Buyer is liable for all costs incurred by Air Liquide (including transportation and storage charges) in entering and removing Goods. Air Liquide may resell any Goods and apply the proceeds of sale in reduction of the Buyer's Indebtedness.
- (d) The Buyer must advise Air Liquide immediately of any Event of Default or any action by third parties (including any of its creditors) affecting Air Liquide's interest in the Goods.

6.4 If the Buyer resells or uses Goods while those Goods continue to secure the Buyer's indebtedness and obligations to Air Liquide, the proceeds of such sale or use shall be received and held by the Buyer (in whatever form) in trust for both the Buyer and Air Liquide. Air Liquide's interest as beneficiary under that trust shall be that portion of the proceeds which does not exceed the Buyer's indebtedness to Air Liquide. The balance of the proceeds (if any) shall be the Buyer's beneficial interest under that trust.

6.5 The Buyer agrees to do anything that Air Liquide reasonably requires to ensure that Air Liquide has a perfected security interest in all the Goods and a purchase money security interest in each part of the Goods to the extent of the purchase price for that part.

6.6 Air Liquide may allocate amounts received from the Buyer in any manner it determines, including in any manner required to preserve any purchase money security interest it has in any Goods.

## 7. GUARANTEES

7.1 Where the Consumer Guarantees Act 1993 applies to this agreement, if the Goods and/or Services are acquired by the Buyer for business purposes, the Buyer agrees that the Consumer Guarantees Act 1993 does not apply.

7.2 Where the Buyer supplies Goods and/or Services in trade to a person acquiring them for business purposes, it must be a term of the Buyer's contract with that person that the Consumer Guarantees Act 1993 does not apply in respect of the Goods and/or Services.

7.3 The Buyer agrees to indemnify Air Liquide against any liability or cost incurred by Air Liquide under the Consumer Guarantees Act 1993 as a result of any breach by the Buyer of the obligations contained in these terms.

7.4 Where the Buyer supplies Goods to any other person in the course of trading, the Buyer must not give or make any undertaking, assertion or representation in relation to the Goods (including the giving of any warranties) without Air Liquide's prior approval in writing.

7.5 The Buyer must strictly observe any operating and maintenance instructions and procedures specified by Air Liquide. Air Liquide shall not be liable for

damage to Goods caused by incorrect use, lack of adequate maintenance, incorrect power supply, overload, shock, fall or the Buyer's fault or negligence.

7.6 Repairs and maintenance of any Goods must only be carried out by authorised Air Liquide personnel.

7.7 The following terms apply wherever the Consumer Guarantees Act 1993 does not apply to this agreement, or where the following terms are not inconsistent with the Consumer Guarantees Act 1993:

- (a) Defective Goods and Services, and Goods and Services which do not comply with any agreed specifications, shall at Air Liquide's discretion be repaired or replaced.
- (b) Any right which the buyer may have to reject non-conforming or defective Goods or Services shall only be effective if:
  - (i) the Buyer notifies Air Liquide in writing within three months following delivery;
  - (ii) the Goods (where applicable) have only been employed under normal conditions of use; and
  - (iii) Air Liquide is given the opportunity to inspect the Goods and/or the end result of the Services.
- (c) Air Liquide is not liable to the buyer for any loss of gas, except where such loss arises during the warranty period specified in this clause 7.7 or during the period of hire referred to in Part 2 of these terms and such loss arises due to a defect in any Goods supplied. In any event, Air Liquide's liability in such circumstances shall not exceed the price of the gas lost.
- (d) Where the repair or maintenance of any Goods is carried out by persons other than authorised Air Liquide personnel, the warranty set in this clause 7.7 shall be voided.
- (e) Air Liquide accepts no liability for any Claim by the Buyer or any other person, including without limitation any Claim relating to or arising from:
  - (i) any conditions, warranties, descriptions, representations, conditions as to fitness or suitability for any purpose, tolerance to any conditions, merchantability or otherwise, whether express or implied by law, trade custom or otherwise; or
  - (ii) any representations, warranties, conditions or agreement made by any agent or representative, which are not expressly confirmed by Air Liquide in writing, and the Buyer agrees to indemnify Air Liquide against any such Claim.
- (f) In any event, Air Liquide's liability under any Claim shall not exceed the price of the Goods and Services.

7.8 Nothing in these terms is intended to have the effect of contracting out of the provisions of the Consumer Guarantees Act 1993 except to the extent permitted by that Act, and these terms are to be modified to the extent necessary to give effect to that intention.

## 8. SPECIFICATIONS

8.1 Except where Air Liquide advises the Buyer of specific tolerances, all drawings, technical specifications, dimensions and weights provided by Air Liquide are approximate only.

## 9. CONFIDENTIALITY

9.1 All drawings, technical specifications or other information provided by Air Liquide in connection with this order are confidential to Air Liquide ("Confidential Information") and shall be used by the Buyer solely for the purposes of this agreement. Air Liquide shall retain ownership and copyright in respect of the Confidential Information. The Buyer shall not make copies of the Confidential Information or disclose it to any third party except with the prior consent of Air Liquide. The Buyer shall take all reasonable steps to ensure that no third party obtains or makes copies of any of the Confidential Information.

## 10. DEFAULT

10.1 If any Event of Default occurs, Air Liquide may at its discretion terminate any contract governed by these terms.

10.2 If the Buyer does not pay the price by the due date, Air Liquide may charge a default penalty at a rate per annum equal to 4% above the retail lending base rate of ANZ Banking Group (New Zealand) Limited as varied from time to time and calculated on a daily basis on the unpaid portion of the price from due date until payment in full.

10.3 The Buyer shall indemnify Air Liquide for costs and expenses incurred by it in seeking recovery by any means of any equipment owned by Air Liquide or any moneys owing under this agreement.

10.4 If an Event of Default occurs, all moneys owing by the Buyer to Air Liquide shall immediately become due and payable notwithstanding that the due date has not arisen. At any time after an Event of Default occurs, Air Liquide may (whether or not Air Liquide has exercised any other right) appoint any person to be a receiver of all or any of the Goods. In addition to, and without limiting or affecting any other powers and authorities conferred on a receiver (whether under the Receiverships Act 1993 or at law or otherwise), a receiver has the power to do all things in relation to the Goods as if the receiver has absolute ownership of the Goods.

## 11. MEDIATION

11.1 Either party may require any dispute arising which has not been resolved within 14 days to be referred to mediation. The mediator shall be appointed by both parties or, where the parties cannot agree within 14 days, appointed by the chairperson or any other office holder of the New Zealand chapter of LEADR. The mediator shall conduct the mediation in accordance with the guidelines agreed between the parties or, if the parties cannot agree within 14 days following appointment of the mediator, in accordance with the guidelines set by the mediator. The costs and expenses of the mediator shall be shared by the parties equally.

## 12. USE OF INFORMATION

12.1 The Buyer agrees that Air Liquide may obtain information about the Buyer from the Buyer or any other person (including any credit or debt collection agencies) in the course of Air Liquide's business. The Buyer consents to any person providing Air Liquide with such information, and agrees that Air Liquide may use and disclose any information it has about the Buyer (including information contained on the Air Liquide Credit Application Form) for the purposes of credit assessment and for purposes relating to the ongoing relationship between Air Liquide and the Buyer, including debt collection and marketing.

12.2 The Buyer must notify Air Liquide of any change in circumstances that may affect the accuracy of the information provided by the Buyer to Air Liquide.

12.3 If the Buyer is an individual, ie: a natural person, the Buyer has rights under the Privacy Act 1993 to access and request the correction of any personal information which Air Liquide holds about the Buyer.

### 13. CONTRACT AND CONFLICT

- 13.1 The Contract forms the basis on which Air Liquide supplies and sells Goods to the Buyer. Each such supply and sale shall be effected pursuant to the terms of this Contract (unless in any specific case agreed otherwise in writing). Any invoice or other document evidencing or describing any Goods is incorporated into and forms part of the Contract.
- 13.2 These terms are paramount, and, to the extent that there is any conflict between any provision of them and any invoice or other document evidencing or describing any Goods, the conditions of sale will prevail. Further, if there is any other document or arrangement which conflicts with the Contract, the Contract shall prevail.

### 14. WAIVER

- 14.1 If Air Liquide exercises or fails to exercise any right or remedy available to it, this shall not prejudice Air Liquide's rights in exercising that or any other right or remedy.
- 14.2 Waiver of any term of this agreement must be specified in writing and signed by an authorised officer of Air Liquide.

### 15. CONTRACTING OUT OF THE PPSA

- 15.1 The Buyer waives the right to receive a copy of the verification statement confirming registration of a financing statement or financing change statement relating to the security interest under the Contract.
- 15.2 The Buyer agrees that nothing in sections 114(1)(a), 133 and 134 of the PPSA shall apply to this Contract, or the security under this Contract, and waives the Buyer's rights under sections 121, 125, 129, 131 and 132 of the PPSA.

### 16. NO ASSIGNMENT

- 16.1 The Buyer must not transfer or assign its rights under this agreement without Air Liquide's prior consent in writing.

### 17. NOTICES

- 17.1 Except where otherwise specified in this agreement, or authorised pursuant to this agreement, any notice to be given pursuant to this agreement must be given in writing and may be given by hand or by facsimile to the following addresses, or such other addresses as may be notified from time to time:

<b>Auckland</b> Postal PO Box 12846 Penrose Auckland 1642	<i>Physical</i> 19 Maurice Road Penrose Auckland	<b>Hamilton</b> Postal PO Box 10394 Te Rapa Hamilton 3241	<i>Physical</i> 2 Tawn Place Pukete Hamilton	<b>Palmerston North</b> Postal PO Box 10010 Terrace End Palmerston North 4441	<i>Physical</i> 5 Connolly Place Milson Palmerston North
Ph +64 (9) 622 3888 Fax +64 (9) 622 3882 Email nzaklaccounts@airliquide.com		Ph +64 (7) 849 2969 Fax +64 (7) 849 2968 Email nzctnaccounts@airliquide.com		Ph +64 (6) 355 5216 Fax +64 (6) 354 7104 Email nzstnaccounts@airliquide.com	

<b>South Island</b> Postal PO Box 16453 Hornby Christchurch 8441	<i>Physical</i> 7 Canterbury Street Hornby Christchurch
Ph +64 (3) 344 6033 Fax +64 (3) 344 6031 Email nzchcaccounts@airliquide.com	

### PART 2 - HIRE OF EQUIPMENT

The following terms apply in addition to the general terms contained in Part 1 where the Buyer hires equipment including bulk storage, supply vessels and gas cylinders (the "Equipment") from Air Liquide:

### 18. GENERAL

- 18.1 The Buyer shall pay Air Liquide a monthly rental charge for hireage of the Equipment in accordance with clause 3, at the rate specified in schedule one.
- 18.2 Air Liquide reserves the right to vary the rental charges from time to time on written notice to the Buyer.
- 18.3 The Buyer shall be liable for the cost of installing the Equipment, including the cost of providing a suitable site for the installation of the Equipment, in accordance with any quotation provided by Air Liquide. Where no quotation is provided by Air Liquide, the Buyer shall be liable for all costs incurred in installing the Equipment and providing a suitable site for installation.
- 18.4 Air Liquide reserves the right to charge the Buyer for all costs of installation over and above those provided for in the relevant quotation where such costs are incurred through no fault of Air Liquide.
- 18.5 The Equipment shall remain the sole property of Air Liquide at all times and shall not at any time become a fixture on the Buyer's Premises. The Buyer will procure, in a form prescribed by Air Liquide, a waiver and consent to Air Liquide's rights pursuant to clause 6 from the landlord of the Buyer's Premises and any mortgagee or party holding a secured interest over the Buyer's Premises or the Goods.
- 18.6 The Buyer warrants that there is safe and proper access to the Buyer's Premises, and shall allow Air Liquide unrestricted access to the Buyer's Premises to retake possession of the Equipment at any time.
- 18.7 Where installation is required and the Buyer's Premises are not owned by the Buyer, or are subject to any mortgage or charge, the Buyer shall obtain any necessary consent to the installation of the Equipment by Air Liquide, and shall provide Air Liquide with evidence of such consent as well as any other information it requires concerning such mortgage or charge.
- 18.8 At any time following termination of this agreement, Air Liquide may enter the Buyer's Premises and remove any Equipment held by the Buyer. Air

Liquide reserves the right to charge the Buyer all costs incurred by Air Liquide in effecting removal of the Equipment.

- 18.9 Air Liquide shall, at any time on the giving of reasonable notice, be entitled to discontinue the use of the Equipment temporarily for the purpose of testing, repairs or any other purpose Air Liquide considers necessary. Air Liquide shall be entitled to remove the Equipment or any part of it for such purpose.
- 18.10 They Buyer shall be liable for any costs incurred by Air Liquide in removing the equipment, and any damage caused by such removal.

## **19. MAINTENANCE**

19.1 The Buyer shall:

- (a) only use the Equipment for the purpose for which it was supplied, and keep the Equipment free from damage;
- (b) not remove, deface or alter any identification marks fixed to or painted on the Equipment;
- (c) operate and maintain the Equipment in accordance with instructions provided from time to time by Air Liquide;
- (d) inform Air Liquide immediately when there are abnormal conditions, leaks or defects in the Equipment;
- (e) not use the Equipment for the storage or dispensing of gas other than gas supplied by Air Liquide without Air Liquide's prior consent, provided that Air Liquide will not unreasonably withhold such consent where it is unable to meet the Buyer's requirements for the supply of gas; and
- (f) indemnify Air Liquide for all loss or damage to the Equipment, and against all claims arising out of the possession or use of the Equipment by the Buyer or any other person during the period of hire.

19.2 Air Liquide shall:

- (a) maintain the Equipment in good working order and condition;
- (b) comply with any statutory or other regulations relating to the registration of the Equipment; and
- (c) not be liable to the Buyer for any loss suffered by the Buyer as a result of failure of any part of the Equipment, or any delay or defect in maintenance or repair of the Equipment by Air Liquide.

*In addition to the foregoing clauses 18 and 19, the following clause 20 applies to the hire of Equipment comprising cylinders:*

## **20. CYLINDERS**

- 20.1 The Buyer shall be solely responsible for the safe custody and proper use of the cylinders and all valve attachments, pressure gauges, regulators and gas controlling and conserving devices.
- 20.2 The Buyer shall pay a single charge, as determined by Air Liquide from time to time, in return for the right to use cylinders during an agreed term, provided that all gas supplied shall be subject to an additional charge.
- 20.3 An Immobilisation Indicator Fee will be imposed on a monthly basis in addition to the normal rental on cylinders held if, during any period of six consecutive months, a lesser number of cylinders has been returned than the total number held by the Buyer at the beginning of that period, or if during such period the Buyer has not purchased any gas using Air Liquide's cylinders. Such additional charge shall continue to apply until such time as the matter is rectified.
- 20.4 All cylinders shall be returned to Air Liquide at the cost of the Buyer as soon as they are empty, except where Air Liquide agrees to collect cylinders from the Buyer's Premises.
- 20.5 Where the Buyer returns cylinders to Air Liquide, the Buyer shall ensure that they are returned in a safe condition, and the Buyer shall be liable for any damage caused to the cylinders or damage to persons or property caused by the cylinders up to the time the cylinders are emptied by Air Liquide.
- 20.6 Where Air Liquide agrees to collect cylinders from the Buyer's Premises, the Buyer shall ensure that the cylinders are easily accessible and ready for collection at the time advised by Air Liquide in advance. The Buyer shall be liable for any additional costs and expenses incurred by Air Liquide where the Buyer fails to comply with this clause.
- 20.7 No allowance will be made in the price payable for any residual gas returned in cylinders.
- 20.8 Air Liquide shall be entitled at any time to obtain verification from the Buyer, or inspect the Buyer's Premises, to ensure that all cylinders supplied to the buyer and not returned are in good order and condition.
- 20.9 The Buyer shall pay Air Liquide the current replacement value of any missing cylinders if such cylinders are not returned to Air Liquide within 14 days following demand.
- 20.10 Any amount paid to Air Liquide as a security deposit on cylinders will be refunded following the return of the cylinders in good order and condition, subject to any charge which Air Liquide is entitled to make.
- 20.11 Such additional charges shall continue to apply until such time as the matter is rectified.

## **21. BUYER - OWNED CYLINDERS**

- 21.1 Air Liquide is not obliged to refill cylinders not owned by it, and is entitled to impose any terms and conditions in relation to the refill of such cylinders as it thinks fit. When Air Liquide refills cylinders not owned by it, it does so entirely at the risk of the Buyer. Air Liquide reserves the right to test such cylinders and charge the Buyer for such testing.