
PACIFIC HYDRAULICS PTY LTD
TERMS AND CONDITIONS
ABN 79 011 053 704

PACIFIC HYDRAULICS PTY LTD

CONTRACT TERMS AND CONDITIONS

1. DEFINITIONS AND INTERPRETATION

1.1 In this Contract:

- (a) **Company** means **Pacific Hydraulics Pty Ltd**;
- (b) **Contract** means the agreement recorded by this document including any schedule to it;
- (c) **Force Majeure Event** includes:
 - (i) any natural disaster, lightning, earthquake or other act of God;
 - (ii) war, terrorist act, riot, insurrection or civil commotion;
 - (iii) fire or explosion; or
 - (iv) industrial or other action beyond the control of the Company.
- (d) **Goods** means the goods or rendering of a service the subject of the Contract;
- (e) **GST** means goods and services tax;
- (f) **Insolvency Event** means, for a person, being in liquidation or provisional liquidation or under administration, having a controller (as defined in the Corporations Act 2001 (Cth)) or analogous person appointed to it or any of its property, being taken under section 459F(1) of the Corporations Act 2001 (Cth) to have failed to comply with a statutory demand, being unable to pay its debts as and when they fall due or otherwise insolvent, the taking of any step that could result in the person becoming an insolvent under administration (as defined in section 9 of the Corporations Act 2001 (Cth)), entering into a compromise or arrangement with, or assignment for the benefit of, any of its creditors, or any analogous event. However, a compromise or arrangement is not an Insolvency Event if it does not prejudice the interests of any creditors.
- (g) **Notice** means a notice in accordance with clause 22;
- (h) **Order** means the Purchaser's offer to the Company to purchase the Goods;
- (i) **Price** has the meaning stated in clause 4;
- (j) **Trade Practices Act** means the Trade Practices Act 1974 (Cth) and any similar legislation;
- (k) **Purchaser** means any purchaser of Goods from the Company; and
- (l) **Warranty** has the meaning stated in clause 9.

1.2 Headings are for convenience only and do not affect interpretation.

1.3 A reference to a "person" includes a natural person, corporation, trust, partnership, unincorporated body or other entity, whether or not it comprises a separate legal entity.

1.4 A reference to legislation (including subordinate legislation) is to that legislation as amended, re-enacted or replaced, and includes any subordinate legislation issued under it

1.5 Each indemnity provided by the Purchaser in this Contract is a separate and continuing indemnity which survives the termination of this Contract and the delivery and supply of the Goods.

1.6 If the Purchaser is made up of more than one person:

- (a) an obligation of those persons is joint and several;
- (b) a right of those persons is held by each of them severally; and
- (c) any reference to the Purchaser is a reference to each of those persons separately, and any warranty, covenant or indemnity is given by each of them separately.

1.7 Any modifications to this Contract made without the written consent of the Company are void.

2. ORDER, ACCEPTANCE AND APPLICATION

2.1 If the Purchaser places an Order, accepts delivery of the Goods, makes any payment in respect of the Goods or performs any obligation under this Contract, the Purchaser shall be taken to have agreed to and accepted the terms of this Contract.

2.2 Subject to clause 2.3, the Order is accepted by the Company on the basis that this Contract constitutes the entire agreement between the Purchaser and the Company for the sale, purchase, delivery and supply of the Goods.

- 2.3 Unless otherwise agreed in writing in accordance with clause 1.7 and clause 21 of this Contract, this Contract constitutes the entire agreement between the Purchaser and the Company and supersedes and will prevail over all prior discussions, representations, agreements and arrangements in relation to the sale, purchase, delivery and supply of the Goods.
- 2.4 To the extent permitted by law any prior representations, agreements and arrangements, including representations as to the suitability of the Goods, and any descriptions, illustrations and material contained in any advertisement, catalogue, price list or brochure are excluded from, and do not form part of, this Contract unless specifically stated in this Contract to the contrary.
- 2.5 All specifications, drawings, and particulars of weight and dimensions of the Goods are approximate only. Unless the accuracy of such specifications, drawings, and particulars of weight and dimensions of the Goods has been confirmed by the Company to the Purchaser in writing in respect of a particular Order, the Purchaser cannot claim against the Company for any deviation in such specifications, drawings, or particulars of weight or dimensions.

3. PERFORMANCE

- 3.1 Any performance figures in relation to the Goods given to the Purchaser by the Company are estimates only. The Company is not liable to the Purchaser or any other person for any loss or damage, including any consequential loss or damage (including for example, loss of profits or of business opportunity), in connection with a failure of any Goods to attain such figures, unless the Company gives a written guarantee in relation to such figures.
- 3.2 The Purchaser may inspect and test the Goods at the premises of the Company or at other premises with the prior written approval of the Company to verify any of the estimated performance figures. The Purchaser must bear the costs of the inspection and any tests except to the extent that inspection or testing is expressly included in the Price.
- 3.3 No performance figures other than performance figures obtained under such inspection and/or testing may be used by the Purchaser to support any claim by the Purchaser.

4. QUOTATIONS AND PRICE

- 4.1 Any quotation in relation to the Goods issued by the Company is an estimate of the costs of the Goods only and does not constitute an offer by the Company unless stated to be an offer by the Company in writing. Any quotation may be withdrawn or altered by the Company without notice.
- 4.2 If the Company does not withdraw a quotation, then it is valid for the period stated on the quotation. If no period is stated on the quotation, then it is valid for a period of 30 days from the date of the quotation.
- 4.3 The Price of the Goods:
- (a) is the amount, confirmed by the Company, that the Purchaser is required to pay to the Company to purchase the Goods;
 - (b) excludes the cost of carriage;
 - (c) includes the cost of packaging;
 - (d) is GST exclusive.
- 4.4 The Price of the Goods:
- (a) is subject to reasonable adjustment by the Company to take into account any alteration in costs associated with the delivery of the Goods or (in the case of delivery by instalments) prior to the final delivery of the Goods;
 - (b) can be increased by the Company without notice to the Purchaser if any government authority imposes any further duty, tax or fee in respect of the Goods or this Contract; and
 - (c) the Purchaser agrees to pay to the Company any reasonable adjustment to the Price of the Goods the subject of clauses 4.4(a) or 4.4(b).
- 4.5 Any Price concession or discount the Company provides to the Purchaser is conditional on the Purchaser's full compliance with this Contract.

5. PAYMENT

- 5.1 The Purchaser agrees to accept and pay for the Goods in accordance with this Contract.
- 5.2 Payment of any invoice issued by the Company must be made in full by the end of the month following the month in which an invoice is dated (the **Due Date**).
- 5.3 Payment in full on or before the Due Date is a condition precedent to future deliveries and services under this Contract or any other contract between the Purchaser and the Company.

- 5.4 Without prejudice to any other right or remedy the Company may have, it may charge the Purchaser on any overdue amounts payable by the Purchaser to the Company, interest at a rate of 5% per annum calculated daily above the Cash Rate Target specified by the Reserve Bank of Australia.
- 5.5 The Purchaser indemnifies the Company for any expenses incurred by the Company in enforcing the Company's rights against the Purchaser under this Contract and will reimburse the Company as a debt due and payable for such expenses when requested to do so by the Company.
- 5.6 If the Purchaser becomes, or is in danger of becoming the subject of an Insolvency Event, the Company may:
- (a) repossess any Goods in the Purchaser's possession, custody or control wherever located for which full payment has not been made; and
 - (b) offset any payments owed by the Purchaser to the Company against any moneys owed by the Company to the Purchaser.
- 5.7 The Purchaser must not withhold payment of any invoice by reasons of set off, counter claim or otherwise.
- 5.8 Time of payment is of the essence of the Contract.

6. DELIVERY

- 6.1 Delivery is taken to occur when
- (a) the Company notifies the Purchaser that the Goods are available for collection at the premises of the Company; or
 - (b) the Company dispatches the Goods at the direction of the Purchaser, whichever is the earliest.
- 6.2 The Purchaser must provide the Company with adequate delivery instructions for the Goods no later than 7 days after the Company informs the Purchaser that the Goods are ready for collection. The Company may charge the Purchaser a reasonable storage and/or administration fee in relation to Goods held by the Company for more than 14 days. The Purchaser must pay the charges under this clause specified by the Company when asked to do so as a debt due and payable. Any Goods stored by the Company on behalf of the Purchaser are at the Purchaser's risk.
- 6.3 The Company must use its best endeavours to deliver the Goods within the time agreed with the Purchaser or if no such time is agreed, then at the Company's reasonable discretion.
- 6.4 The delivery time is an estimate only and the Company shall not be responsible for any loss or damage suffered as a result of the failure to meet any delivery date, whether agreed to by the parties to this Contract or otherwise. The Purchaser shall not be relieved of performance because of the Company's failure to meet any estimated delivery dates.
- 6.5 If by any reason of any event beyond the reasonable control of the Company, including any Force Majeure Event, the delivery of Goods becomes impracticable or impossible in the Company's opinion, the Company may terminate this Contract by Notice to the Purchaser. In these circumstances, the Purchaser must pay to the Company any unpaid amounts in relation to such Goods (including any variation thereof) that were actually delivered.
- 6.6 All export orders are delivered, Ex Works, which expression has the meaning assigned to it by the current version of Incoterms.
- 6.7 If the Contract provides for the Goods to be specified by the Purchaser by schedule from time to time, any schedule is subject to acceptance by the Company.
- 6.8 Where a schedule is accepted by the Company under clause 6.7, any requirements stated in the schedule to be "firm" are deemed to form part of this Contract and may only be cancelled upon written approval of the Company.

7. COST OF CARRIAGE AND PACKING

- 7.1 The Price does not include the cost of carriages from the premises of the Company to the Purchaser unless otherwise agreed in writing between the Purchaser and the Company.
- 7.2 The Purchaser may nominate, arrange or retain the carrier to effect delivery of the Goods from the Company to the Purchaser. Where the Purchaser does not nominate or state that it will arrange or retain the carrier in its delivery instructions, the Company may nominate, arrange or retain the carrier.
- 7.3 The Purchaser must bear all carriage costs.
- 7.4 The Price includes standard packing unless otherwise agreed in writing between the Purchaser and the Company.

8. TITLE AND RISK

- 8.1 Title in the Goods passes to the Purchaser on payment by the Purchaser of the Price in full. Where the Purchaser has not paid the Company the Price in full, the Purchaser agrees to hold the Goods as a fiduciary for the Company.
- 8.2 Notwithstanding clause 8.1 above, risk in the Goods passes to the Purchaser from the first occurrence of:
- (a) the passing of title in the Goods to the Purchaser;
 - (b) the physical delivery of the Goods to the Purchaser;
 - (c) the time when the Goods have been dispatched from the premises of the Company or placed on a carrier which is to effect delivery of the Goods from the Company to the Purchaser, where the carrier has been nominated, arranged or retained by the Purchaser; or
 - (d) the time when the Goods arrive at the premises of the Purchaser (prior to being taken off the carrier) where the carrier which is to effect delivery of the Goods from the Company to the Purchaser has been nominated, arranged or retained by the Company; or
 - (e) if Goods are stored by the Company in excess of 14 days on behalf of the Purchaser in accordance with Clause 6.2.
- 8.3 The Company is not liable for any loss or damage or deterioration of the Goods after risk in the Goods has passed to the Purchaser.
- 8.4 In addition to any other rights the Company may have against the Purchaser, the Company may repossess the Goods if any amount due in respect of the Goods is outstanding or if the Company reasonably believes that any such amount will not be paid in full when it falls due for payment. The Purchaser grants the Company an irrevocable licence to enter upon any premises of the Purchaser for the purpose of taking possession of the Goods in accordance with this clause.
- 8.5 The Purchaser may, sell and deliver the Goods as the Company's fiduciary to a third party in the ordinary course of the Purchaser's business provided that:
- (a) where the Purchaser is paid by the third party for the Goods, the Purchaser shall account to the Company in respect of the payment in accordance with the Purchaser's fiduciary obligations; and
 - (b) where the Purchaser is not paid by the third party the Purchaser agrees to assign to the Company its claim against the third party upon receiving the Company's written request to that effect.]

9. WARRANTY

- 9.1 The Company gives the warranty contained in Schedule 1 in respect of the Goods. (the **Warranty**).
- 9.2 Subject to clause 10:
- (a) the Warranty is given in addition to all statutory rights conferred on the Purchaser.
 - (b) the Company does not make any promise, for example, that any part or repair facility in respect of the Goods will be available at any time or at any specified location, other than as expressly provided for in the Warranty.
- 9.3 The Company will use its reasonable endeavours to make available to the Purchaser the benefit of any guarantee or warranty given by the manufacturer to the Company in respect of any Goods not manufactured by the Company.

10. LIMITATION OF LIABILITY

- 10.1 To the fullest extent permitted by law, and subject to clause 9:
- (a) the Company is not liable for any loss or damage, however caused (including, but not limited to, by the negligence of the Company), suffered by the Purchaser or any other person in connection with:
 - (i) this Contract;
 - (ii) the Goods;
 - (iii) any misrepresentation by the Company, its directors, officers, employees, agents and/or subcontractors; or
 - (iv) any statement by a third party accepted in good faith by the Company and repeated by it, in connection with the Goods; and
 - (b) all express and implied terms, conditions, representations and warranties relating to the Goods (including without limitation all conditions or warranties as to the merchantability, quality, description, condition, safety, performance or fitness for purpose of any of the Goods) are excluded.
- 10.2 The Company shall not be liable to the Purchaser or to any other person for any loss of profit or other economic loss, indirect, special, consequential, general or other similar loss or damage how so ever arising.

10.3 Nothing in this Contract is intended to exclude, restrict or modify any rights which the Purchaser may have under the Trade Practices Act or any other legislation which cannot be excluded, restricted or modified by agreement.

11. WARRANTY, COVENANT AND INDEMNITY BY THE PURCHASER

11.1 The Purchaser warrants the accuracy of any specification or information provided by the Purchaser.

11.2 The Purchaser covenants not to make any claim or commence any proceedings against any employee, director, agent or subcontractor of the Company in connection with this Contract including in connection with any misrepresentation by, or negligence of, them or the Company.

11.3 The Purchaser must indemnify the Company and any of its employees, directors, agents or subcontractors and hold them harmless in respect of a breach of clause 11.1 or clause 11.2.

11.4 If the Purchaser fails to accept or to pay for the Goods in accordance with this Contract, then the Purchaser must (without prejudice to any other rights of the Company) indemnify the Company and hold it harmless in respect of any loss, damage, claim, cost of labour or other overhead or expense that is attributable to such failure.

11.5 The benefit of this clause 11 is held on trust by the Company for the benefit of its employees, directors, agents and subcontractors and can be enforced by the Company on their behalf.

12. SUSPENSION AND TERMINATION

12.1 If the Purchaser:

- (a) defaults in any of its obligations under this Contract;
- (b) suspends or ceases to carry on business; or
- (c) is the subject of an Insolvency Event;

then the Company may immediately upon notifying the Purchaser, do one or more of the following:

- (d) terminate this Contract or any other contract between the parties to this Contract;
- (e) suspend the performance of any or all of its obligations under this Contract until the end of the period in which the Purchaser has suspended or ceased to carry on business;
- (f) demand immediate payment for any Goods:
 - (i) already delivered or provided by the Company to the Purchaser for which payment in accordance with this Contract has not been received by the Company; or
 - (ii) ordered by the Purchaser but not yet delivered or provided by or on behalf of the Company/ other than that contained in the Warranty.

12.2 The rights of the Company provided for in clause 12.1 shall be without prejudice to any other rights the Company may have against the Purchaser.

13. RETURN OF GOODS

13.1 Subject to clause 9, the Purchaser must not return the Goods to the Company for any reason except upon the written consent of the Company obtained in advance of such return. Any consent given under this clause may specify the terms and conditions and charges upon which any such return may be made.

13.2 If any of the Goods are returned by the Purchaser to the Company, then the Company shall determine whether the Purchaser has any rights against the Company in relation to those Goods under the Warranty. If the Company determines that the Purchaser has no such rights, then the Purchaser must:

- (a) reimburse the Company for all related shipping and other costs incurred by the Company; and
- (b) pay to the Company an amount equal to the Company's standard service charge in effect at the time.

14. LAWFUL USE OF GOODS

14.1 The Purchaser must:

- (a) acquaint itself with requirements of all relevant Government and statutory or other authority (including, but not limited to, a manufacturer's technical, copyright and operational requirements) in relation to the Goods and to the application(s) to which the Goods are put.
- (b) comply with such requirements at all times while the Goods are in its possession or under its control.
- (c) procure that any purchaser of the Goods from the Purchaser acquaints itself with and complies with such requirements.

- 14.2 The Purchaser must:
- (a) comply with any instructions by the Company relating to the Goods; and
 - (b) indemnify the Company in respect of any breach of this clause 14.

15. INTELLECTUAL PROPERTY RIGHTS

- 15.1 No rights or licence is granted to the Purchaser under any patent copyright, registered design or other intellectual or industrial property right or interest other than the right to install, operate or resell the Goods.
- 15.2 Copies of documents in relation to the Company or the Goods such as drawings, plans and specifications the Company submits to the Purchaser, remain the property of the Company. The Purchaser must treat the information contained in those documents as strictly confidential. The Purchaser must use the information contained in those documents only to install or operate the Goods. The Purchaser must not use this information in any other way to the advantage of the Purchaser or the detriment of the Company.
- 15.3 By purchasing the Goods, the Purchaser does not gain any licence or right under any of the Company's intellectual or industrial property such as a patent, registered design, trademark or copyright or confidential information.

16. GOODS MADE TO THE PURCHASER'S SPECIFICATION

- 16.1 If the Goods are manufactured to the design or specification of the Purchaser, the Purchaser warrants that the design, specification and Goods do not infringe any intellectual property right of a third party (such as patent, copyright, trademark or registered design) or other like protection of any other person and comply with any applicable statute, statutory instrument or regulation.
- 16.2 The Purchaser must indemnify the Company and hold it harmless in respect of any breach of clause 16.1

17. ASSIGNMENT AND SUBCONTRACTING

- 17.1 The Company may assign, sub-contract or sub-let this Contract or the production, manufacture or supply of the whole or any part of the Goods without seeking the consent of the Purchaser.

18. WAIVER

- 18.1 Any waiver by the Company must be in writing signed by the Company.
- 18.2 Failure by the Company to enforce any right or remedy is not a waiver of any right or remedy, or a waiver in respect of continuing breach.

19. SEVERABILITY

- 19.1 If any provision of this Contract is invalid or unenforceable in any jurisdiction, it is, if and to the extent possible, to be read down so as to be valid and enforceable. The read down provision will only apply in the relevant jurisdiction. If the provision cannot be read down, and it can be severed to the extent of the invalidity or unenforceability, it is to be severed. The rest of the provisions, and the validity or enforceability of the affected provision in any other jurisdiction, will not be affected.

20. GOVERNING LAW AND JURISDICTION

- 20.1 This Contract is governed by the laws of the State of New South Wales and any dispute between the parties to this Contract in connection with the Contract is to be resolved in accordance with the laws of the State of New South Wales.
- 20.2 The parties to this Contract irrevocably submit to the jurisdiction of the courts of New South Wales in respect of all claims, proceedings and matters arising out of or in connection with the Goods and this Contract.
- 20.3 So far as it is consistent with this Contract, the Convention on Contracts for the international sale of Goods 1980 (sometimes known as the Vienna Convention) applies to any export order.

21. VARIATION

- 21.1 Any variation of this Contract must be in writing and signed by a Director of the Company or the Company Secretary and refer expressly to the provisions being amended.

22. NOTICE

- 22.1 Any Notice must be in writing and delivered by hand or sent by post, email or facsimile as follows:
- (a) if the Company:
The registered office of the Company, as per the *Corporations Act 2001* (Cth).
 - (b) if the Purchaser:
As per the Order details.

- 22.2 A Notice is regarded as given by the sender and received by the addressee:
- (a) if the Notice is delivered by hand, when delivered to the addressee;
 - (b) if the Notice is sent by post, on the 2nd business day following the date of postage or when delivered to the addressee, whichever occurs first;
 - (c) if sent by facsimile, when the transmission is successfully completed (as reported by the sender's machine), unless the addressee informs the sender that the transmission is illegible or incomplete by telephone or Notice within 2 hours of the transmission being received; and
 - (d) if sent by electronic mail, when the addressee opens the message (as reported by the sender's machine), unless the addressee informs the sender that the transmission is illegible or incomplete or corrupted by telephone or Notice within 2 hours of the transmission being received.

22.3 A Notice delivered or received:

- (a) on a day which is not a business day or after 4.00 pm (recipient's time) is regarded as received at 9.00 am on the following business day; and
- (b) before 9.00 am (recipient's time) on a business day it is regarded as received at 9.00 am that day.

23. PRIVACY

- 23.1 The Company may use and disclose to third parties personal information held by the Company, including information relating to the Purchaser's commercial dealings and transactions with the Company for reasons including:
- (a) arranging for the deliver of the Goods;
 - (b) facilitate the Company's internal business operations, including fulfilment of any legal requirements;
 - (c) credit reference checking and verification of the Purchaser's financing arrangements;
 - (d) arranging or facilitating any Warranty repairs or services; and
 - (e) providing the Purchaser with information and promotional material about other products and services that may be of benefit to the Purchaser.
- 23.2 The Purchaser can request access at any time to personal information held by the Company, and the Company will process the request within a reasonable time. The Purchaser may ask the Company at any time to correct personal information held by the Company which the Purchaser believes is incorrect. Access and correction requests will be granted in accordance with the Privacy Act 1988 (Cth).

SCHEDULE 1

WARRANTY

(Clause 9 – Warranty)

1. DEFINITIONS IN THIS SCHEDULE 1

Warranty Period means the period of six months from the date of deliver of the Goods to the Purchaser.

Normal Wear and Tear means the gradual reduction in performance of Goods having regard to the age of the Goods and the nature and frequency of use of the Goods.

2. SERVICE AND REPAIR

2.1 Subject to clauses 3 and 4 of this Warranty, and in the absence of a third party manufacturer warranty, the Company agrees, in relation to any faulty workmanship or material defect in the Goods that are purchased by the Purchaser and reported by the Purchaser to the Company during the Warranty Period, to any one or more of any the following:

- (a) in the case of goods:
 - (i) to replace the goods or the supply of equivalent goods;
 - (ii) to repair of the goods;
 - (iii) to pay the cost of replacing the goods or of acquiring equivalent goods; or
 - (iv) to pay the cost of having the goods repaired; and
- (b) in the case of services:
 - (i) to supply the services again; or
 - (ii) to pay the cost of having the services supplied again.

2.2 To avoid doubt, the Company has sole discretion as to any one or more of the alternatives specified in clauses 2.1(a) or 2.1(b).

2.3 This Warranty does not cover anything which is not expressly included in the Warranty.

3. EXCLUSIONS

3.1 To the extent permissible by law, the Warranty does not cover:

- (a) anything caused or contributed to by:
 - (i) Normal Wear and Tear and the gradual reduction in operating performance of the Goods;
 - (ii) the Company being the subject of a Force Majeure Event;
 - (iii) an accident, abuse, neglect of a person other than of the Company;
 - (iv) vandalism, power outages, surges, inadequate or improper voltage or current or use and instalment of Goods contrary to any instruction;
 - (v) repair or modification of the Goods carried out:
 - (A) without the proper written consent of the Company; or
 - (B) by a person other than the Company or its agent;
 - (vi) costs of removal, reinstallation, recommissioning or shipping of the Goods
 - (vii) damage occurring during transportation, freight, installation of the Goods or while moving the Goods;
 - (viii) any criminal, deliberate, wilful, dishonest or fraudulent act, error or omission of the Purchaser;
 - (ix) any breach by the Purchaser of law or regulatory requirement;
 - (x) any defect or faulty workmanship in relation to the Goods:
 - (A) not notified to the Company within the Warranty Period; or
 - (B) where the Purchaser continues to use the Goods after the Purchaser knew or discovered or ought reasonably to have known or discovered the defect or faulty workmanship.

4. WARRANTY CLAIMS

- 4.1 If a Purchaser wishes to lodge a claim under this Warranty in relation to the Goods, then the Purchaser must notify the Company immediately and during the Warranty Period. Further information regarding the Warranty claim procedure can be obtained by contacting the Company.
- 4.2 The Company may, under this Warranty, direct that the Purchaser returns the Goods to:
- (a) the location from which the Goods were originally dispatched to the Purchaser; or
 - (b) another location, provided that the cost of returning the Goods to such a location does not exceed the cost of returning the Goods to the location from which the Goods were originally dispatched to the Purchaser.
- 4.3 Where the Company directs the Customer under clause 4.2 of this Warranty, the Customer must return the Goods in accordance with such direction.

This Warranty forms part of and is to be read in conjunction with the Contract.