

L.K. Diesel Service Pty Ltd - Terms & Conditions of Trade

1. Definitions

- 1.1 "Seller" shall mean L.K. Diesel Service Pty Ltd and its successors, nominees and assigns.
- 1.2 "Buyer" shall mean the Buyer or any person acting on behalf of and with the authority of the Buyer.
- 1.3 "Guarantor" means that person (or persons), or entity who agrees herein to be liable for the debts of the Buyer if a Limited Liability Buyer on a principal debtor basis.
- 1.4 "Goods" shall mean Goods supplied by the Seller to the Buyer (and where the context so permits shall include any supply of Services as hereinafter defined).
- 1.5 "Services" shall mean all services supplied by the Seller to the Buyer and includes any advice or recommendations (and where the context so permits shall include any supply of Services as defined supra).
- 1.6 "Price" shall mean the cost of the Goods as agreed between the Seller and the Buyer subject to clause 4 of this contract.

2. Acceptance

- 2.1 Any instructions received by the Seller from the Buyer for the supply of Goods and/or the Buyer's acceptance of Services and/or Goods supplied by the Seller shall constitute acceptance of the terms and conditions contained herein.
- 2.2 Where more than one Buyer has entered into this agreement, the Buyers shall be jointly and severally liable for all payments of the Price.
- 2.3 Upon acceptance of these terms and conditions by the Buyer the terms and conditions are irrevocable and can only be rescinded in accordance with these terms and conditions or with the written consent of the manager of the Seller.
- 2.4 None of the Seller's agents or representatives are authorised to make any representations, statements, conditions or agreements not expressed by the manager of the Seller in writing nor is the Seller bound by any such unauthorised statements.
- 2.5 These terms and conditions are to be read in conjunction with the Warranty Sheet. If there are any inconsistencies between the two documents then the terms and conditions contained in this document shall prevail.

3. Goods

- 3.1 The Goods shall be as described on the invoices, quotation, work authorisation, sales order or any other work commencement forms as provided by the Seller to the Buyer.

4. Price And Payment

- 4.1 At the Sellers sole discretion;
 - (a) The Price shall be as indicated on invoices provided by the Seller to the Buyer in respect of Goods supplied; or
 - (b) The Price shall be the Seller's current price at the date of delivery of the Goods according to the Sellers current Price list; or
 - (c) The Price of the Goods shall, subject to clause 4.2, be the Sellers quoted Price which shall be binding upon the Seller provided that the Buyer shall accept in writing the Sellers quotation within thirty (30) days.
- 4.2 Any variation from the plan of scheduled works or specifications, will be charged for on the basis of the Seller's quotation and will be shown as extras on the invoice. Payment for all extras must be made in full at their time of completion.
- 4.3 At the Sellers sole discretion a deposit may be required. The deposit amount or percentage of the Price will be stipulated at the time of the order of the Goods/Services and shall become immediately due and payable.
- 4.4 Time for payment for the Goods/Services shall be of the essence and will be stated on the invoice, quotation or any other order forms. If no time is stated then payment shall be on delivery of the Goods/Service.
- 4.5 The Seller may withhold delivery of the Goods until the Buyer has paid for them, in which event payment shall be made before the delivery date.
- 4.6 Payment will be made by cash on delivery, or by cheque, or by bank cheque, or by credit card (plus any charges that maybe applicable), or by EFT or by any other method as agreed to between the Buyer and the Seller.

- 4.7 The Price shall be increased by the amount of any GST and other taxes and duties which may be applicable, except to the extent that such taxes are expressly included in any quotation given by the Seller.

5. Delivery Of Goods / Services

- 5.1 Delivery of the Goods shall be made to the Buyer's address. The Buyer shall make all arrangements necessary to take delivery of the Goods whenever they are tendered for delivery, or delivery of the Goods shall be made to the Buyer at the Sellers address.
- 5.2 Delivery of the Goods to a carrier, either named by the Buyer or failing such naming to a carrier at the discretion of the Seller for the purpose of transmission to the Buyer, is deemed to be a delivery of the Goods to the Buyer.
- 5.3 Where there is no agreement that the Seller shall send the Goods to the Buyer, delivery to a carrier at limited carrier's risk at the expense of the Buyer is deemed to be delivery to the Buyer.
- 5.4 The Buyer shall take delivery of the Goods tendered notwithstanding that the quantity so delivered shall be either greater or less than the quantity purchased provided that;
 - (a) such discrepancy in quantity shall not exceed 5%, and
 - (b) the Price shall be adjusted pro rata to the discrepancy.
- 5.5 The costs of carriage and any insurance will be the responsibility of the Buyer. The Seller shall not be liable for any loss or damage caused or shortage during transit.
- 5.6 The failure of the Seller to deliver shall not entitle either party to treat this contract as repudiated.
- 5.7 The Seller shall not be liable for any loss or damage whatever due to failure by the Seller to deliver the Goods (or any of them) promptly or at all.

6. Risk

- 6.1 If the Seller retains property in the Goods nonetheless, all risk for the Goods passes to the Buyer on delivery.
- 6.2 If any of the Goods are damaged or destroyed prior to property in them passing to the Buyer, the Seller is entitled, without prejudice to any of its other rights or remedies under these Terms and Conditions of Trade (including the right to receive payment of the balance of the Price for the Goods), to receive all insurance proceeds payable for the Goods. This applies whether or not the Price has become payable under the Contract. The production of these terms and conditions by the Seller is sufficient evidence of the Seller's rights to receive the insurance proceeds without the need for any person dealing with the Seller to make further enquiries.

7. Buyers Disclaimer

- 7.1 The Buyer hereby disclaims any right to rescind, or cancel the contract or to sue for damages or to claim restitution arising out of any misrepresentation made to him by any servant or agent of the Seller and the Buyer acknowledges that he buys the Goods relying solely upon his own skill and judgement and that the Seller shall not be bound by nor responsible for any term, condition, representation or warranty other than the warranty given by the Manufacturer which warranty shall be personal to the Buyer and shall not be transferable to any subsequent Buyer.

8. Defects/Return Of Goods

- 8.1 The Buyer shall inspect the Goods on delivery and shall within seven (7) days of delivery notify the Seller in writing of any alleged defect, shortage in quantity, damage or failure to comply with the description or quote. The Buyer shall afford the Seller an opportunity to inspect the Goods within a reasonable time following delivery. If the Buyer shall fail to comply with these provisions the Goods shall be conclusively presumed to be in accordance with the terms and conditions and free from any defect or damage.
- 8.2 For defective Goods which the Seller has agreed in writing that the Buyer is entitled to reject, the Seller's liability is limited to either (at the Seller's discretion) replacing the Goods or repairing the Goods provided that:
 - (a) the Buyer has complied with the provisions of clause 8.1;
 - (b) the Goods are returned at the Buyers cost within fourteen (14) days of the delivery date;
 - (c) the Seller will not be liable for Goods which have not been stored or used in a proper manner;
- 8.3 No goods will be considered for credit unless a request for credit number has been issued by the Seller.

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- 8.4 Any goods returned without a "request for credit number" will be returned to the Buyer at their expense.
- 8.5 The Seller may (in its discretion) accept the Goods for credit but this may incur a handling fee of 15% of the value of the returned Goods plus any freight.
- 8.6 Goods made to customer specification are under no circumstances acceptable for credit or return.
- 8.7 Goods ordered in from overseas will not be eligible for Credit.
- 8.8 Electrical goods are not be eligible for Credit.
- 8.9 The Buyer leaves goods for repair at own risk.
- 8.10 Goods ordered by part number or description which are incorrect for the Buyer's intended application or use, are not eligible for credit, refund or exchange.

9. Warranty

- 9.1 The conditions applicable to the warranty given on Goods/Services supplied by the Seller are contained on the "Warranty Sheet" that will be supplied with the Goods / Services.
- 9.2 For Goods not manufactured by the Seller the warranty shall be the current warranty provided by the manufacturer of the Goods. The Seller shall be under no liability whatsoever except for the express conditions as detailed and stipulated in the manufacturers warranty.
- 9.3 In the case of second hand Goods the Buyer acknowledges that he has had full opportunity to inspect the same and that he accepts the same with all faults and that no warranty is given by the Seller as to the quality or suitability for any purpose and any implied warranty, statutory or otherwise, is expressly excluded. The Seller shall not be responsible for any loss or damage to the Goods, or caused by the Goods, or any part thereof however arising.

10. Competition and Consumer Act 2010 and Australian Consumer Law

- 10.1 Nothing in this agreement is intended to have the affect of contracting out of any applicable provisions of the Competition and Consumer Act 2010 and Australian Consumer Law in any of the States and Territories of Australia, except to the extent permitted by those Acts where applicable.

11. Intellectual Property

- 11.1 Where the Seller has designed or drawn Goods for the Buyer, then the copyright in those designs and drawings shall remain vested in the Seller, and shall only be used by the Buyer at the Seller's discretion.
- 11.2 Conversely, in such a situation, where the Buyer has supplied drawings, the Seller in its sale conditions may look for an indemnity (the specifications and design of the Goods (including the copyright, design right or other intellectual property in them) shall as between the parties be the property of the Seller). Where any designs or specifications have been supplied by the Buyer for manufacture by or to the order of the Seller then the Buyer warrants that the use of those designs or specifications for the manufacture, processing, assembly or supply of the Goods shall not infringe the rights of any third party.

12. Default & Consequences Of Default

- 12.1 Interest on overdue invoices shall accrue from the date when payment becomes due daily until the date of payment at a rate of 2.5% per calendar month and shall accrue at such a rate after as well as before any judgement.
- 12.2 If the Buyer defaults in payment of any invoice when due, the Buyer shall indemnify the Seller from and against all the Seller's costs and disbursements including on a solicitor and own Buyer basis and in addition all costs of collection.
- 12.3 Without prejudice to any other remedies the Seller may have, if at any time the Buyer is in breach of any obligation (including those relating to payment), the Seller may suspend or terminate the supply of Goods to the Buyer and any of its other obligations under the terms and conditions. The Seller will not be liable to the Buyer for any loss or damage the Buyer suffers because the Seller exercised its rights under this clause.
- 12.4 If any account remains unpaid at the end of the second month after supply of the goods or services the following shall apply: An immediate amount of the greater of \$20.00 or 10.00% of the amount overdue shall be levied for administration fees which sum shall become immediately due and payable.

12.5 In the event that:

- (a) any money payable to the Seller becomes overdue, or in the Seller's opinion the Buyer will be unable to meet its payments as they fall due; or
- (b) the Buyer becomes insolvent, convenes a meeting with its creditors or proposes or enters into an arrangement with creditors, or makes an assignment for the benefit of its creditors; or
- (c) a receiver, manager, liquidator (provisional or otherwise) or similar person is appointed in respect of the Buyer or any asset of the Buyer; then without prejudice to the Seller's other remedies at law
- (d) the Seller shall be entitled to cancel all or any part of any order of the Buyer which remains unperformed in addition to and without prejudice to any other remedies; and
- (e) all amounts owing to the Seller shall, whether or not due for payment, immediately become payable.

13. Title

In this clause, the following expressions have the following meanings:

"dealing" means and includes the Buyer using the Goods in some manufacturing or construction process of its own or of a third party;

"resale" means and includes any form of sale, hire, loan or in any way, parting with possession of Goods.

- 13.1 Each sale of Goods and each delivery of Goods by the Seller to the Buyer the subject of this Invoice shall be deemed to be subject to the following conditions:
 - (a) The Buyer acknowledges that risk in the Goods passes to the Buyer once the Goods have been delivered by the Seller to the Buyer.
 - (b) No title or ownership of the Goods passes to the Buyer until payment in full of all monies owing by the Buyer to the Seller in respect of Goods so delivered pursuant to this Invoice, is received by the Seller from the Buyer and the Buyer shall:
 - (c) Store Goods which have not been paid for, separately, securely, safe from damage and readily identifiable as Goods of the Seller and as agent, trustee and bailee of the Seller;
 - (d) The Buyer may resell the Goods but only as agent of the Seller. Any right to bind the Seller to any liability or third party by agreement or otherwise is expressly negated. Any resale of the Goods by the Buyer is to be at arm's-length and on market terms and pending resale or dealing in the Goods, the Goods are to kept separate from the Buyer's own goods and insured by the Buyer with a reputable insurer and noting the interest of the Seller;
 - (e) The Buyer will receive all proceeds of resale of or any dealing with the Goods, whether the proceeds are tangible or intangible, whether direct or indirect, in trust for the Seller and will keep such proceeds in a separate account until the liability of the Buyer to the Seller pursuant to this Invoice shall have been discharged. Such proceeds of resale shall be held in trust for the Seller and shall be deemed to be equal in dollar terms to the amount owing by the Buyer to the Seller in respect of the goods at the time of receipt of such proceeds;
 - f) The Seller is to have the power to appropriate payments to such Goods and accounts as it thinks fit notwithstanding any appropriation by the Buyer to the contrary;
 - (g) If the Buyer does not pay for any Goods on the due date specified in this Invoice, the Seller is hereby irrevocably authorised by the Buyer to enter the Buyer's premises (or any premises under the control of the Buyer or as agent of the Buyer if the goods are stored at such premises), and use reasonable force to take possession of the Goods without liability for the tort of trespass, negligence or payment of any compensation to the Buyer (or its agent) whatsoever;
 - (h) Should the Seller seek to recover the Goods, the Buyer grants access to the premises where the Goods are stored and indemnifies the Seller in relation to any damage caused to those premises;
 - (i) For the purpose of giving effect to and perfecting the matters specified in sub-clause 13(v) hereof, the Buyer irrevocably appoints the Seller as its attorney; and

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- (j) The parties agree that the provisions of this clause apply notwithstanding an agreement, whether subsequent to this Invoice or not, between the parties under which the Seller gives the Buyer credit.
- 13.2 It is expressly agreed between the Seller and the Buyer that:
- (a) Neither the Goods or proceeds of sale or dealing therefrom shall be available for general distribution among creditors of the Buyer in the case of corporate administration, liquidation or bankruptcy;
 - (b) Neither the Goods or proceeds of sale or dealing therefrom shall be available for distribution among secured creditors of the Buyer holding a fixed or floating security over the Buyer; and
 - (c) The loss of identity of Goods subject to resale or dealing does not prevent the proceeds of resale or dealing being held on trust by the Buyer or the Seller.

14. Personal Property Security Act 2009 ("PPSA")

- 14.1 This Agreement creates in favour of the Seller a first ranking security interest in the Goods and the Buyer acknowledges that the Seller may register a financing statement against the Buyer in this regard.

The content of this clause and the conditions contained in it constitute a security agreement for the purposes of the PPSA, in respect of which the Buyer agrees that the Goods are not to be used predominantly for personal, domestic or household purposes. The Buyer unconditionally and irrevocably contracts out of the following provisions of the PPSA:

- (a) Section 95 (requiring notice to be given of removal of an accession);
- (b) Section 96 (when a person with an interest in the whole may retain an accession);
- (c) Section 121(4) (requiring notice to grantor in relation to enforcement of liquid assets);
- (d) Section 130 (requiring a secured party to give notice to a grantor in respect of disposal of Goods);
- (e) Section 132(1) (requiring the delivery of a statement of account to a grantor after disposal);
- (f) Section 132(4) (requiring delivery of a statement of account if no disposal);
- (g) Section 135 (requiring delivery by a secured party to a grantor of notice of retention);
- (h) Section 142 (giving the right of a grantor to redeem the Goods); and
- (i) Section 143 (giving the right of a grantor to seek reinstatement of a security agreement).

- 14.2 The Buyer consents to the Seller, at the Buyer's cost and expense, registering any security interest contemplated or constituted by this paragraph or these conditions, and agrees to sign all documents and do all such things as requested by the Seller in order to register the Seller's security interest pursuant to the PPSA, including the registration of a Financing Statement, Financing Change Statement in respect of a security interest and any other document or notice required for the purposes of the PPSA. The Buyer unconditionally and irrevocably waives the right to receive a Verification Statement in relation to the registration of any security interest by the Seller in respect of the Goods.

- 14.3 The Buyer undertakes that it will not:
- i. Do anything which would prejudice or interfere with the Seller's right to registration of its security interest pursuant to the provisions of the PPSA;
 - ii. Register or seek to register a Financing Change Statement in respect of the Goods without the Seller's prior written consent; and
 - iii. Permit any further encumbrance to subsist in respect of the Goods in favour of any third party without prior written consent of the Seller.

- 14.4. The Seller's rights pursuant to this paragraph are in addition to and not in substitution of any other rights the Seller has against the Buyer.

15. Cancellation

- 15.1 The Seller may cancel these terms and conditions or cancel delivery of Goods and Services at any time before the Goods are delivered by giving written notice. On giving such notice the Seller shall promptly repay to the Buyer any sums paid in respect of the Price for those Goods. The Seller shall not be liable for any loss or damage whatever arising from such cancellation.

16. Privacy Act 1988

- 16.1 The Buyer and/or the Guarantor/s agree for the Seller to obtain from a credit reporting agency a credit report containing personal credit information about the Buyer and Guarantor/s in relation to credit provided by the Seller.
- 16.2 The Buyer and/or the Guarantor/s agree that the Seller may exchange information about Buyer and Guarantor/s with those credit providers named in the Application for Credit account or named in a consumer credit report issued by a reporting agency for the following purposes:
- (a) To assess an application by Buyer;
 - (b) To notify other credit providers of a default by the Buyer;
 - (c) To exchange information with other credit providers as to the status of this credit account, where the Buyer is in default with other credit providers; and
 - (d) To assess the credit worthiness of Buyer and/or Guarantor/s.
- 16.3 The Buyer consents to the Seller being given a consumer credit report to collect overdue payment on commercial credit (Section 18K(1)(h) Privacy Act 1988).
- 16.4 The Buyer agrees that Personal Data provided may be used and retained by the Seller for the following purposes and for other purposes as shall be agreed between the Buyer and Seller or required by law from time to time:
- (a) provision of Services & Goods;
 - (b) marketing of Services and or Goods by the Seller, its agents or distributors in relation to the Services and Goods;
 - (c) analysing, verifying and/or checking the Buyer's credit, payment and/or status in relation to provision of Services/Goods;
 - (d) processing of any payment instructions, direct debit facilities and/or credit facilities requested by Buyer; and
 - (e) enabling the daily operation of Buyer's account and/or the collection of amounts outstanding in the Buyer's account in relation to the Services and Goods.
- 16.5 The Seller may give, information about the Buyer to a credit reporting agency for the following purposes:
- (a) to obtain a consumer credit report about the Buyer; and or
 - (b) allow the credit reporting agency to create or maintain a credit information file containing information about the Buyer.

17. Unpaid Sellers Rights To Dispose Of Goods

- 17.1 In the event that:
- (a) the Seller retains possession or control of the Goods; and
 - (b) payment of the Price is due to the Seller; and
 - (c) the Seller has made demand in writing of the Buyer for payment of the Price in terms of this contract; and
 - (d) the Seller has not received the Price of the Goods,
- then, the Seller may dispose of the Goods and may claim from the Buyer the loss to the Seller on such disposal.

18. Lien & Stoppage in Transit

- 18.1 Where the Seller has not received or been tendered the whole of the price, or the payment has been dishonoured, the Seller shall have:
- (a) a lien on the goods;
 - (b) the right to retain them for the price while the Seller is in possession of them;
 - (c) a right of stopping the goods in transit whether or not delivery has been made or ownership has passed; and
 - (d) a right of resale,
 - (e) the foregoing right of disposal,

19. General

- 19.1 If any provision of these terms and conditions shall be invalid, void or illegal or unenforceable the validity existence, legality and enforceability of the remaining provisions shall not be affected, prejudiced or impaired.

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- 19.2 All Services/Goods supplied by the Seller are subject to the laws of Victoria and the Seller takes no responsibility for changes in the law which affect the Services/Goods supplied.
- 19.3 The Seller shall be under no liability whatever to the Buyer for any indirect loss and/or expense (including loss of profit) suffered by the Buyer arising out of a breach by the Seller of these terms and conditions.
- 19.4 In the event of any breach of this contract by the Seller the remedies of the Buyer shall be limited to damages. Under no circumstances shall the liability of the Seller exceed the Price of the Goods.
- 19.5 The Buyer shall not set off against the Price amounts due from the Seller.
- 19.6 The Seller may license or sub-contract all or any part of its rights and obligations without the Buyer's consent.
- 19.7 The Seller reserves the right to review these terms and conditions at any time and from time to time. If, following any such review, there is to be any change in such terms and conditions, that change will take effect from the date on which the Seller notifies the Buyer of such change.
- 19.8 Neither party shall be liable for any default due to any act of God, war, terrorism, strike, lock out, industrial action, fire, flood, drought, storm or other event beyond the reasonable control of either party.