

TERMS AND CONDITIONS FOR GOODS AND SERVICES

1. Definitions

In these terms and conditions:

"Conditions" means the terms of these terms and conditions for goods and services;

"Customer" means an individual, partnership or corporation seeking to acquire Goods or Services from Motion and where applicable includes the applicant in the Credit Application and, if the Customer consists of more than one person, each of them jointly and severally;

"Goods" means all goods and or materials supplied by Motion to the Customer;

"GST" means GST within the meaning of *A New Tax System (Goods and Services Tax) Act 1999* (Cth) as amended;

"Insolvency Event" means any matter referred to in clause 5.6 of these Conditions;

"Motion" means Motion Hydraulics Pty Ltd (ACN 609 587 064);

"Other Property" means all present and after-acquired property of the Customer (except the Goods) whether acquired alone or jointly as a tenant in common or as a joint tenant;

"PPSA" means the *Personal Property Securities Act 2009* (Cth) as amended;

"Real Property" means all real property interest held by the Customer now and in the future;

"Security Agreement" and **"Security Interest"** have the meaning ascribed to them in the PPSA;

"Services" means any and all services supplied by Motion to the Customer; and

"Website" means www.motionhydraulics.com.au including all password protected areas and subdomains of such website and all related top-level domains, mobile sites, apps, APIs and widgets.

2. Application of the Conditions

2.1 Subject to clause 2.2, or unless otherwise agreed in writing, these Conditions will apply exclusively to every contract for the sale of Goods and or the supply of Services by Motion to the Customer and cannot be varied or replaced by any other conditions without the prior written consent of Motion.

2.2 Motion reserves the right to vary these Conditions by publishing varied or new Conditions on the Website. This may include changes needed to reflect changes to the law or changes to Motion's Goods and Services. Customers should review the Conditions published on the Website regularly. Any order placed, or Goods or Services supplied at the request of the Customer, after varied or new Conditions are published on the Website, will be deemed to be the Customer's acceptance of the varied or new Conditions irrespective of whether the Customer has actual notice thereof.

2.3 Motion may terminate this agreement on 7 days written notice. Any termination is without prejudice to the rights of Motion accrued prior to such termination including the right to be paid or to recover the Goods.

2.4 Motion may terminate this agreement without notice if an Insolvency Event occurs in relation to the Customer.

2.5 The Customer and Motion agree to keep confidential the price of the Goods and Services, except as required by law.

3. Quotes and Orders

3.1 Any written quotation provided by Motion to the Customer concerning the supply of Goods and or Services is valid for 30 days, unless otherwise stated in the quotation, and is an invitation only to the Customer to place an order based upon that quotation.

3.2 Motion will not be deemed to have accepted an order or an offer by the Customer unless it has communicated acceptance to the Customer in writing or has delivered the Goods or Services stated in the order.

3.3 Motion can withdraw a quotation at any time before it has communicated acceptance of an order to the Customer in writing,

3.4 The minimum order value is \$100.00 or as otherwise notified by Motion to the Customer from time to time.

4. Payment

4.1 Payment for Goods and or Services must be made, without deduction or setoff, within 30 days following the date of the invoice.

- 4.2 In the event that there are insufficient funds to meet any cheque drawn by the Customer in favour of Motion, an administration fee of \$100.00 will be charged on each and every representation and or dishonour.
- 4.3 Motion may withdraw any credit terms or require the provision of security at any time in its absolute discretion and without notice to the Customer and may apply any payment by the Customer in any manner as Motion sees fit.

5. Payment Default and Security

- 5.1 If the Customer defaults in payment by the due date of any amount payable to Motion, then all money which would become payable by the Customer to Motion at a later date on any account, becomes immediately due and payable without the requirement of any notice to the Customer, and Motion may, without prejudice to any accrued rights or other remedy available to it:-
 - (a) charge the Customer interest on any sum due at the prevailing rate pursuant to the *Penalty Interest Rates Act 1983* (Vic) plus 2 per cent for the period from the due date until the date of payment in full;
 - (b) charge the Customer for all expenses and costs (including legal costs on a solicitor/own client basis) incurred by it resulting from the default and in taking whatever action it deems appropriate to recover any sum due including enforcing the charge in clause 5.2;
 - (c) cease or suspend for such period as Motion thinks fit, supply of any further Goods, Services or credit to the Customer; and
 - (d) by notice in writing to the Customer, terminate any contract with the Customer so far as unperformed by Motion.
- 5.2 As security for any amounts due to Motion from time to time, the Customer charges all of its legal and equitable interest (both present and future) of whatsoever nature held in any and all Real Property to Motion.
- 5.3 Without limiting the generality of the charge in clause 5.2, the Customer agrees on request by Motion, to execute any documents and do all things reasonably required by Motion to perfect the charge given in clause 5.2 including registering a mortgage security over any Real Property. The Customer appoints Motion to be the Customer's lawful attorney for the purposes of executing and registering such documents and taking all such steps in that regard. The Customer indemnifies Motion on an indemnity basis against all costs and expenses incurred by Motion in connection with the preparation and registration of any such steps needed to perfect the security or prepare to register the mortgage documents.
- 5.4 The Customer consents unconditionally to Motion lodging a caveat or caveats noting its interest in any Real Property.
- 5.5 A statement in writing by an authorised officer of Motion setting out the moneys due or owing to Motion at the date of the statement shall be sufficient evidence of the amount so due or owing until the contrary is proven.
- 5.6 Clause 5.1 may also be relied upon, at the option of Motion:
 - (a) where the Customer is an individual and becomes bankrupt or enters into any scheme of arrangement or any assignment or composition with or for the benefit of any creditors; or
 - (b) where the Customer is a corporation and it enters into any scheme of arrangement or any assignment or composition with or for the benefit of any creditors or has a liquidator, provisional liquidator, administrator, receiver or receiver and manager appointed, or any action is taken for, or with the view to, the liquidation (including provisional liquidation), winding up or dissolution without winding up of the Customer.
- 5.7 In the event of a dispute, the Customer will not be entitled to withhold payment of any undisputed amount due to Motion.

6. Retention of title

6.1 The Customer agrees:

- (a) title and property in all Goods remain vested in Motion and do not pass to the Customer;
- (b) the Customer must hold the Goods as fiduciary bailee and agent for Motion;
- (c) the Customer must keep the Goods separate from its own goods and maintain the labelling and packaging of Motion;
- (d) the Customer is required to hold the proceeds of any sale of the Goods on trust for Motion in a separate account;
- (e) the Customer must deliver up all Goods to Motion immediately upon service of a written demand; and
- (f) Motion may without notice, enter any premises where it suspects the Goods may be and remove them, notwithstanding that they may have been attached to other goods not the property of Motion, and for this purpose the Customer irrevocably licences Motion to enter such premises and also indemnifies Motion from and against all costs, claims, demands or actions by any party arising from such action,

until full payment in cleared funds is received by Motion for all Goods supplied by it to the Customer, as well as all other amounts owing to Motion by the Customer.

- 6.2 The Customer may resell the Goods in the ordinary course of its business (but may not otherwise sell or encumber the Goods) and if it does so shall receive the proceeds of resale as trustee of Motion, to be held on trust for Motion. Motion shall be entitled to trace the proceeds of resale.
- 6.3 The reservation of title and ownership is effective whether or not the Goods have been altered from their supplied form or commingled with other goods.
- 6.4 To assure performance of its obligations under these Conditions, the Customer hereby grants Motion an irrevocable power of attorney to do anything Motion considers should be done by the Customer pursuant to these Conditions. Motion may recover from the Customer the cost of doing anything under this clause 6, including registration fees and legal costs (on a solicitor/own client basis).

7. Security Interest

7.1 The Customer agrees:

- (a) that these Conditions constitute a Security Agreement for the purposes of the PPSA;
- (b) that these Conditions create a Security Interest in all Goods (and the proceeds of the Goods) in favour of Motion to secure the purchase price for the Goods;
- (c) that the following sections of the PPSA do not apply: 95, 96, 118, 121(4), 125, 129(2), 129(3), 130, 132(3)(d), 132(4), 135, 143 and 144 and, to the extent section 115(7) applies, each section of Part 4.3 of the PPSA is excluded unless Motion elects in writing to retain Part 4.3 (which Motion may elect to do either in whole or in part); and
- (d) to waive its right to receive notice of a verification statement in relation to registration of a Security Interest.

7.2 The Customer:

- (a) further agrees that these Conditions also create a Security Interest in all of the Customer's Other Property, although such Security Interest is not intended to prevent the Customer from transferring such Other Property in the ordinary course of the Customer's business; and
- (b) separately charges all Real Property owned now and in the future by the Customer whether owned alone or jointly as a tenant in common or as a joint tenant,

in favour of Motion to secure payment and performance of all the Customer's obligations under these Conditions.

- 7.3 The Customer must immediately, if requested by Motion, sign any documents, provide all necessary information and do anything else required by Motion to ensure that Motion's Security Interest is a perfected security interest.
- 7.4 The Customer will not enter into any other Security Agreement that permits any other person to have or to register any Security Interest in respect of the Goods or any proceeds from the sale of the Goods until Motion has perfected its Security Interest.

8. GST and Duties

- 8.1 Prices for the supply of Goods and or Services exclude sales tax, consumption or goods and services tax, and any other taxes, duties or imposts imposed on or in relation to the Goods and or Services.
- 8.2 If prices for Goods and or Services provided by Motion do not expressly indicate that the prices include GST then the Customer will pay Motion the price for the Goods and or Services plus GST.

9. Delivery of the Goods

- 9.1 Motion will arrange delivery of the Goods or supply of the Services to the address nominated in writing by the Customer.
- 9.2 Any period or date for delivery of Goods stated by Motion is intended as an estimate only and is not guaranteed or a contractual commitment.
- 9.3 Motion may deliver the Customer's orders in part or in whole and the Customer will not be entitled to cancel the order or withhold payment for the Goods.
- 9.4 All costs of freight, insurance and other charges associated with the delivery of the Goods to the agreed delivery address shall be borne by the Customer.
- 9.5 If the Customer is unable or fails to accept delivery of the Goods, the Customer will be liable for all costs incurred by Motion due to storage, detention, double cartage, travel expenses or similar causes.

10. Risk and Insurance

- 10.1 All risk in the Goods and all insurance responsibility for theft, damage or otherwise in respect of the Goods will pass to the Customer immediately upon delivery of the Goods to the Customer.
- 10.2 Insurance of the Goods in transit to the Customer's point of delivery against loss or damage in transit will be affected by Motion in accordance with the instruction of the Purchaser and on terms agreed by Motion.
- 10.3 If any of the Goods are damaged or destroyed following delivery but prior to ownership passing to the Customer, Motion is entitled to receive all insurance proceeds payable for the Goods. The production of these Conditions by Motion is sufficient evidence of Motion's right to receive the insurance proceeds without the need for any person dealing with Motion to make further enquiries.

11. Liability

- 11.1 Except as specifically set out herein, any term, condition or warranty in respect of the quality, fitness for purpose, condition, description, assembly, manufacture, design or performance of the Goods and/or Services, whether implied by statute, common law, trade usage, custom or otherwise, is hereby expressly excluded.
- 11.2 Motion is not liable for any indirect or consequential losses or expenses suffered by the Customer or any third party, howsoever caused arising from the supply of the Goods and/or Services, including but not limited to loss of turnover, profits, business or goodwill.
- 11.3 Motion will not be liable for any loss, damage or claim suffered by the Customer where Motion has failed to meet any delivery date or cancels or suspends the supply of Goods.
- 11.4 Nothing in these Conditions is to be interpreted as excluding, restricting or modifying or having the effect of excluding, restricting or modifying the application of any State or Federal legislation applicable to the sale of Goods and/or Services which cannot be excluded, restricted or modified. If any of these Conditions is inconsistent with State or Federal legislation, such Conditions must be read down only to the extent necessary to comply with such legislation and will otherwise apply to the fullest extent legally possible.

- 11.5 Motion's total aggregate liability for any loss, damage or claim suffered by the Customer, however arising, shall not exceed the GST exclusive aggregate price paid by the Customer to Motion for the specific Goods or Services that gave rise to the loss, damage or claim in question.
- 11.6 The Customer must take reasonable steps to mitigate any loss, damage or claim it suffers or incurs as a result of Motion's actions of conduct.
- 11.7 Motion's Goods and Services come with guarantees that cannot be excluded under the Australian Consumer Law. For major failures with the Service, the Customer is entitled:
- (a) to cancel its service contract with Motion; and
 - (b) to a refund for the unused portion, or to compensation for its reduced value.
- 11.8 The Customer is also entitled to choose a refund or replacement for major failures with Goods.
- 11.9 If a failure with the Goods or a Service does not amount to a major failure, the Customer is entitled to have the failure rectified in a reasonable time. If this is not done the Customer is entitled to a refund for the Goods and to cancel the contract for the Service and obtain a refund of any unused portion.
- 11.10 The Customer is also entitled to be compensated for any other reasonably foreseeable loss or damage from a failure in the Goods or Service.

12. Cancellation

- 12.1 No purported cancellation or suspension of an order or contract for Goods and or Services by the Customer will be binding on Motion after that order has been accepted by Motion.
- 12.2 Cancellation of ordered Services less than two hours prior to the planned commencement time of the Services will incur a four hour minimum charge.

13. Goods Returned

- 13.1 All Goods are sold on a non-returnable, non-refundable basis and, subject to clause 13.3, may only be returned if the Goods are damaged by Motion upon delivery or are incorrectly supplied by Motion.
- 13.2 Any claim by the Customer that the Goods are damaged or incorrectly supplied must be made in writing to Motion within 2 business days of receipt of the Goods by the Customer and the Customer must provide a reasonable opportunity for Motion to inspect the Goods. Motion's only liability (if any) is limited to the resupply of the Goods.
- 13.3 Motion may, in its sole and absolute discretion, agree to accept the return of some or all of the Goods but all such Goods returned will be subject to a minimum 25% handling fee.

14. Governing Law

These Conditions are governed by and are to be interpreted according to the laws in force in Victoria and the parties submit to the non-exclusive jurisdiction of the courts operating in Victoria.

15. Guarantee and Indemnity

If the Customer is a company, the directors of the company must, if required by Motion, enter into a Deed of Guarantee and Indemnity.