

## TRADING TERMS AND CONDITIONS

***These Trading Terms and Conditions are divided into four sections:***

***Section A:***        ***Applies for supply of all Services***

***Section B:***        ***Supplementary – applies only for supply (by way of hire) of Equipment***

***Section C:***        ***Supplementary – applies only for supply of repair Services***

***Section D:***        ***Supplementary – applies only for supply (by way of sale) of Equipment/Parts***

## TRADING TERMS AND CONDITIONS

### SECTION A – GENERAL TERMS

#### 1. DEFINITIONS

##### 1.1 In this Agreement:

**Agreement** means this agreement and any special conditions and Schedules to this agreement

**Business Day** means any day that is not a Saturday, Sunday or a declared public holiday in the States of either or both of Victoria and/or the State in which the Services are provided

**Business Hours** means between the hours of 8:00am and 4:00pm on any Business Day

**Charges** means the amount payable by the Customer for the supply of the Services, being the amount set out in the Quote (or otherwise agreed between the Parties) or as varied in accordance with clauses 17.3 29.4 and 33.3 below (if any)

**Commencement Date** means the date set out in the Quote or the date that the Supplier commences the supply of the Services (whichever comes first)

**Consequential Loss** means and includes (but is not limited to) any loss of profit, loss of opportunity, loss of business, loss of production, loss of time, diminution of goodwill or share value or loss of reputation but does **not** include any Mitigation Cost (with the effect that any such Mitigation Cost does not constitute Consequential Loss)

**Credit Application** means the credit application completed (or provided) and signed by the Customer either prior to or contemporaneously with this Agreement

**Customer** means the recipient of the supply of the Services as set out in the Quote or otherwise

**Default Event** means where:

- (a) the Customer makes default in payment of any monies due to the Supplier but unpaid on its due date (whether or not a formal demand for payment has been made); or
- (b) the Customer suffers an Insolvency Event (for which no demand or notice is required); or
- (c) the Customer breaches or is found to be in breach of any of the Supplier's Policies and/or any Laws
- (d) the Customer breaches or is found to be in breach of any representation or warranty given by the Customer to the Supplier under this Agreement; or
- (e) the Customer breaches any term of this Agreement (other than in respect of the payment of monies) and fails to remedy that breach within 7 days of receiving written notice from the Supplier of the breach

**Default Interest** means the rate that is the prevailing rate of interest as set out in the *Penalty Interest Rates Act 1983 (Vic)*

**Equipment** means the equipment to be hired or sold by the Supplier to the Customer or to be serviced by the Supplier (as the case may be) as set out in the Quote

**Excluded Services** means the following services provided or to be provided by the Supplier to the Customer:

- (a) the supply, by way of hire, of Equipment purchased specifically for the Customer and to be hired on a permanent or long-term basis;
- (b) the supply of Equipment under a Rent-To-Buy arrangement;

- (c) the supply of repair and maintenance services which is governed by a separate agreement between the Supplier and the Customer; and/or
- (d) any other arrangement or agreement between the Supplier and the Customer which expressly excludes this Agreement

**Fair Wear and Tear** means the deterioration of the Equipment through ordinary and normal use having regard to the condition in which the Equipment will operate and otherwise as set out in any Fair Wear and Tear Policy that the Supplier may issue from time to time

**Force Majeure** means an act of God, national emergency, war, insurrection, riot, act of terrorism, pandemic, epidemic, flood or anything outside of the reasonable control of a Party

**Insolvency Event** means where the Customer commits an act of bankruptcy, goes into liquidation, administration or receivership, is unable to pay its debts as and when due, ceases to carry on business or a material part of it, a resolution is passed for the winding-up of the Customer or execution of distress is levied against the Customer or its assets

**Invoice** means the invoice to be issued by the Supplier to the Customer for the performance of the Services

**Laws** means any laws of any nature (whether State or Federal and whether Acts, regulations, by-laws, orders, proclamations or standards (including Australian Standards)) and which apply in relation to the business and operations of the Supplier and Customer and includes (without limitation) any laws made under the *Fair Work Act 2009 (Cth)*, *Corporations Act 2001 (Cth)*, *Modern Slavery Act 2018 (Cth)*, OHS Laws and/or any anti-bribery, anti-corruption and/or anti-money laundering laws

**Mitigation Cost** means any cost or expense incurred by either Party to mitigate any loss arising under this Agreement

**OHS Laws** means any workplace or occupational health and safety laws that apply in the State or Territory in which the Services are supplied (including whether such laws are under statute, common law or otherwise)

**Parties** means, collectively, the Supplier and Customer

**Parts** means any spare parts (whether new or used) sold by the Supplier to the Customer pursuant to a Quote

**Payment Breach** means where the Customer is in breach of sub-clause (a) of the definition of Default Event

**Payment Terms** means the terms of payment (including, without limitation, as to the payment of any deposit and the time for payment) that is:

- (a) set out in the Quote; or
- (b) otherwise, is 14 days from the date of Invoice

**Policies** means any policies published by, or which covers, the Supplier from time to time

**Purchase Order** means any purchase order issued by the Customer to the Supplier authorising the supply of Services under this Agreement

**Quote** means a quote provided by the Supplier to the Customer for the supply of the Services (or any one of them), which must set out (without limitation) the Customer, the Services to be provided, the Price, the Term (if applicable) and any other commercial terms governing the supply of the Services

**Services** means all services provided or to be provided by the Supplier to the Customer which are

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not Excluded Services and includes (without limitation):

- (a) the supply, by way of hire, of Equipment on a casual basis – see also *Section B – Casual Hire*;
- (b) the supply of repair and maintenance services – see also *Section C – Repair Services*;
- (c) the supply, by way of sale and purchase, of Equipment (including Used Equipment) – see also *Section D – Sale of Equipment and Parts*;
- (d) the supply, by way of sale and purchase, of Parts – see also *Section D – Sale of Equipment and Parts*

**Site** means, where applicable, the Customer's site where the Services are to be performed

**Site Survey** means, where applicable, the survey provided to the Customer and prepared by the Supplier in respect of the Site, which survey sets out the conditions of the Site and the Customer's requirements under this Agreement

**Supplier** means Pacific Materials Handling Pty Ltd (ACN 663 010 893)

**Term** means the term of the Agreement as specified in the Quote or, if there is no term, means the date that commences on the Commencement Date and ends on the date that the Services are delivered/provided

### 2. APPLICATION AND ORDER OF PRECEDENCE

#### 2.1 Application

This Agreement governs the terms of the supply from the Supplier to the Customer for the Services but does not govern the terms of the supply of any Excluded Services.

#### 2.2 Order of Precedence

To the extent of any inconsistency, the following terms and conditions take precedence:

- (a) first – the Quote;
- (b) second – any further or separate agreement between the Parties governing the supply of the Services and which is signed by the Parties contemporaneously with, or subsequent to, this Agreement;
- (c) third – this Agreement; and
- (d) fourth – the Credit Application.

#### 2.3 Customer Terms

By agreeing to the Quote and accepting supply of the Services from the Supplier, the Customer expressly acknowledges and agrees that this Agreement applies for the purpose of the supply and any Customer terms of supply (whether provided on a Purchase Order or otherwise) are excluded and do not apply for the purpose of the supply.

#### 2.4 Variation

Any variation to this Agreement must be in writing and signed by both Parties to be valid and binding on the Parties.

#### 2.5 Prior Agreements

The terms of this Agreement replace and supercede all prior agreements between the Parties (whether in writing, verbal or otherwise) governing the supply of the Services from the Supplier to the Customer.

#### 2.6 Credit Application

The Customer acknowledges, agrees and represents that the representations made by the Customer in the Credit Application are true and correct and apply and are repeated for the purpose of any supply under this Agreement.

2.7 The Customer is required to only complete one Credit Application to commence supply of any Services from the Supplier. Any further or additional supply will be

provided in accordance with clause 4 below without the need to complete a further Credit Application and the Customer acknowledges and agrees that such further or additional supply will be subject to the terms of this Agreement (except where the supply relates to any Excluded Services).

#### 2.8 Application of Sections in this Agreement

For the purpose of this Agreement:

- (a) Section A applies for the supply of all Services covered by this Agreement; and
- (b) Sections B – D apply only in respect of those Services covered by those Sections.

2.9 For the avoidance of doubt, if the Services supplied pursuant to a Quote consist of:

- (a) the hire of Equipment on a casual basis – only Sections A and B apply;
- (b) the supply of repair and maintenance services – only Sections A and C apply; and
- (c) the sale/purchase of Equipment and/or Parts – only Sections A and D apply.

#### 2.10 Separate Contract

Each Quote and/or Purchase Order issued under and in accordance with these Terms constitutes a new and separate contract on the terms of this Agreement and in the manner set out in this clause 2.

#### 2.11 Capacity – Trust

If the Customer enters into this Agreement and any Credit Application in its capacity as trustee of a trust, the Customer agrees that it enters into this Agreement in both its personal capacity and in its capacity as trustee of a trust and is liable in both of these capacities.

### 3. TERM OF AGREEMENT

#### 3.1 Term

This Agreement applies for the Term (save for those terms that apply and continue in force after the end of the Term).

3.2 If, despite the above, the Customer continues sourcing supply of the Services (whether the original Services provided or any further or additional Services), the supply is (or continues to be) provided pursuant to the terms of this Agreement

### 4. SERVICES

#### 4.1 Engagement of Supplier

The Customer engages the Supplier to perform the Services set out in the Quote and Purchase Order (if any).

#### 4.2 Quote

Prior to performing the Services, the Supplier must provide to the Customer a Quote.

4.3 The Quote constitutes an offer by the Supplier to supply the Services on the terms of that Quote.

4.4 The Quote may be withdrawn by the Supplier in its sole and absolute discretion at any time prior to the Customer accepting the Quote.

4.5 Notwithstanding clause 4.6 below, where a Customer returns a signed Quote to the Supplier, this constitutes irrevocable acceptance of both the terms set out in the Quote and this Agreement and a binding contract is immediately formed for the supply of the Services the subject of, and pursuant to the terms of, the Quote and this Agreement.

#### 4.6 Purchase Order

The Customer may issue a Purchase Order for the supply of the Services set out in the Quote (or otherwise to be performed), and such Purchase Order

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must include the Quote number and the Services to be provided under the Quote.

- 4.7 Where the Supplier does not provide a Quote – or a Quote is provided but the Customer does not issue a Purchase Order – but the Supplier still supplies the Services as requested by the Customer, the Customer must pay for the Services (and this Agreement otherwise applies for the provision of the Services) unless the Customer proves that it requested the Supplier not to provide the Services (the onus of which is on the Customer). This clause 4.5 supplements clause 13.6 (Variation) below.

### 4.8 Supply and Suspension of Services

The Supplier may, in its sole and absolute discretion (but at all times acting reasonably), supply the Services by instalments or suspend the supply of any Services provided (or to be provided) under this Agreement. The Supplier may suspend supply where (without limitation):

- (a) where the supply is a supply of goods – the goods are not available for supply;
- (b) where the supply is a supply of services – there is insufficient personnel or material to perform the services; or
- (c) generally – if the Customer is otherwise in breach of this Agreement (whether in respect of that supply or any previous supply) or has exceeded its credit limit.

## 5. CUSTOMER OBLIGATIONS, WARRANTIES & REPRESENTATIONS

### 5.1 The Customer must:

- (a) notify the Supplier in writing of any specific purpose for which the requested Services will be put and otherwise satisfy itself that the Services it has requested from the Supplier are suitable for its use and fit for purpose;
- (b) (where applicable) provide to the Supplier a work area or location at the Site to enable the Supplier to perform the Services and (where relevant) provide the Equipment in order to enable the Supplier to perform the Services during Business Hours;
- (c) ensure that the Site is safe and affords the Supplier a safe working environment that complies in all respects with all OHS Laws;
- (d) pay the Charges for the Services in accordance with the Payment Terms;
- (e) at its cost, provide to the Supplier any induction or other training necessary to permit the Supplier to attend on the Site;
- (f) comply with all reasonable directions of the Supplier;
- (g) hold the insurances required by clause 11;
- (h) provide to the Supplier all reasonable assistance to enable the Supplier to perform the Services (including by providing access to water, electricity and any specific tools or other equipment owned by the Customer); and
- (i) provide to the Supplier a list of all personnel who are authorised to request the Supplier to perform Services under this Agreement.

- 5.2 The obligations set out in clause 5.1 are in addition to any further obligations set out in Sections B, C and D (as applicable).

### 5.3 Proper Authority

The Customer warrants and represents that the person signing the Quote, issuing the Purchase Order or otherwise agreeing with the Supplier to perform the

Services on behalf of the Customer, is properly authorised to do all such matters on its behalf and to enter into this Agreement and bind the Customer to the obligations set out in this Agreement.

### 5.4 Warranties and Representations

The Customer warrants and represents to the Owner that:

- (a) it has read and understood the Supplier's Policies and agrees that at all times during the operation of this Agreement, its business and operations will be conducted in compliance with – and will not put the Supplier in breach of – the Policies;
- (b) it has read, understood and agrees with the contents of the Site Survey (where applicable and where provided by the Supplier); and
- (c) it will conduct its business and operations in accordance with all Laws.

## 6. SUPPLIER OBLIGATIONS

### 6.1 The Supplier must:

- (a) subject to clause 4.7 above, perform the Services in a timely manner and in accordance with all relevant legislation and standards;
- (b) perform the Services with the level of skill and care reasonably expected of a service provider experienced in performing the Services;
- (c) report immediately to the Customer any damage to any Equipment or any maintenance and/or repairs necessary to the Equipment and which it does not consider falls within the Services;
- (d) (where applicable), advance or procure for the benefit of the Customer any warranty in respect to the supply of the Services;
- (e) use full trained, competent and qualified service technicians employed or engaged by the Supplier to perform the Services;
- (f) comply with all reasonable directions of the Customer;
- (g) hold the insurances required by clause 11;
- (h) obtain, maintain and comply with all permissions, licences, consents, approvals, certificates and/or permits necessary for the performance of the Services; and
- (i) if reasonably requested by the Customer, provide all reports and documents regarding its performance of the Services under this Agreement.

## 7. INVOICING AND PAYMENT TERMS

### 7.1 Payment of Charges

The Customer must pay to the Supplier the Charges and all other monies due and payable to the Supplier under this Agreement without set-off or deduction.

- 7.2 Unless the Parties otherwise agree, payment of the Charges must be paid to the Supplier by direct debit into the Supplier's nominated account and the Customer agrees that it must complete and sign all relevant authorisations and forms and give all necessary directions as is necessary in order to facilitate payment by direct debit.

- 7.3 Subject to clause 7.15 below, the Charges must be paid by the Customer in accordance with the Payment Terms.

### 7.4 Deposit

The Customer acknowledges and agrees that if it is required (in accordance with the Payment Terms or as otherwise set out in the Quote) to pay to the Supplier a deposit prior to the Supplier supplying the Services, then:

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- (a) unless this Agreement or any supply under this Agreement is terminated due to a breach by the Supplier – the deposit is non-refundable; and
- (b) without prejudice to sub-clause (a) above or any other rights the Supplier may have under this Agreement, the deposit may be applied against any loss or damage suffered by the Supplier arising from any breach or termination by the Customer of this Agreement.

### 7.5 Calculation of Charges

Unless otherwise set out in the Quote and subject to clauses 17.3, 29.4 and 33.3 below, the Charges set out in the Quote are fixed for that Quote only and remain valid for acceptance for 14 days. If not accepted within 14 days, the Supplier may issue a new Quote for an amount and on terms in the Supplier's sole discretion.

7.6 The Supplier makes no representation or warranty that any further or additional Quote for the performance of the same Services will be for the same Charge or on the same terms.

7.7 After a Quote is accepted by the Customer, any variation to the Services to be performed under the Quote can only be agreed by the Parties in writing and signed by both Parties, failing which the variation is of no effect. Any additional Charges that may arise or accrue for the performance of such variation is to be paid by the Customer.

### 7.8 Invoicing

The Supplier must invoice the Customer for the Charges at the completion of the Services or at such other time or intervals as advised by the Supplier from time to time.

7.9 The Invoice issued by the Supplier is prima facie evidence for all purposes that the amount stated in the invoice is due and payable by the Customer (save for manifest error).

### 7.10 Set-Off

The Supplier may set-off any amount due and payable by the Supplier to the Customer (whether under this Agreement or otherwise) against any amount due and payable by the Customer to the Supplier under this Agreement.

7.11 The Customer must not at any time or for any reason deduct or set-off any monies payable by it under this Agreement.

### 7.12 GST

Any GST payable on the supply of the Services is to be paid by the Customer in addition to the Charge.

### 7.13 Default Interest

If any amount the Customer is required to pay under this Agreement is not paid by the due date, interest accrues on that amount until it is paid by the Default Interest (compounded daily).

### 7.14 Application of Monies Received

Any monies received from the Customer under this Agreement may be applied by the Supplier:

- (a) first – to the payment of any Default Interest (where applicable); and
- (b) second – to the payment of any legal costs incurred for any recovery of the Charges (where applicable); and
- (c) third – to payment of the Charges (in whatever order the Supplier elects);

and the Supplier is not required to apply such monies in the manner requested by the Customer.

### 7.15 Advancement of Credit

Any credit given by the Supplier to the Customer is given at the time of the advance and is not an invitation to continue. Credit may be reduced or withdrawn at

any time where the Customer has committed a Payment Breach. If the credit limit is reduced or withdrawn, any payments then outstanding must be immediately paid in full. The Supplier is not liable to the Customer for any loss or damages in the event that it reduces or withdraws any credit it has previously advanced.

## 8. OPERATION & EXCLUSION OF WARRANTIES

8.1 This clause 8 applies subject to any express warranties given by the Supplier in Sections B, C and D (as applicable).

8.2 Subject to clause 8.1 above and this Agreement generally, all warranties, representations, promises, conditions or statements regarding the Services, whether in writing, verbal or to be implied, are expressly excluded to the fullest extent permissible by law.

8.3 Without limiting this clause 8, the Supplier is not liable to the Customer under any circumstances for any damage to Equipment (whether hired or sold to the Customer or owned by the Customer) that is due to Fair Wear and Tear.

### 8.4 Consequential Loss

Notwithstanding any other provision of this Agreement, the Supplier is not liable to the Customer for any Consequential Loss.

### 8.5 Limit of Liability

To the extent that the exclusion of any implied terms is prohibited by legislation or for any liability of the Supplier arising under any warranty given under this Agreement, the Supplier's liability will be limited – at the Supplier's sole election – to one or more of the following:

- (a) in the case of the supply of Equipment or Parts:
  - (i) the replacement of the Equipment or Parts;
  - (ii) the re-supply of equivalent Equipment or Parts;
  - (iii) the repair of the Equipment or Parts; or
  - (iv) the payment of the cost of repairing, replacing or of acquiring equivalent Equipment or Parts; and
- (b) in the case of the supply of Services (not being Equipment or Parts):
  - (i) the supply of the Services again; or
  - (ii) the payment of the cost of having the Services supplied again.

## 9. SUB-CONTRACTING & PERSONNEL

### 9.1 Right to Sub-Contract

The Supplier may, in its sole discretion, sub-contract or otherwise arrange for a third party to perform any of the Services or to discharge any of its obligations under this Agreement. The Supplier must give to the Customer details of the proposed sub-contractor.

9.2 If the Supplier engages a sub-contractor in accordance with this clause 9, it agrees that:

- (a) it will ensure that the sub-contractor is aware of – and will comply with – the Supplier's obligations under this Agreement as if it was a party to this Agreement; and
- (b) it (the Supplier) will remain principally liable to the Customer for any work performed by the sub-contractor.

9.3 The cost of any Services performed by the sub-contractor will be included in the Quote and payable by the Customer.



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### 9.4 Exclusion of Personnel

The Customer may request the Supplier to exclude certain personnel from attending at a Site to perform the Services. In making this request:

- (a) the Customer must give to the Supplier written notice of the proposed individual(s) it wishes to exclude and the reason for the exclusion;
- (b) the Customer must at all times act reasonably and for just cause; and
- (c) the Supplier must consider and comply with the request (if it is satisfied that the request is made reasonably and with just case).

- 9.5 The Customer is not required to give notice – and the Supplier must remove any personnel – where the individual(s) has engaged in serious or wilful misconduct or has acted in a way that has or may immediately and materially impact the Customer's business and operations.

## 10. TERMINATION

### 10.1 Termination for Default Event

If a Default Event occurs:

- (a) the default is taken to be a repudiation of this Agreement; and
- (b) without prejudice to the Supplier's rights arising from the Default Event, the Supplier may terminate this Agreement by notice in writing to the Customer.

### 10.2 Termination for Convenience

Subject to clauses 16.2 – 16.5 below and unless the context otherwise provides as set out in this Agreement, either Party may terminate this Agreement (without reason) by giving to the other Party written notice of its intention to terminate no less than 30 days' notice to the proposed date of termination.

### 10.3 Effect of Termination

If this Agreement is terminated or repudiated by a Party (whether under this clause 10 or otherwise), then, subject to any other provision in this Agreement:

- (a) unless the Parties otherwise agree, the Supplier must complete any Services that are the subject of a Quote (and/or Purchase Order) or which has otherwise been requested by the Customer or is incomplete;
- (b) save for sub-clause (a) above, the Supplier must immediately cease providing any Services;
- (c) all monies due and payable by one Party to the other must immediately be paid in full (including for any Services completed in accordance with sub-clause (a) above); and
- (d) all accrued rights or obligations of a Party survive.

- 10.4 For the avoidance of doubt, the effects set out in clause 10.3 above apply subject to any specific termination provisions set out in Sections B, C and D (if any), with the effect that any specific termination provisions set out in those Sections take precedence over clause 10.3.

- 10.5 If this Agreement is terminated, the Supplier is entitled – without notice or consent of the Customer – to enter onto any Site or any premises where any Equipment is held (being Equipment for which the Customer has not yet paid) to recover the Equipment or any other property of the Supplier and the Customer hereby consents to the Supplier entering such Site/premises for this purpose.

## 11. INSURANCES

- 11.1 This clause 11 applies in addition to any other obligation set out in Sections B, C and D (if any).

### 11.2 Required Insurances

Each Party must hold the following insurances with a reputable insurer approved by the Supplier (in its sole discretion):

- (a) product and public liability insurance up to a maximum of \$20,000,000.00 for any one event; and
- (b) (where the supply of the Services is a supply of Equipment under Section B below (Casual Hire) – mobile plant and equipment insurance with a limit of not less than:
  - (i) where the Equipment is less than 24 months' old – replacement of the Equipment supplied on a new-for-old basis; and
  - (ii) where the Equipment is 24 months' or more old – replacement of the Equipment supplied on current market value of the Equipment;
- (c) workers' compensation insurance in the State or Territory in which the Services are performed.

- 11.3 Any insurance required to be held by a Party in accordance with clause 11.2 above must be maintained until the completion of the Services or the Term of this Agreement (whichever ends later) and for a period of five (5) years after completion or end (as the case may be).

- 11.4 On request, each Party must provide to the other certificates of currency or other documents proving their compliance with this clause 11.

- 11.5 A Party must ensure that it does not do or omit to do anything which may prejudice any insurance held by it and promptly notify the other if any insurance is to lapse or cancel.

- 11.6 If a Party fails or refuses to obtain the insurances required by this clause, the other Party may effect such insurance on behalf of that Party and recover from that Party the cost of holding the insurance.

## 12. PPS PROVISIONS

- 12.1 Words and phrases used in this clause 12 have the same meaning as in the PPSA.

### 12.2 Acknowledgements and Grant

The Customer acknowledges and agrees that:

- (a) this Agreement may be a PPS Lease;
- (b) this Agreement creates a Security Interest in favour of the Supplier for the purposes of the PPSA;
- (c) the Customer grants to the Supplier a Security Interest in the Equipment and this Agreement, which secures the punctual payment of all amounts owed or which may be owed by the Customer to the Supplier under this Agreement;
- (d) the Security Interest created by this Agreement extends to the Equipment and all and any proceeds arising from any dealing with the Equipment;
- (e) the Supplier may register this interest on the Register to perfect the Security Interest;
- (f) the Security Interest granted to the Supplier is also a Purchase Money Security Interest for the purpose of the PPSA; and
- (g) any Security Interest created by this Agreement attaches or otherwise takes effect immediately upon the Customer entering into this Agreement.

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### 12.3 PPS Notice(s)

If under the PPSA the Customer may waive its right to receive a notice, such waiver is expressly given by the Customer to the Supplier.

12.4 For the purposes of enforcement under the PPSA and to the extent permitted by the PPSA, the Customer agrees that the following provisions of the PPSA do not apply – sections 125 (obligation to dispose of or retain collateral), 130 (notice of disposal), 132(3)-(4) (statement of account), 134(2) (retention of collateral notice), 135 (notice of retention), 137 (persons entitled to notice may object), 142 (redemption of collateral), and 143 (reinstatement of security agreement).

### 12.5 Release of Security Interest

Within 5 business days of expiry or termination of this Agreement or the delivery and expiry of any Services supplied under this Agreement – and provided the Supplier has otherwise complied in all respects with the terms of this Agreement and all monies accrued and/or due and payable have been paid by the Customer in full – the Supplier will apply to the Register to remove any Security Interest registered on the Register against the Customer (and, where applicable, the Equipment).

## 13. GENERAL PROVISIONS

### 13.1 Force Majeure

If a Party is affected by an event of Force Majeure (the **Affected Party**), then:

- (a) the Affected Party must take all reasonable steps to minimise or remove the event;
- (b) if despite sub-clause (a) above, the event continues and prevents a Party from performing all of its obligations under this Agreement, the obligations of both Parties are suspended during – but no longer than – the period of the event;
- (c) if the event only affects part (but not all) of the Affected Party's obligations, the suspension set out in sub-clause (b) above applies only in respect of that part (but not the whole Agreement); and
- (d) if the event affects the whole of the performance of the Agreement and continues for six months' or more, this Agreement may be terminated and clause 10.3 applies.

### 13.2 Notices

Any notice to be given under this Agreement is to be given in writing and to the persons identified on the Quote and Credit Application. The notice is deemed to have been served:

- (a) if sent by express post – on the day that is 2 business days after it is sent;
- (b) if sent by ordinary post – on the day that is 3 business days after it is sent;
- (c) if sent by email – on the day the email is sent, unless it is sent on a day that is not a business day or after 5:00pm, in which case it is deemed to be sent on the next business day; or
- (d) if hand delivered – on the day it is delivered.

### 13.3 Severability

If any provision of this Agreement is invalid in the State or Territory in which it is entered, that provision is to be read down to the extent of its invalidity and if that is not possible, it is to be severed from the Agreement without otherwise affecting the operation of this Agreement.

### 13.4 Entire Understanding

This Agreement contains the entire understanding of the Parties concerning the subject matter of the

Agreement and supercedes, terminate and replaces all prior agreements and communications between the Parties in respect of the performance of the Services (but not the Excluded Services).

### 13.5 No Reliance on Representations

Save where expressly stated in this Agreement, both Parties acknowledge and agree that neither has relied on any representation, warranty or undertaking of any kind by the other Party in relation to the subject matter of this Agreement.

### 13.6 Variation

- (a) Subject to clauses 17.3 and 29.4 below (which take precedence to this clause 13.6), no variation of this Agreement will be valid unless it is in writing and agreed and signed by both Parties.
- (b) Notwithstanding the above, if the Customer requests a variation to the Services to be performed and the Supplier supplies the requested variation (whether or not the variation has been agreed in writing), the Customer must pay for the variation in addition to the Services.

### 13.7 Waiver

The Parties agree that:

- (a) a failure to exercise, delay or grant an indulgence in respect of a right does not operate as a general waiver;
- (b) a single or partial exercise of a right does not preclude a further exercise of that right (whether in part or full);
- (c) a waiver of one breach does not operate as a waiver of any other breach; and
- (d) there is no general waiver of any right or power unless the Party with that right or power expressly waives it by notice in writing.

### 13.8 Governing Law

This Agreement is governed by the laws in force in the State of Victoria and the Parties submit to the exclusive jurisdiction of the State of Victoria in the interpretation and enforcement of this Agreement.

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### SECTION B – SHORT TERM RENTAL

#### 14. APPLICATION – SECTION B

- 14.1 This Section B supplements Section A (General Terms) and contains additional terms where the Services supplied by the Supplier consists of the hire of Equipment on a short-term or casual basis.
- 14.2 If there is any inconsistency with the terms set out in Section A and this Section B, the terms of this Section B take precedence to the extent of the inconsistency.
- 14.3 This Section B has no effect where the Services being supplied are not short-term or casual hire of Equipment.
- 14.4 Words and phrases used in this Section B have the same meaning as in Section A.

#### 15. DEFINITIONS

- 15.1 In this Section B:
- Allowable Hours** means the maximum hours per week that the Customer is permitted to use the Equipment as set out in the Quote
- Battery Charging Procedures** means the procedures for charging batteries, the details of which can be found at in the Supplier's Fair Wear and Tear Policy
- Corrosion Charge** means, where payable in accordance with clause 21.3 below, the amount that is 25% of the total Rental payable for the Equipment for the Hire Period (or such other amount as agreed between the Supplier and Customer)
- Damage** means any damage or deterioration of Equipment (including any damage caused by the failure to perform the Routine Checks or adopt the Battery Charging Procedures) other than where it arises due to:
- (a) Fair Wear and Tear;
  - (b) damage caused by the Supplier; or
  - (c) repairs under warranty
- Deemed Lost Unit** means any unit of Equipment that is deemed lost because the unit of Equipment on hire to the Customer is either:
- (a) lost; or
  - (b) stolen; or
  - (c) damaged beyond economic repair; or
  - (d) unable to be produced to the Supplier (whether at the Site or otherwise) upon reasonable request by the Supplier;
- Excess Hour Charge** means the charge payable by the Customer where it exceeds the Allowable Hours per week, being the amount set out in the Quote
- Good Condition** means, in respect of the Equipment, good condition and appearance throughout and in sound mechanical order, subject to Fair Wear and Tear
- Hire Period** means the period of hire set out in the Quote
- PPSA** means the *Personal Property Securities Act 2009 (Cth)* and includes any regulations or subordinate legislation made pursuant to the PPSA
- Rental** means the rental payable by the Customer to the Supplier for the hire of the Equipment as set out in the Quote or otherwise as varied in accordance with clause 17.3
- Replacement Value** means the total cost to the Supplier to acquire Equipment of equivalent age and condition plus delivery and statutory charges (provided always that if the Equipment is less than 12 months' old, it is deemed to be new Equipment)

**Routine Checks** means the daily checks to be performed to the Equipment by the Customer as set out in the manufacturer's operating manual or otherwise as advised by the Supplier from time to time

#### 16. HIRE OF EQUIPMENT

- 16.1 **Title**  
Equipment hired to the Customer under this Section B is held and used by the Customer as hirer only and title in the Equipment at all times remains with the Supplier.
- 16.2 **Hire Period**  
Subject to clause 16.3 below, the Supplier agrees to hire to the Customer, and the Customer agrees to hire from the Supplier, the Equipment for the Hire Period.
- 16.3 Notwithstanding clause 16.2 above, the:
- (a) Supplier may terminate the Hire Period for any reason on 7 days' prior written notice; or
  - (b) the parties may mutually agree to terminate the Hire Period at any time.
- 16.4 The Customer acknowledges that the Supplier is supplying the Equipment specifically for the purposes of satisfying the Customer's requirements and on the representation that the Customer will be hiring the Equipment for the full Hire Period. Subject to the rights reserved to the parties as set out in clause 16.3 above, the obligation to hire the Equipment for the Hire Period is essential and if the Customer fails to hire for the full Hire Period or the hiring is otherwise terminated for any reason (except where clause 16.3 above applies), the Customer must pay to the Supplier the Rental that would have been payable for the remainder of the Hire Period but for the termination. For the avoidance of doubt, this clause 16.4 takes precedence over clause 10.3 (to the extent of any inconsistency).
- 16.5 The Customer acknowledges and agrees that the obligation set out in clause 16.4 is fair and reasonable having regard to the fact that the Supplier has foregone other rental opportunities and otherwise for the reason set out in clause 17.1 below.
- 16.6 **Delivery**  
Unless otherwise set out in the Quote, the cost of delivery to and from the Customer's Site is to be paid by the Customer in addition to the Rental.
- 16.7 The Equipment must at all times remain on the Site and not transported to any other location without the express agreement of the Supplier.
- 16.8 Subject to the Owner making the Equipment available for delivery, the Customer must take delivery of the Equipment from the commencement of the Hire Period and a failure to do so by the Customer constitutes a breach by the Customer of this Agreement.

#### 17. CALCULATION AND PAYMENT OF RENTAL

- 17.1 **Calculation**  
The Customer acknowledges and agrees that the Rental has been calculated assuming that:
- (a) the Equipment will be used by the Customer for no more than the Allowable Hours per week; and
  - (b) the Equipment will be hired for the full Hire Period.
- 17.2 If the Customer uses the Equipment for more than the Allowable Hours in any given week, the Supplier may charge to the Customer (and the Customer must pay) the Excess Hour Charge at such frequency as the Supplier directs.
- 17.3 **Variation to Charges – Rental**  
The Customer acknowledges and agrees that the Supplier may from time to time review the Rental to be



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charged on the Equipment and, following that review, the Supplier may (and is entitled to) increase the Rental by notice in writing to the Customer. In respect of such increase (if any), the Parties each acknowledge and agree that:

- (a) any increase in the Rental is to be a fair and reasonable increase only and is not to be excessive;
- (b) the obligation on the Supplier to give written notice is an obligation to use all reasonable and best endeavours to notify the Customer, including by sending it to the Customer contact as recorded in the Supplier's database or with whom the Supplier typically communicates with the Customer (with email communication an acceptable form of notice);
- (c) the notice must set out the reason(s) for the increase, the amount of the increase and the date the increase takes effect (which must not be less than 21 days from the date of the notice); and
- (d) if the Supplier gives a notice in accordance with this clause 17.3, the increase applies on and from the day set out in the notice (and the Customer must pay the varied Rental on and from that day).

### 17.4 Payment

The Rental (and Excess Hour Charge, if applicable) and all other monies due and payable by the Customer under this Agreement must be paid in accordance with the Payment Terms without set-off or deduction.

## 18. REPAIRS AND MAINTENANCE

### 18.1 General Maintenance

The Supplier must perform routine (preventative) maintenance and repairs to the Equipment arising from the ordinary use of the Equipment at such time and frequency as it directs. Only the Supplier may perform such maintenance and repairs (unless otherwise agreed by the Supplier) and the cost of such maintenance/repairs is to be borne by the Supplier.

18.2 The Customer must give the Supplier reasonable access to allow it to performance the maintenance required by clause 18.1.

### 18.3 Damage

The Supplier (and only the Supplier) must perform repairs to the Equipment due to Damage but the cost of such repairs is to be borne at all times by the Customer.

18.4 The Supplier must provide to the Customer a further Quote for the performance of the repairs due to Damage and must seek approval to perform the repairs pursuant to that Quote except where:

- (a) the repairs are required urgently; or
- (b) the Supplier has sought approval and the Customer has not given the approval within a reasonable period of time (being not less than 48 hours from the request);

in which case the Supplier may perform the repairs and the Customer must pay for the repairs.

18.5 If Equipment must be transported from the Site to perform repairs due to Damage, the cost of transport from and to the Site is to be borne by the Customer.

18.6 The Supplier must repair any Damage as soon as reasonably practicable after it is notified by the Customer of the Damage (and in any event within 45 days of such notification).

18.7 If Equipment is Damaged – and provided the Supplier has or is complying with clause 18.6 above – the Customer must continue paying the Rental on the

Equipment until such time as it is repaired and returned to service.

### 18.8 Battery Charging and Routine Checks

The Customer must perform routine battery maintenance including by filling batteries with distilled water (where required) and perform the Battery Charging Procedures.

18.9 If the Customer fails to perform its obligations under clause 18.8 above and, as a result of this, the battery fails, the failure constitutes Damage and the Customer must pay to the Supplier the full cost of a replacement battery.

18.10 The Customer must perform the Routine Checks on a daily basis and prior to using the Equipment.

### 18.11 Customer Daily Maintenance

The Customer must keep Equipment supplied at normal levels with lubricating oils, cooling fluids, air and hydraulic oils and must keep tyres inflated to the required pressure.

### 18.12 Tyre Replacement

Unless the Quote provides otherwise, the Supplier is responsible for replacing tyres on Equipment that have worn due to Fair Wear and Tear. Notwithstanding this clause 18.10, the Supplier is not responsible for – and the Customer must pay for – the replacement of tyres where the tyre(s) to be replaced:

- (a) is Damaged; or
- (b) suffered a puncture; or
- (c) failed within 12 months of being replaced by the Supplier; or
- (d) are on Equipment that has a capacity of 8T or greater.

## 19. LOST OR STOLEN EQUIPMENT OR DAMAGED BEYOND ECONOMIC REPAIR

19.1 If any unit of Equipment on hire to the Customer becomes a Deemed Lost Unit, the Customer must pay to the Supplier within 14 days the Replacement Value of that Deemed Lost Unit.

19.2 Until the Customer makes payment to the Supplier in accordance with clause 19.1 above, the Customer must continue paying to the Supplier the Rental on the Deemed Lost Unit.

19.3 Upon payment in full by the Customer in accordance with clause 19.1 above:

- (a) title in that Deemed Lost Unit passes to the Customer (and if that Deemed Lost Unit is recovered by the Customer, the Customer retains full title in that Deemed Lost Unit); and
- (b) this Agreement comes to an end (insofar as it relates to that Deemed Lost Unit).

## 20. [INTENTIONALLY DELETED]

## 21. CUSTOMER OBLIGATIONS, WARRANTIES & REPRESENTATIONS

21.1 This clause 21 supplements the Customer's obligations, warranties and representations set out in clause 5 above.

### 21.2 Obligations

The Customer must:

- (a) take possession of, and hire, the Equipment for the Hire Period
- (b) at its own cost insure the Equipment against any loss for an amount not less than the Replacement Value;
- (c) use the Equipment at all times in a skilful and proper manner by suitably qualified and competent persons and ensure that any persons using the Equipment have required competency

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- certificates as required by relevant State or Territory bodies;
- (d) not in any way interfere with any fittings or appliances attached to the Equipment;
  - (e) not allow a lien or other security interest to be created over the Equipment;
  - (f) not allow or effect any repairs to the Equipment other than by the Supplier;
  - (g) immediately notify and cooperate with the Supplier in respect of any loss, damage or accident to the Equipment;
  - (h) on request on reasonable notice, produce the Equipment for inspection, maintenance, repairs or testing and permit the Supplier to attend on its Site for these purposes;
  - (i) not do, cause, permit or suffer any act or circumstance likely to endanger the safety, condition or safe keeping of the Equipment or otherwise imperil or prejudice the Supplier's interest in the Equipment;
  - (j) not use the Equipment where it is damaged, faulty, in need of repair or unsafe;
  - (k) not remove the Equipment from the Site unless previously notified to, and agreed by, the Supplier; and
  - (l) at the end of the Hire Period, return the Equipment to the Supplier in Good Condition.

### 21.3 Representation and Warranty – Corrosion

In addition to clause 5.4 above, the Customer represents and warrants to the Supplier that the Equipment will not be exposed to, used or operated in – and the Site is not subject to – any corrosive or erosive elements or substances (including, without limitation, asbestos, salt, acid or radioactive substances) that may erode, rust or cause Damage to the Equipment or which may otherwise pose a health and safety risk. The Customer acknowledges and agrees that a breach of this representation and warranty will cause the Supplier to suffer significant loss and, accordingly, any breach entitles the Supplier – without prejudice to any other right or remedy available to it – to charge to the Customer the Corrosion Charge in addition to the Rental (which Corrosion Charge the Customer acknowledges and agrees is fair, reasonable and proportionate to the damage that will or may be suffered by the Supplier as a result of the breach).

- 21.4 For the avoidance of doubt, if any Equipment is found to be operating or is being used in breach of clause 21.3 above, then:
- (a) any resulting damage to the Equipment is deemed to be Damage (as defined); and
  - (b) the right of the Owner to recover from the Hirer for its loss includes, but is not limited to, the right to recover the Corrosion Charge; and
  - (c) without prejudice to any other rights arising from such breach, the Owner may immediately terminate the hire of the Equipment; and
  - (d) nothing in clause 21.3 above is intended or has the effect of limiting the Hirer's obligations as set out in clauses 18.3 – 18.7 above and 22.1 below.

## 22. CUSTOMER INDEMNITY

22.1 Subject to clause 22.2 below, the Customer indemnifies and keeps the Supplier indemnified against all loss, costs, charges, damages, actions, penalties, claims, suits and expenses whatsoever caused by or to the Equipment or arising out of the Customer's possession, use or operation, whether or

not the same is or could have been covered by insurance.

- 22.2 The indemnity given by the Customer in accordance with clause 22.1 above is reduced to the extent that the loss, costs etc. is caused or contributed to by any breach by the Supplier of this Agreement.
- 22.3 The Customer must promptly notify the Supplier of any act, omission or event that has or may cause loss or damage to the Equipment or which may give rise to a claim under this indemnity.

## 23. PPS PROVISIONS

23.1 Words and phrases used in this clause 23 have the same meaning as in the PPSA.

### 23.2 Acknowledgements and Grant

The Customer acknowledges and agrees that clause 12 of this Agreement applies in respect of the supply by the Supplier to the Customer of Equipment under this Section B.

## 24. TERMINATION

24.1 This clause 24 supplements (and, where relevant, overrides) clause 10 above.

24.2 If:

- (a) this Agreement is terminated in accordance with clause 10 above (including under clause 10.2); or
- (b) the Parties agree to terminate the hire of a unit of Equipment (but not the whole of this Agreement); or
- (c) the Supplier (in its sole discretion) elects to terminate the hire of the Equipment (but not the whole of the Agreement) on the happening of a Default Event; or
- (d) the Supplier (in its sole discretion) elects to terminate the hire of the Equipment as a result of a breach by the Customer of the representation and warranty given by it in accordance with clause 21.3 above;

then this clause 24 applies.

24.3 On termination:

- (a) the Customer must deliver up the Equipment in Good Condition (or, where it fails to do so, it grants permission to the Supplier to attend on the Site to collect the Equipment);
- (b) all accrued rights and obligations of the Parties survive; and
- (c) the Customer must pay to the Supplier – in addition to any other amount due and payable under this Agreement – the following:
  - (i) the amount set out in clause 16.4 above ; and
  - (ii) any amount otherwise accrued and/or due and payable (including for Damage); and
  - (iii) the Default Interest payable on any amount due and payable by the Customer.

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### SECTION C: REPAIR SERVICES

#### 25. APPLICATION – SECTION C

- 25.1 This Section C supplements Section A (General Terms) and contains additional terms where the Services supplied by the Supplier consists of the supply of repair and maintenance services (other than where supplied further to Section B above).
- 25.2 If there is any inconsistency with the terms set out in Section A and this Section C, the terms of this Section C take precedence to the extent of the inconsistency.
- 25.3 This Section C has no effect where the Services being supplied are Services supplied pursuant to Section B above.
- 25.4 Words and phrases used in this Section C have the same meaning as in Section A

#### 26. DEFINITIONS

- 26.1 In this Section C:
- Collection Date** means the date that commences from the date that the Supplier notifies the Customer that any Equipment held by the Supplier is to be collected (either because the Services have been completed or otherwise) and ends on the date that is 7 days after this date
- Confidential Information** means any information, technical knowledge, training, assistance, guidelines, specifications, drawings, contracts, business dealings and any other information given by the Provider to the Recipient and includes (without limitation):
- this Agreement;
  - the Quote; and
  - the fact that the Parties have entered into this Agreement and agreed for the Supplier to provide the Services to Customer under this Agreement
- Monthly Target** means the monthly target spend of the Customer for the Services supplied under this Section C, being the amount set out in the Quote (if any)
- Provider** means the Party providing the Confidential Information to the Recipient
- Recipient** means the party receiving the Confidential Information from the Provider
- Storage Fees** means the amount that is \$25.00 per day

#### 27. SUPPLIER OBLIGATIONS

- 27.1 This clause 27 supplements clause 6 above.
- 27.2 The Supplier agrees to:
- where covered by the Quote, maintain any equipment in reasonable condition and in good and proper working order, subject always to Fair Wear and Tear; and
  - unless required as part of the Services, not store any poisonous, dangerous, explosive, corrosive or flammable liquids, gas or oil at the Site.

#### 28. SUPPLIER WARRANTIES

- 28.1 The Supplier warrants that the Services it supplies will:
- be rendered with due care and skill and by persons competent to perform the Services and by persons with all necessary licences, permits and consents;
  - be rendered in a timely and diligent manner;
  - comply with all standards, laws and regulations relating to the provision of such Services; and

- otherwise will be provided in accordance with clause 27 above.

#### 29. CUSTOMER OBLIGATIONS

- 29.1 This clause 29 supplements clause 5 above.
- 29.2 The Customer agrees to:
- ensure that any equipment covered by the Services is used at all times in accordance with the requirements of the manufacturer's operation manual in a skilful and proper manner and by suitable qualified and competent persons in possession of all relevant certificates, permits and licences;
  - perform daily operator checks on any equipment covered by the Services and as specified in the operational and/or maintenance manual or otherwise as notified by the Supplier;
  - (where applicable) meet or exceed the Monthly Target;
  - make available to the Supplier any equipment covered by the Services during Business Hours or otherwise at mutually agreed and acceptable times; and
  - subject to clause 29.5(b) below, where the Services performed on the Equipment and provided under this Section C are performed at the Supplier's site, collect the Equipment from the Supplier before the expiry of the Collection Period.
- 29.3 **Monthly Target**
- If and only if the Quote contains a Monthly Target, the Customer acknowledges and agrees that the Charges payable by it under this Agreement have been calculated and agreed on the basis that it (the Customer) will meet or exceed the Monthly Target and that any breach of this obligation entitles the Supplier (without limitation and at its sole election) to vary the Charges payable for the Services to be provided or otherwise treat the breach as a Default Event **provided always that:**
- the Supplier must notify the Customer of the breach; and
  - the breach occurs either:
    - for 2 or more consecutive months; or
    - for 3 or more months (whether consecutive or not) in any calendar year.

#### 29.4 Variation to Charges – Services

- Where the Services being supplied to the Customer under this Agreement consist of the on-going supply of repair and/or maintenance Services under this Section C, the Customer acknowledges and agrees that the Supplier may from time to time review the Charges to be payable for those Services and the Supplier may (and is entitled to) increase the Charges by notice in writing to the Customer. In respect of such increase (if any), the Parties each acknowledge and agree that: any increase in the Charges is to be a fair and reasonable increase only and is not to be excessive;
- the obligation on the Supplier to give written notice is an obligation to use all reasonable and best endeavours to notify the Customer, including by sending it to the Customer contact as recorded in the Supplier's database or with whom the Supplier typically communicates with the Customer (with email communication an acceptable form of notice);

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- (c) the notice must set out the reason(s) for the increase, the amount of the increase and the date that the increase is to take effect (which must not be less than 21 days from the date of the notice);
- (d) if the Supplier gives a notice in accordance with this clause 29.4, the increase applies on and from the date set out in the notice (and the Customer must pay the varied Charges on and from that day); and
- (e) if the Customer does not agree with the increase, it may terminate the supply.

### 29.5 Lien and Storage Fees

- (a) For any Customer-owned equipment held by the Supplier for the purposes of performing any Services (or otherwise), the Customer:
  - (i) acknowledges and agrees that the Supplier has a right to retain possession of the equipment until all amounts owing to it under this Agreement (including, without limitation, all Charges, interest and Storage Fees (where applicable)) have been paid in full; and
  - (ii) further to the above, agrees and grants to the Supplier a lien over such Equipment to secure payment of the amounts set out in (a)(i) above.
- (b) Where all Charges and all other monies have been paid by the Customer, the Customer must comply with 29.2(e) above and collect the equipment before the end of the Collection Period.
- (c) Where the Supplier retains possession of Customer-owned equipment in accordance with sub-clause (a) above, the Storage Fees are payable by the Customer for the period that commences from the day after the end of the Collection Period and ends on the day that the equipment is either collected or sold by the Supplier under this clause 29.5 (as the case may be).
- (d) The Supplier may sell any equipment in its possession subject to the lien granted under this clause 29.5 but only where:
  - (i) the Customer has either:
    - (A) caused or committed a Payment Breach and has not remedied this breach before the expiry of the period set out in sub-clause (d)(ii) below; or
    - (B) has not collected its equipment within the time set out in (d)(ii) below;
  - (ii) the Supplier has given to the Customer notice that it intends to sell and a reasonable period for the Customer to collect the equipment (which shall be the greater of any period as set by any Laws in the State or Territory where the equipment is held or 14 days);
  - (iii) the Customer has not collected the equipment further to any notice;
  - (iv) any sale is done at arms' length and either on commercial terms or at a public auction; and
  - (v) subject to sub-clause (e) below, to the extent that there is any surplus in funds following such sale, it accounts to the Customer for such surplus.
- (e) The Supplier may apply any proceeds of sale of any equipment sold under this clause 29.5 against any amount that the Customer owes to the Supplier (including any amount owing and

due and payable under this Agreement plus any Storage Fees plus any costs of sale).

- (f) The Customer acknowledges and agrees that it has no claim against the Supplier for any loss or damage arising from the exercise of its right of lien as set out in this clause 29.5.

## 30. CONFIDENTIALITY

**30.1** The Provider will, from time to time, provide to the Recipient the Confidential Information.

### 30.2 Obligations of Confidentiality

In receiving the Confidential Information, the Recipient acknowledges and agrees that:

- (a) the Confidential Information is provided solely for the purpose of the Recipient to fulfil its obligations under this Agreement and will be used solely for this purpose;
- (b) the Confidential Information remains the property of the Provider;
- (c) it will take all necessary measures to retain the confidentiality of the Confidential Information; and
- (d) it will not disclose the Confidential Information to any other person or entity without the consent of the Provider or in order to obtain professional (legal or financial) advice.

### 30.3 Exceptions to Confidentiality

The obligations set out in this clause 30 do not extend to any Confidential Information that is:

- (a) already in the public domain (other than by reason of a breach of this clause 30); or
- (b) required to be disclosed by law or Court order, provided always that the Recipient first gives to the Provider notice of the requirement prior to disclosing it.

### 30.4 Dealing with Confidential Information

Upon the expiration or termination of this Agreement, the Recipient must immediately on demand return to the Provider any Confidential Information in its possession, including any medium that the Confidential Information has been disseminated to.

**30.5** The obligations in this clause 30 survive expiration or termination.



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### SECTION D: SALE OF EQUIPMENT AND PARTS

#### 31. APPLICATION

- 31.1 This Section D supplements Section A (General Terms) and contains additional terms where the Services supplied by the Supplier consist of the sale of Equipment or Parts.
- 31.2 If there is any inconsistency with the terms set out in Section A and this Section D, the terms of this Section D take precedence to the extent of the inconsistency.
- 31.3 This Section D has no effect where the Services being supplied are Services supplied pursuant to Sections B and/or C above.
- 31.4 Words and phrases used in this Section D have the same meaning as in Section A.

#### 32. DEFINITIONS

##### 32.1 In this Section D:

**PDI Form** means the Pre-Delivery and Installation Report form (or however it is so described) that is provided to the Customer for all new Equipment sales and which must be completed and returned by the Customer to the Supplier in accordance with clause 33.12 below

**Restocking Fee** means the amount that is 15% of the value of the Equipment or Part(s)

**Specialised Equipment** means any Equipment that is bespoke or not standard or manufactured specifically at the Customer's request and which is otherwise not available from stock and specifically **excludes** Used Equipment

**Used Equipment** means any Equipment sold by the Supplier to the Customer that is not purchased new but is purchased second-hand

**Warranty Period** means, unless the Parties otherwise agree in writing to a different period or unless otherwise stated in the Quote:

- (a) for Used Equipment – the period that is calculated from the date that the Equipment is delivered or collected (as the case may be) and which ends at the end of the period set out in the Quote and which is the subject of the Purchase Order (or, if no period is stated, the period is nil days); or
- (b) for Equipment that is not Used Equipment – the period that is calculated from the date that the Equipment is delivered or collected (as the case may be) and which ends at the later of:
- (i) the period given by the manufacturer of the Equipment to the Supplier; or
- (ii) such other period as is agreed in writing between the Parties from time to time

#### 33. ORDERING, DELIVERY & INSPECTION

##### 33.1 Ordering

The Supplier must place an order for any Equipment to be supplied as soon as reasonably practicable following acceptance of a Quote.

- 33.2 The Customer acknowledges that once an order is placed it cannot be cancelled and if the Customer purports to cancel after accepting a Quote, clause 34 below applies.

##### 33.3 Variation to Charges – Purchase

The Customer acknowledges and agrees that the Charges payable for the Equipment set out in the Quote is correct as at the date the Quote is given and is based on prices quoted to the Supplier by the

Equipment manufacturer at the time of providing the Quote. If the Customer does not accept the Quote within the time set out in the Quote, the offer contained in the Quote lapses and a new Quote must be requested by the Customer (and the Charges may change accordingly).

- 33.4 Further to clause 33.3 above, the Customer acknowledges and agrees that the Supplier may be subject to a variation in the amount it (the Supplier) pays the manufacturer for the Equipment (**Price Variation**), which Price Variation may be passed on after the Quote has been accepted and/or a Purchase Order has been issued. If, and only if, the Supplier is subject to a Price Variation from the manufacturer, the Parties each agree that the Charges payable is to be varied as follows:

- (a) any variation is to be a fair and reasonable variation only and is to be referable to the Price Variation charged by the manufacturer (and not for any other reason);
- (b) the Supplier must give to the Customer written notice of the increase, which may be given by sending it to the Customer contact as recorded in the Supplier's database or with whom the Supplier typically communicates with the Customer (email communication being an acceptable form of notice); and
- (c) the variation to the Charges applies on and from the date of the notice given by the Supplier and the Charges payable by the Customer for the supply of the Equipment the subject of the Quote is to be taken to be the Charges set out in the Quote plus the variation.

##### 33.5 Delivery

Delivery dates or times given by the Supplier are approximate only and are not to be construed in any way as a guarantee that it will be delivered by that date.

- 33.6 The Supplier must take all reasonable endeavours to deliver by the delivery date but if it fails to do so, this does not constitute a breach or repudiation of this Agreement.

- 33.7 The Supplier is not in any way liable for any delay in delivery (including, without limitation, any penalty for delayed delivery).

- 33.8 The Supplier may deliver the Equipment and/or Parts by instalments. If the Equipment and/or Parts are delivered by instalments, a failure of the Supplier to deliver an instalment does not entitle the Customer to cancel the Purchase Order unless the remaining instalment(s) is unable to be delivered **and** the Supplier unable to source the instalment(s) from a third party supplier.

- 33.9 Delivery is deemed to occur on the day that the Equipment is either made available for collection by the Customer or delivered to the Customer's Site (whichever applies).

##### 33.10 Inspection

The Customer must inspect any Equipment and/or Parts immediately on delivery and must notify the Supplier within 24 hours of delivery of any defect or failure to deliver in accordance with the Quote.

- 33.11 If no notice is given in accordance with clause 33.8 above, it is deemed that the Equipment and/or Parts comply with the Quote and the Customer is deemed to have accepted the Equipment and/or Parts.

##### 33.12 Provision of PDI Form

- (a) The Customer must complete and return the PDI Form to the Supplier within 14 days of the

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- Equipment being collected by the Customer or delivered by the Supplier (as the case may be).
- (b) The time for completing and returning the PDI Form is of the essence.
  - (c) The Customer acknowledges and agrees that a failure by it to complete and return the PDI Form in accordance with this clause 33.12 may result in any manufacturer Warranty being declined, with the effect that the Supplier is not liable to the Customer under any Warranty that would otherwise be applicable for the supply of the Equipment.

### 33.13 "As-Is" Basis – Used Equipment

If the Equipment being sold is Used Equipment, the Customer acknowledges and agrees that it has inspected – or had the opportunity to inspect – the Used Equipment and accepts the Used Equipment on an "as-is" basis, with the effect that:

- (a) the Customer acknowledges and agrees that the Supplier has made no – and the Customer has not relied on any – representation or warranty as to its condition or fitness for purpose (other than where otherwise stated in the Quote); and
- (b) unless the Customer purchases warranty cover as set out in clause 37 below, it is purchased and accepted by the Customer in the condition it is delivered (and otherwise as set out in the Quote); and
- (c) the Customer's rights to notify of a defect in clause 33.8 above is limited to any defects that:
  - (i) are not set out in the Quote or could not reasonably have been known or ascertained by the Customer at the time of signing the Quote or otherwise consist of the wrong supply; and
  - (ii) materially affect the performance of – and the Customer's use of – the Used Equipment.

### 33.14 Obligation to Take Delivery

Further to clause 33.9 above, the Customer agrees that – unless otherwise agreed in writing with the Supplier – it (the Customer) will take delivery and possession of the Equipment as soon as reasonably practicable (and in any event, within 7 days) after being notified by the Supplier that the Equipment is ready for delivery/collection (as the case may be) and otherwise pay for the Equipment in accordance with the Payment Terms. The Customer acknowledges and agrees that the time stipulation set out in this clause 33.14 is of the essence and if this clause 33.14 is breached, the Supplier may (without prejudice to any other rights arising from the breach) terminate this Agreement insofar as it relates to the supply of the Equipment, in which case clause 33.15 below applies.

- 33.15 If the Supplier terminates the Agreement in accordance with clause 33.14 above then, further to clause 10 above, the Purchase Order is deemed to be cancelled and (without prejudice to any other rights the Supplier may have arising from such breach and cancellation), clauses 34.3 and 34.4 below applies in respect of such cancellation.

## 34. NO CANCELLATION

- 34.1 This clause 34 supplements clause 4 above.
- 34.2 Further to clause 34.1 above, the Customer acknowledges and agrees that, where it agrees to the supply by the Supplier of Equipment by any of the means set out in clause 4 above, the supply may not

be cancelled without the written consent of the Supplier (which consent may be given or withheld in the Supplier's sole discretion).

- 34.3 If the Customer cancels or terminates any supply (or purports to do so) or fails or refuses to accept any supply under this Section D, it agrees that:

- (a) clause 7.4 of this Agreement applies in respect of the deposit (if any); and
- (b) it is liable for, and indemnifies the Supplier against, all losses suffered by the Supplier arising out of the cancellation or termination, including (without limitation):
  - (i) where the Equipment being supplied is Specialised Equipment – the Charges payable for that Equipment (in full); and
  - (ii) for any Equipment that is not Specialised Equipment – the Restocking Fee as a liquidated sum (which is due and payable by the Customer on demand and which may be offset against the deposit (if any) received by the Supplier)

- 34.4 The Customer acknowledges and agrees that the amounts set out in clause 34.3 above:

- (a) does not limit the amount the Supplier may recover from the Customer arising from the cancellation/termination; and
- (b) where sub-clause 34.3(b)(i) applies – this is fair and reasonable having regard to the fact that the Equipment cannot be repurposed and otherwise for the reasons set out in sub-clause (c) below;
- (c) where sub-clause 34.3(b)(ii) applies – the Restocking Fee is fair and reasonable having regard to (amongst other things) the fact that the Equipment has not been used or sold elsewhere, has been purchased or made available to the Customer at the Customer's request and the Supplier has (or may have) ongoing financial obligations with regards to the Equipment and/or foregone other opportunities to sell/lease the Equipment.

## 35. TITLE AND RISK

### 35.1 Title

Title in the Equipment and/or Parts remains with the Supplier until payment in full is received from the Customer.

- 35.2 Until payment of the Charges is received by the Supplier in full, the Customer holds the Equipment and/or Parts as bailee only and the Customer must ensure that the Equipment/Parts are retained in their original state, not mixed and are maintained in a satisfactory and working condition.

- 35.3 If the Customer sells or otherwise disposes of the Equipment and/or Parts prior to payment being received in full, the proceeds of such sale are held on trust for the Supplier and a Security Interest (being a purchase money security interest) is granted by the Customer in the Equipment and/or Parts (or the proceeds of the sale of such Equipment and/or Parts) in accordance with clause 12 above.

### 35.4 Risk

Notwithstanding clauses 35.1 – 35.2 above, risk in the Equipment and/or Parts passes to the Customer immediately upon the Customer collecting the Equipment/Parts or the Equipment/Parts being delivered to the Customer's Site (whichever is applicable).

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### 36. RETURN OF PARTS

#### 36.1 Right of Return

The Customer can return Parts purchased subject to clause 36.2 below.

#### 36.2 Return of Parts

If the Customer wishes to return Parts purchased from the Supplier then, unless a right of return is otherwise provided for in this Agreement, the following conditions apply:

- (a) any return must be requested within 14 days from the date of purchase, failing which the right of return lapses;
- (b) no Parts may be returned that have been specially ordered or manufactured at the request of the Customer;
- (c) the Customer must pay to the Supplier the Restocking Fee;
- (d) the Parts must be returned in their original condition, in the same packaging (if applicable), unopened, unmarked, in a saleable condition and not having been used;
- (e) if the Parts are returned in a Damaged state or otherwise in breach of sub-clause (b) above, the Supplier may (in its sole and absolute discretion) reject the request for return;
- (f) the Customer must return the Parts at its (the Customer's) own cost and risk; and
- (g) the Customer must pay to the Supplier the Restocking Fee.

#### 36.3 If the Customer returns Parts in full compliance with clause 36.2 above, the Supplier must either:

- (a) where the Charges have been paid for the Parts – refund the Charges payable for the Part(s) (less the Restocking Fee); or
- (b) where the Charges have not yet been paid for the Parts – take back the Parts upon payment by the Customer of the Restocking Fee; or
- (c) if requested by the Customer, supply alternative Parts up to the value of the Parts being returned upon payment by the Customer of the Restocking Fee.

#### 36.4 If the Customer returns Parts that it alleges are defective (and otherwise covered by clause 37.2 below) but which are subsequently determined not to be defective, the Customer must pay to the Supplier the Restocking Fee plus a reasonable testing fee as a debt due and payable by the Customer. This clause does not limit the right of the Supplier to recover for any other loss, cost or damage it has suffered by the return of the Parts under this clause 36.4.

### 37. WARRANTIES

#### 37.1 Warranty Period – Equipment

Subject to clause 37.5 below, the Supplier warrants the major components of the Equipment (including Used Equipment, where relevant) for the Warranty Period.

#### 37.2 Warranty Period – Parts

Subject to clause 37.5 below, the Supplier warrants the Parts for 30 days from the date of sale.

#### 37.3 Warranty – Supplier Obligations

Subject to clause 37.5 below, if during the Warranty Period the Equipment/Parts fail or prove defective in workmanship, the Supplier will (at its sole election) repair, replace or pay for the cost of repairing/replacing the Equipment/Parts (including, where applicable, any delivery charges applicable for such repair/replacement).

#### 37.4 Warranty – Customer Obligations

- (a) Where:
  - i) the Customer makes a claim pursuant to this clause 37;
  - ii) the claim is accepted in accordance with this clause 37; and
  - iii) the Supplier elects to repair the Equipment/Parts in accordance with clause 37.3 above;then the Customer must make available the Equipment/Parts to the Supplier on reasonable request by the Supplier and during Business Hours in order to undertake the repair.
- (b) If the Customer does not comply with the above or if the Equipment/Parts are made available outside of Business Hours, a charge-out rate will be payable by the Customer based on the Supplier's then prevailing rates.

#### 37.5 Warranty Exclusions – General

The warranty given by this clause 37 does not apply if the PDI Form is not returned in accordance with clause 33.12 above or if the Equipment/Parts are damaged or fail due to any one or more of the following:

- (a) improper adjustment, calibration or operation;
- (b) the use of accessories, consumables, hardware or software that were not manufactured by or approved in writing by the Supplier;
- (c) any contamination or leakage whilst the Equipment/Parts are in the possession of the Customer;
- (d) any modifications that were not authorised or approved by the Supplier;
- (e) any accident or misuse;
- (f) any use or operation outside of the physical, electrical or environmental specifications of the Equipment/Parts;
- (g) inadequate or improper maintenance and/or repairs;
- (h) dirt or other foreign substance; and/or
- (i) damage or loss during transit (unless transported by the Supplier).

#### 37.6 Warranty Exclusions – Specific (Used Equipment)

Further to clause 37.5 above and subject to any other matter set out in the Quote, the warranty given by this Agreement extends to cover only major components and the structure of the Used Equipment and does not extend to cover any of the following on the Used Equipment (the condition of each of which the Customer acknowledges and agrees it is – or had the opportunity to be – aware of prior to accepting the Quote):

- (a) brakes, including brake pads and shoes;
- (b) tyres;
- (c) batteries;
- (d) hoses and hose fittings;
- (e) starter motor; and/or
- (f) parts that are used or would typically be used as part of regular service and maintenance of the Equipment.

#### 37.7 Implied Terms and Warranties

Except as provided above, all express and implied warranties, guarantees and representations as to merchantability, description, quality, suitability, description based on illustrations and material contained in any advertisement, website or brochure or fitness for purposes are otherwise expressly excluded to the maximum extent permissible by law. If such terms cannot be excluded by law, the liability of any breach of such implied term is limited (at the

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Supplier's option) in accordance with clause 8.5 of this Agreement.

- 37.8** If the purchase by the Customer is the purchase of Used Equipment, the Customer expressly acknowledges and agrees that clause 33.13 above applies in precedence to this clause 37.
- 37.9** For the avoidance of doubt, this clause 37 applies subject to clause 8 above (and, specifically, clause 8.4 (No Consequential Loss) applies in precedence to any rights under this clause 37).