

## Terms of trade

### 1 Definitions and interpretation

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#### 1.1 Definitions

**Additional Charge** means:

- (a) fees or charges for additional work performed at the Customer's request or reasonably required as a result of the Customer's conduct, calculated in accordance with the Supplier's then current prices; and
- (b) expenses incurred by the Supplier, at the Customer's request or reasonably required as a result of the Customer's conduct.

**Business Day** means a day that is not a Saturday, Sunday or public holiday in the place where the contract was formed.

**Contract** means the terms of contract between the Supplier and the Customer as defined in clause 2 of these Terms of Trade.

**Customer** means the person (including a corporation) to whom the Supplier has offered or agreed to supply the Goods and/or Services identified in a Quote.

**Customer Specifications** means Specifications for an item of Goods made known to the Supplier by the Customer with respect to that item, or otherwise as are reasonable having regard to the circumstances.

**Default Interest Rate** means the annual rate of interest calculated as: the RBA Cash Rate Target plus 5%.

**Essential Term** includes:

- (a) The Customer's obligations to make payments in full and at the times specified in the Contract;
- (b) The Supplier's obligations to supply Goods that meet or exceed the Supplier Specifications for those goods required by the Contract; and
- (c) Any other provision that, in fact, or at law, is essential to the Contract.

**Event of Default** has the meaning given in clause 9.

**Fundamental Breach** means:

- (a) the happening of a Solvency Event to a party to the Contract;
- (b) a breach of an Essential Term by a party to the Contract; or
- (c) a purported termination of this Contract by a party who is not entitled to terminate the contract.

**Goods** means the goods supplied by the Supplier to the Customer, including those supplied in the course of providing Services.

**Intellectual Property Rights** means intellectual property rights protected by statute or common law, including copyright, trade marks, patents and registered designs.

**Interest** means interest calculated on daily balances, compounding monthly on the first day of each month.

**Loss** arising from a breach includes costs and expenses directly caused by the breach, including costs of mitigation and legal costs and lost profits but does not include consequential losses. Loss includes

**Order** means an effective acceptance of a Quote by the Customer. To be effective, an Order must be in writing, and be received by the Supplier within the Quote Validity Period. A purported Order that does not meet these requirements operates as a Request for Quote.

**Order Confirmation** means a written notification issued by the Supplier to the customer confirming the Supplier's receipt of the Customer's Order and the formation of the Contract.

**PPS Law** means:

- (a) the *Personal Property Security Act 2009* (Cth) (**PPSA**) and any regulation made at any time under the PPSA (each as amended from time to time); and
- (b) any amendment made at any time to any other legislation as a consequence of a PPS Law.

**Quote** means a document issued by the Supplier to the Customer identifying the Goods and any Services to be supplied by the Supplier to the Customer, the price at which they will be supplied, the terms on which they will be supplied (namely, these terms of trade) and any special conditions. A Quote is a formal offer issued by the Supplier and supercedes any invitation to treat (whether or not described as an order or offer) given by the prospective Customer to the Supplier.

**Quote Validity Period** means the period nominated in the Quote during which the offer constituted by the Quote may be accepted by sending an Order to the Supplier. If not otherwise specified, the Quote Validity Period is 30 days.

**RBA Cash Rate Target** means the rate published from time to time by the Reserve Bank of Australia as its target for the cash rate (the interest rate on unsecured overnight loans between banks).

**Ready for Dispatch** means that the order is complete at the Supplier's premises, and ready for delivery to, or collection by, the Customer.

**Request for Quote** means a verbal or written request (including a document which is styled an Order) by the Customer to the Supplier for the supply of goods and/or services. A request for quote operates as an invitation to treat to the Supplier.

**Services** means any services to be provided by the Supplier to the Customer in accordance with a Quote or an invoice and these terms of trade.

**Specifications** with respect to any Goods means the tolerances (as to average and maximum operating pressure, temperature, work rate, service cycle life, flexibility type, fittings type, goods type, goods velocity, whether thrust force is required, whether spring rate is required, movement or vibration, environmental factors or any other relevant matter).

**Solvency Event** has the meaning set out in clause 9.

**Storage Fee** means the amount calculated as the Storage Rate multiplied by the area in m2 consumed by the storage of the uncollected Goods multiplied by the number of days more than 30 for which the Goods remain uncollected by the Customer.

**Storage Rate** means the rate per day per m2 specified in Contract, and if not otherwise specified means \$50/day/m2.

**Supplier** means Pacific Hoseflex Pty Ltd ACN 073 719 874 and includes the Supplier's agents and permitted assigns.

**Supplier Specifications** means Specifications for an item of Goods published or made known to the Customer with respect to that item by the Supplier, or otherwise as are reasonable having regard to the circumstances.

**Terms of Trade** means the content of this document.

**Variation** means an agreed change to the contract terms reached after the contract has been formed.

**Warranty Period** means the period of 12 months following the date of the invoice provided by the supplier to the Customer for the particular Goods or Services.

## 1.2 Interpretation

In these Terms of Trade, unless the context otherwise requires:

- (a) the singular includes the plural and vice versa;
- (b) a reference to a clause or paragraph is a reference to a clause or paragraph of these terms of trade;
- (c) a reference to a party to these terms of trade or any other document or arrangement includes that party's executors, administrators, successors and permitted assigns;
- (d) where an expression is defined, another part of speech or grammatical form of that expression has a corresponding meaning;
- (e) capitalisation of defined terms is for ease of identification only and lack of capitalisation when referencing a defined term does not indicate that the definition is inapplicable in that instance.
- (f) headings are for ease of reference only and do not affect the meaning or interpretation of these terms of trade; and
- (g) if the date on which any act, matter or thing is to be done falls on a day which is not a Business Day, that act, matter or thing must be done on the next Business Day.
- (h) A reference to a period of time in days without specifying 'Business Days', is a reference to calendar days.
- (i) Expressions defined in the PPS Law have the same meaning when used in these terms of trade.

## **2 Contract Terms**

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- (a) The terms of contract between the Supplier and the Customer shall be the terms set out:
  - (i) In the Quote; and
  - (ii) In these Terms of Trade.
- (b) Any special conditions in the Quote shall override these Terms of Trade to the extent that they are inconsistent.
- (c) The contract shall be formed when the Customer issues the Supplier with a valid Order.
- (d) The place of formation of the Contract shall be the premises of the Supplier from which the Goods and/or Services are to be supplied (and if not otherwise specified, the address of the Supplier identified on the Quote).
- (e) The Supplier may issue an Order Confirmation after receipt of a valid Order. An Order Confirmation operates as confirmation that the Supplier has received and accepted the Customer's Order.
- (f) Any discussions or negotiations which precede the formation of the contract, whether written or verbal, and including anything in a Request for Quote, shall have no effect unless reflected in a Quote, which has been accepted in an Order.
- (g) Any discussions or negotiations, whether written or verbal, which post-date the formation of the contract will have no effect unless reduced to writing and signed by the Customer and the Supplier, and, in that event, shall take effect as a Variation.
- (h) The provisions in a Variation shall override the Quote and the Terms of Trade to the extent of any inconsistency.
- (i) Unless otherwise specified in the Quote:
  - (i) the Customer must collect the Goods from the Supplier within 30 days of the date on which the Supplier notifies the Customer that the Goods are available for collection.
  - (ii) The Customer must pay the Storage Fee for Goods not collected within 30 days.
  - (iii) Delivery or installation of Goods is not an implied obligation of the Supplier.

## **3 Specifications**

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- (a) Subject to clause (b):
  - (i) the Customer expressly agrees to use any Goods supplied:
    - (A) For the use, and in the manner of use, for which the goods have been designed; and
    - (B) In conformance with the Supplier's Specifications applicable to the Goods.

- (ii) The Supplier does not assert that the Goods are suitable for any purpose or use other than strictly in conformance with the Supplier's Specifications.
- (b) The Customer may request the Supplier to supply products in accordance with the Customer's Specifications.
  - (i) The Supplier may, by express provision in a Quote, agree to provide some or all Goods in accordance with the Customer's Specifications.
  - (ii) Where the Supplier agrees to the Customer's Specifications:
    - (A) the Customer is responsible to ensure that all relevant matters are included in the Specification.
    - (B) The Supplier is not responsible for any failure of any item which fails by reason of one or more relevant factors that were not included in the Customer's Specifications.

#### **4 Invoicing and payment**

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- (a) The Supplier will invoice the Customer in the amounts and at the times (or stages of completion) specified in the Quote.
- (b) The Customer must pay a valid invoice issued by the Supplier within 7 days of the date of the invoice.
- (c) The Supplier is not obliged to deliver any Goods or Services during any period where there is an amount outstanding to the Supplier by the Customer, including invoices issued but not yet due.
- (d) The Customer and the Supplier agree to comply with their obligations in relation to Goods and Services Tax (**GST**) under the *A New Tax System (Goods and Services Tax) Act 1999* and any other applicable legislation governing GST.

#### **5 Title and risk**

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- (a) Risk in Goods passes to the Customer immediately upon delivery.
- (b) Property and title in Goods supplied to the Customer under these terms of trade does not pass to the Customer until all money due and payable under the Contract to the Supplier by the Customer have been fully paid.
- (c) Where Goods are supplied by the Supplier to the Customer without payment in full:
  - (i) the Customer is a bailee of the Goods until property in them passes to the Customer;
  - (ii) the Customer hereby irrevocably and by way of security appoints the Supplier to be its true and lawful attorney to execute and register any security as described in clause 6.
  - (iii) the Customer must be able upon demand by the Supplier to separate and identify as belonging to the Supplier Goods supplied by the Supplier from other goods which are held by the Customer;
  - (iv) the Customer will not attempt to convey title to the Goods to any third party unless otherwise agreed by the Supplier in writing;

- (v) the Customer must not allow any person to have or acquire any security interest in the Goods;
- (vi) the Customer agrees that the Supplier may repossess the Goods if there is an Event of Default; and
- (vii) the Customer grants an irrevocable licence to the Supplier or its agent to enter the Customer's premises in order to recover possession of Goods pursuant to this paragraph. The Customer indemnifies the Supplier for any damage to property or personal injury which occurs as a result of the Supplier entering the Customer's premises.
- (viii) The Customer will indemnify the Supplier for any claim made by any third party against the Supplier as a result of the Supplier taking possession of the Goods.
- (ix) If the Customer sells the Goods before it has paid for them in full then the Customer:
  - A. holds the proceeds of the sale on trust as agent for the Supplier immediately when they are received; and
  - B. must pay the proceeds of sale of the Goods into a separate Bank account as trustee for the Supplier.
- (d) Despite paragraph 5(c), the Customer may transfer, sell or dispose of Goods to a third party in the ordinary course of business. This is provided that:
  - (i) where the Customer is paid by a third party in respect of Goods including New Goods, the Customer holds the whole of the proceeds of sale, less any GST, on trust for the Supplier in a separate account, until all amounts owed by the Customer to the Supplier have been paid; or
  - (ii) where the Customer is not paid by a third party, the Customer agrees to assign all of its rights against the third party to the Supplier upon the Supplier giving the Customer notice in writing to that effect and for the purpose of giving effect to that assignment the Customer irrevocably appoints the Supplier as its attorney by way of security.
- (e) Where the Customer appoints the Supplier as its attorney by way of security, then, to the extent required for the Supplier to exercise that attorney for the purposes of enforcing its security, the Supplier is authorised to enter into conflict transactions.

## **6 Security Interest (PPSA)**

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- (a) Where Goods are supplied by the Supplier to the Customer without payment in full of all moneys payable in respect of the Goods and any Services provided by the Supplier in respect of those Goods, the Customer agrees that the Supplier has a right to register and perfect a personal property security interest.
- (b) These terms of trade constitute a security agreement.
- (c) The interest of the Supplier in the Goods and all proceeds from the sale of the Goods by the Customer to a third party is a security interest pursuant to these Terms, including as a purchase money security interest (**PMSI**) (as that term is defined in the PPSA) where applicable.

- (d) The Customer consents to the Supplier perfecting any security interest that it considers this document provides for by registration under the PPSA, including as a PMSI (where applicable). The Customer agrees to do anything the Supplier reasonably asks to ensure that the security interest:
  - (i) is enforceable, perfected and otherwise effective; and
  - (ii) has priority over all other security interests.
- (e) The Customer agrees that the Supplier need not notify the Customer when it registered its security interest under the PPSA.
- (f) To the extent the law permits, the Supplier need not comply with, and the Customer may not exercise rights under, any provisions of Chapter 4 of the PPSA that may be contracted out of.
- (g) If the Supplier exercises a right, power or remedy in connection with this document or a security interest that it provides for, that exercise is taken not to be an exercise of a right, power or remedy under the PPSA unless the Supplier states otherwise at the time of exercise. However, this clause does not apply to a right, power or remedy which can only be exercised under the PPSA.
- (h) To the extent the law permits, the Customer waives its right to receive any notice (including notice of a verification statement) that is required by the PPSA. However, this does not prevent the Supplier from giving a notice under the PPSA.
- (i) The Customer agrees not to exercise its rights to make any request of the Supplier under section 275 of the PPSA. However, this does not limit the Customer's rights to request information other than under section 275.
- (j) If:
  - (i) a PPS Law applies or commences to apply to these terms of trade or any transaction contemplated by them, or the Supplier determines (based on legal advice) that this is the case; and
  - (ii) in the Supplier's opinion, the PPS Law:
    - (A) does or will adversely affect the Supplier's security position or obligations; or
    - (B) enables or would enable the Supplier's security position to be improved without adversely affecting the Customer,

the Supplier may give notice to the Customer requiring the Customer to do anything (including amending these terms of trade or execute any new Terms and Conditions) that in the Supplier's opinion is necessary, to the maximum possible extent, to overcome the circumstances contemplated in paragraph 6(j)(ii)(A) or improve the security position as contemplated in paragraph 6(j)(ii)(B). The Customer must comply with the requirements of that notice within the time specified in the notice. If having completed everything reasonably practicable as required under this paragraph, in the Supplier's opinion the Supplier's security position or obligations under or in connection with these terms of trade have been or will be materially adversely affected, the Supplier may by further notice to the Customer cancel these terms of trade. If this occurs, the Customer must pay to the Supplier any money owed to the Supplier by the Customer immediately.

- (k) Unless the Goods are used predominantly for personal, domestic or household purposes, the Customer agrees that each of the following requirements under the PPS Law does not apply to the enforcement of the Supplier's security interest in the Goods or these terms of trade:
  - (i) any requirement for the Supplier to give the Customer a notice of accession;
  - (ii) any requirement for the Supplier to give the Customer a notice of the Supplier's proposed disposal of the Goods;
  - (iii) any requirement for the Supplier to include in a statement of account, after disposal of the Goods, the details of any amounts paid to other secured parties
  - (iv) any requirement for the Supplier to give the Customer a statement of account if the Supplier does not dispose of the Goods
  - (v) any right the Customer has to redeem the Goods before the Supplier exercises a right of disposal; and
  - (vi) any right the Customer has to reinstate these terms of trade before the Supplier exercises a right of disposal of the Goods.

## **7 Intellectual Property Rights**

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- (a) Where the Customer supplies intellectual property to the Supplier for the purposes of the Supplier completing an Order:
  - (i) The Customer licences the Supplier to use that intellectual property for purposes of and incidental to the completion of the Order, and
  - (ii) warrants to the Supplier that it owns, or is otherwise duly authorised by the owner of the intellectual property, to grant the licence.
- (b) Save for intellectual property supplied by the Customer, all Intellectual Property Rights in any works created by the Supplier, including works created for the purposes of an Order, vest in and remain the property of the Supplier.

## **8 Assignment**

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- (a) The Customer may not assign, or purport to assign, any of its obligations or rights under these terms of trade without the prior written consent of the Supplier.
- (b) The Supplier may assign its obligations and rights under this contract provided, either:
  - (i) The assignment will not operate to the Customer's detriment; or
  - (ii) The Customer has consented to the assignment.

## **9 Default**

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- (a) Where an Event of Default occurs:



- (i) The party not in default shall be entitled to recover from the party in default the value of their Loss occasioned by the event of default.
  - (ii) If the event of default is a Fundamental Breach the party not in default may elect to terminate the contract.
- (b) If an event of default includes the failure by the Customer to make a payment in accordance with the requirements of the Contract, then, without limiting the other rights of the Supplier:
  - (i) the Customer must pay Interest to the Supplier, on the unpaid amount at the Default interest Rate for the period the amount is outstanding;
  - (ii) the Supplier may suspend delivery of Goods and/or Services to the Customer (under any and all Contracts presently underway between the parties) until the default is remedied and any timeframe for the delivery of the Goods and/or Services shall be extended by the length of the period in which the Customer is in default.
- (c) Termination of the Contract in accordance with this clause does not limit the rights of the terminating party to enforce such provisions of the Contract as survive termination, including the enforcement of any security granted by a party to secure the performance of their obligations under this Contract (whether under this Contract or otherwise).
- (d) Definitions:
  - (i) Each of the following occurrences constitutes an “**Event of Default**”:
    - (A) Either party breaches the terms of the Contract;
    - (B) Either party is subject to a Solvency Event.
  - (ii) “**Solvency Event**” means:
    - (A) Either party, being a natural person, commits an act of bankruptcy;
    - (B) Either party, being a corporation, is subject to:
      - a petition being presented, an order being made or a meeting being called to consider a resolution for the Customer to be wound up, deregistered or dissolved;
      - a receiver, receiver and manager or an administrator under Part 5.3A of the *Corporations Act 2001* being appointed to all or any part of the Customer's property and undertaking;
      - the entering of a scheme of arrangement (other than for the purpose of restructuring); and
      - any assignment for the benefit of creditors;
    - (C) Either party ceases or threatens to cease to conduct its business in the normal manner.

## 10 Dispute resolution

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- (a) The parties agree to follow the alternative dispute resolution provisions within this clause in the event of a dispute. However, these provisions do not limit the right of either party to institute legal proceedings in a court of competent jurisdiction.
- (b) Either party may notify the other of the existence of a dispute. If a dispute is notified, the dispute must immediately be referred to the parties' respective senior management. Those representatives must endeavour to resolve the dispute as soon as possible and in any event within 20 Business Days (or other period as agreed).
- (c) Unless otherwise agreed by the parties, if the dispute that cannot be settled by negotiation between the parties or their representatives, the parties expressly agree to endeavour to settle the dispute by mediation administered by the Australian Commercial Disputes Centre (**ACDC**). The mediation must be conducted in accordance with the ACDC Guidelines for Commercial Mediation which operate at the time the matter is referred to ACDC. The Guidelines set out the procedures to be adopted, the process of selection of the mediator and the costs involved.
- (d) Unless otherwise required by law or at the direction of a court of competent jurisdiction, the parties must hold confidential all information relating to the subject matter of the dispute that is disclosed during or for the purposes of dispute resolution. The parties acknowledge that the purpose of any exchange of information or documents or the making of any offer of settlement pursuant to this procedure is to attempt to settle the dispute between the parties. No party may use any information or documents obtained through the dispute resolution process for any purpose other than an attempt to settle the dispute between the parties.

## 11 Force majeure

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- (a) If by reason of any fact, circumstance, matter or thing beyond the reasonable control of the Supplier or the Customer, either is unable to perform in whole or in part any obligation under this agreement:
  - (i) that party is relieved of that obligation under this agreement to the extent and for the period that the party is unable to perform such obligation; and
  - (ii) that party will not be liable to the other party to this agreement for failure to perform such obligation to the extent and for the period of non-performance contemplated by this clause.

## 12 Miscellaneous

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- (a) The contract is governed by the laws of Queensland and each party irrevocably submits to the non-exclusive jurisdiction of the courts of that state.
- (b) If any term of this document:
  - (i) is unenforceable at law
  - (ii) doesn't comply with a law, or

- (iii) imposes an obligation or confers a right prohibited by law,  
the term is omitted or varied to the extent necessary to comply with that law.
- (c) A party's failure or delay to exercise a power or right does not operate as a waiver of that power or right.
- (d) A notice or other communication required or permitted to be given by one party to another must be in writing and may be sent to:
  - (i) The email address used by the party for the purposes of entering into the Contract, or, where that party has subsequently notified the other of a new address, that new address;
  - (ii) The registered office or principal place of business of the party;
- (e) A notice or other communication is taken to have been given:
  - (i) if mailed, on the second Business Day after posting; or
  - (ii) if sent electronically, on the business day first following the day on which it was sent.
- (f) Time is of the essence of this contract.
- (g) The Customer warrants to the Supplier that the Goods or Services are not for personal, domestic or household purposes.