

# Terms and Conditions Supply of Parts and Service

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## 1. DEFINITIONS

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In these conditions:

- 1.1 **Business Day** means Monday to Friday excluding public holidays in Victoria.
- 1.2 **Company** means MacDonalld Johnston Pty Ltd (ACN 004 992 090) and its successors and permitted assigns.
- 1.3 **Contract** means these terms and conditions and any order for the supply of any Product or Service or both which has been accepted by the Company.
- 1.4 **Customer** means any natural person, company, partnership or other entity whose order is accepted by the Company.
- 1.5 **GST Act** means *A New Tax System (Goods and Services Tax) Act 1999*.
- 1.6 **Insolvency Event** means:
  - 1.6.1 the Customer, being an individual, commits an act of bankruptcy;
  - 1.6.2 the Customer becomes insolvent;
  - 1.6.3 a receiver, receiver and manager, administrator, controller, provisional liquidator or liquidator is appointed to the Customer or the Customer enters into a scheme of arrangement with its creditors or is wound up;
  - 1.6.4 the Customer assigns any of its property for the benefit of creditors or any class of them;
  - 1.6.5 an encumbrancee takes any step towards taking possession or takes possession of any of the assets of the Customer or exercises any power of sale; or
  - 1.6.6 a distress, attachment or other execution is levied or enforced against the Customer in excess of \$10,000.
- 1.7 **Price** means the price quoted by the Company from time to time.
- 1.8 **Product** means any goods which the Company is to supply in accordance with these terms.
- 1.9 **Service** means any service which the Company is to supply in accordance with these terms.

## 2. AUTHORITY TO CHANGE

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No representative or agent of the Company has any authority to vary or add to these terms and

conditions except with the Company's official confirmation in writing signed by a director of the Company. Any order placed by a Customer is deemed to be an order incorporating these terms and conditions notwithstanding any inconsistencies which may be introduced in the Customer's order or acceptance of any tender or quotation by the Customer, and in the event of any inconsistency, these terms and conditions will prevail.

## 3. PURCHASE AND SUPPLY

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The Company agrees to supply and the Customer agrees to purchase the Products or Service or both on the terms and conditions set out in the Contract.

## 4. QUOTATIONS

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Unless otherwise agreed in writing, any tender or quotation by the Company is deemed withdrawn unless accepted by the Customer within 30 days from its date. On acceptance by the Customer of any tender or quotation, the Company will only be bound by the order when written confirmation has been given by the Company and subject to the Company's approval of the Customer's credit. Unless otherwise stated all prices are net and exclusive of GST.

## 5. LIMITATION OF LIABILITY

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Except as expressly provided to the contrary in the Contract and to the fullest extent permitted by the law:

- 5.1 all terms, conditions, warranties or representations, whether express, implied, statutory or otherwise relating to the supply of the Products or Service or both are excluded;
- 5.2 the Company will not be liable for any consequential loss or damage suffered by the Customer including without limitation any loss of production or profits and any loss or damage caused to the Customer or any other person which arises out of the negligence or carelessness of the Company or any of its employees, servants or agents or which arises directly or indirectly from the use of the Product or any information relating to the Product or the Service or both;
- 5.3 the Company's liability for any loss or damage suffered by the Customer or any other person for any damage to property, personal injury or death is in every case limited to the Price; and
- 5.4 the Company will not be liable for any delay or failure to provide the Product or the Service or both if the delay is due to any event referred to in clause 11 or something the Customer does or fails to do.

## **6. WHERE LIABILITY CANNOT BE LIMITED**

Certain laws such as the *Trade Practices Act 1974* (Cwlth) may imply warranties or conditions or impose obligations upon the Company that the Company cannot exclude, restrict or modify. If these laws apply, to the extent to which the Company is able to do so, the Company's liability will be limited (at the Company's option) to:

- 6.1 in the case of Products:
  - 6.1.1 the replacement of the Products or the supply of equivalent Products; or
  - 6.1.2 the repair of the Products; or
  - 6.1.3 the payment of the cost of replacing the Products or of acquiring equivalent Products; or
  - 6.1.4 the payment of the cost of having the Products repaired; and
- 6.2 in the case of Service:
  - 6.2.1 the supplying of the Service again; or
  - 6.2.2 the payment of the cost of having the Service supplied again.

## **7. LOCAL LAWS**

It is the Customer's responsibility to ensure that all Products ordered meet all local laws and regulations.

## **8. INSPECTION**

- 8.1 The Customer will be deemed to have accepted the Products unless the Customer notifies the Company within 14 days of delivery of any defect or damage to any Product, and must take all reasonable steps to mitigate loss (if any) arising as a consequence of such defect or damage.
- 8.2 Any defective or damaged Product may, subject to prior written authorisation by the Company and the Product being adequately packaged for transport, be returned to the Company.
- 8.3 The Company:
  - 8.3.1 accepts no responsibility for any Product returned without its prior written authorisation; and
  - 8.3.2 will not accept the return of any Product which has been altered, damaged or defaced in any way.
- 8.4 If the Customer re-supplies any Product supplied by the Company, the Customer must impose upon the acquirer of such Product an obligation to notify the Customer within 14 days of delivery to the acquirer of any defect or damage to the Product of which it becomes aware after delivery and to take all reasonable steps to mitigate loss (if any) arising as a consequence of such defect or damage.
- 8.5 The Customer will be deemed to have accepted the Service unless the Customer

notifies the Company within 14 days of completion of the Service of any inadequacy in the Service, and must take all reasonable steps to mitigate loss (if any) arising as a consequence of such defect or damage.

## **9. WARRANTIES**

- 9.1 The Company warrants to the Customer that on the date of delivery of the Product, the Company believes that the Product is free from defects in material, workmanship and design.
- 9.2 Where Service is provided by the Company, the Service works are warranted for parts and labour supplied by the Company during the Warranty Period (as defined in clause 9.4). The Company will, in the event of any deficiency in Service works and to the extent necessary, provide the relevant Service works at no additional charge.
- 9.3 The Customer may during the Warranty Period (as defined in clause 9.4) notify the Company in writing of any defect or suspected defect in the Product. Subject to clause 9.5, the Company will, to the extent necessary, repair or replace the Product at the Company's discretion at no additional charge provided that:
  - 9.3.1 the Product has been properly serviced, maintained, used and operated by the Customer according to the manner prescribed by the Company, whether in the form of a maintenance manual or otherwise, or if no manner is prescribed by the Company, then according to the manner normally applicable to such Product;
  - 9.3.2 the Product is not subject to unusual or unrecommended physical, environmental or electrical stress;
  - 9.3.3 the Product is not used by any other party other than the Customer, or if the Customer re-supplies any Product, by the party acquiring the Product from the Customer;
  - 9.3.4 the Product has not been repaired, altered, modified or dismantled in any way by any party other than the Company or its authorised service representative; and
  - 9.3.5 the Product is not used in a manner contrary to the law.
- 9.4 The warranty period (**Warranty Period**) means:
  - 9.4.1 in the case of Products, 3 months from the date of delivery of the Product to the Customer, provided that the parts have been fitted correctly and the vehicle setup is to the Company's satisfaction; and
  - 9.4.2 in the case of Service works, 3 months from the date of

- completion of the Service works.
- 9.5 The warranty does not extend to:
- 9.5.1 any part and consumable items used in general maintenance work as set out in the relevant maintenance manual including without limitation filters and elements, drive couplings, bearings and belts, dust curtains and mudflaps, impellers and casings, lift cables, light globes, relays, fuses and batteries, seals (including rear door) and rubbers, tyres and friction material, wearing plates, slide blocks, strips and baffles, windows, mirrors and inspection glasses, and any other item normally considered as consumable;
- 9.5.2 any wearing components including without limitation those on lifters, bodies, shear pins, wear pads and adjustments to pressure;
- 9.5.3 any incidental costs including without limitation towing, hire vehicle costs, travel time, fares, meals, accommodation, overtime, site allowances, penalty rates and all other incidental costs;
- 9.5.4 damage or breakdown of the Product arising directly or indirectly from normal wear and tear, incorrect, faulty or negligent operation or maintenance or by continued use of the Product after the discovery of any defect or deficiency which has not been rectified;
- 9.5.5 any claim other than those directly attributable to faulty material or workmanship or design in respect of the Product; and
- 9.5.6 any parts which are not original parts supplied by the Company, or any consequential damage to or failure or breakdown of the Product arising from the use of unauthorised parts or materials.
- 9.6 Any obligation of the Company to repair or replace the Product or to provide further Service works is subject to:
- 9.6.1 the Product or the Serviced equipment being sent back to one of the Company's service centres, with all delivery and transport costs being fully paid by the Customer;
- 9.6.2 the repair or replacement work or the Service works being conducted during the Company's normal business hours; and
- 9.6.3 if the Customer is located in a remote region, the Customer may, with the Company's prior written agreement:
- (a) arrange for the repair or replacement work or the Service works to be conducted at the

premises of the Customer provided that the Customer pays to the Company all travel, accommodation and other costs and part freights; or

- (b) conduct the warranty repairs or Service works and be reimbursed by the Company at the Company's standard repair times.

## **10. INDEMNITY**

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The Customer must continually indemnify the Company from and against all claims, loss, damage, cost or expense suffered or incurred by the Company (or the Company's employees, agents or contractors) arising from any breach by the Customer of the Contract. Each indemnity is a continuing obligation, separate and independent from the other obligations of the parties and survives the termination of this Agreement. It is not necessary for the Company to incur expense or make payment before enforcing a right of indemnity.

## **11. FORCE MAJEURE**

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If performance of any obligation accepted by the Company is prevented, delayed or interfered for any reason beyond the Company's control including without limitation by any act of war or terrorism, strikes or other industrial action, accident, breakdown, acts of God, acts of governments or government authorities or any events of a similar nature, the Company may at its option suspend performance or cancel the obligation and shall be paid a reasonable price for the work already done or Product or Service supplied by the Company.

## **12. DELIVERY TIMES**

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Times or dates for delivery or performance are business estimates only and not contractual obligations of the Company. The Company will endeavour to deliver or perform by the time or date given but will not accept cancellation or be liable for loss claimed to have arisen from any delay, unless otherwise specifically agreed to in writing by the Company.

## **13. ADVICE**

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Any advice, recommendation, information, assistance or service (including without limitation such advice as may be contained in any drawings, catalogues, shipping specifications) provided by the Company in relation to Products sold or manufactured by it or their use or application or in relation to the Service is given in good faith and is believed by the Company to be appropriate and reliable, however, it is provided without liability or responsibility on the part of the Company. The Company reserves the right to make such changes in specification as it may in its sole discretion deem appropriate or as may be required by conditions beyond its control. Any description of the Products or Service is given by way of identification only and the use of such description shall not constitute a supply by description.

## **14. TERMS OF PAYMENT**

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- 14.1 The Price:

- 14.1.1 is expressed in Australian Dollars; and
- 14.1.2 must be paid by the end of the next month following the month of delivery of the Product or completion of the Service or both, as applicable, if the Customer is within the credit limit approved by the Company for the Customer from time to time; or
- 14.1.3 must be paid upon delivery of the Product or completion of the Service or both, as applicable, if the Customer does not have a credit limit approved by the Company or has a credit limit but the limit is exceeded.
- 14.2 The Price quoted does not include transport or insurance costs, all of which are for the Customer's account
- 14.3 If the Customer fails to pay to the Company the Price within this time, the Company may at its discretion:
  - 14.3.1 without prejudice to any other right or remedy the Company has in respect of the breach, charge the Customer interest on the unpaid amount at the rate of 15% per annum calculated daily ;
  - 14.3.2 withhold delivery to or suspend or cancel any other orders by the Customer.
- 14.4 The Company may at all times at its sole and unfettered discretion and without being under any duty or obligation to assign reasons therefore, review, alter or terminate the Customer's credit limit or terms without notice. The decision of the Company shall be final and the Company accepts no liability or responsibility for any loss, howsoever arising, incurred by the Customer due to the operation of this condition.

## **15. INSOLVENCY**

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If any Insolvency Event happens to the Customer, the Company may:

- 15.1 give the Customer written notice of termination of this Contract and on termination the Company will not be required to provide the Products or the Service or both; or
- 15.2 enter the Customer's premises and retake possession of any Products that the Customer has not fully paid for. The Company may use any method the Company deems appropriate to remove such Products from the Customer's premises and the Customer agrees that the Company will not be liable for any damage caused to the premises or any other goods or equipment on the premises unless the damage is intentionally caused. The Customer must indemnify the Company on demand from and against all loss, damage, costs or expenses suffered or incurred by the Company in retaking possession of the Product and arranging for their resale.

## **16. GST**

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The parties must comply with the GST Act. If GST is payable on a taxable supply, the Customer is responsible for the GST amount and the taxable supply will be increased by the GST amount.

## **17. DESPATCH**

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- 17.1 The Product or the Service or both will be delivered by the Company to the Customer at the place stated agreed to by the Company.
- 17.2 After such delivery the Customer as bailee accepts the responsibility for safety of the Product and takes the risk of any loss or injury thereto however caused which may occur before the property in the Product passes to the Customer.
- 17.3 The Customer must, after delivery to the Customer, keep the Product fully insured and must indemnify the Company against any loss or injury arising out of or relating to the Product or its use.

## **18. PROPERTY IN PRODUCTS**

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- 18.1 Property in the Products shall remain with the Company until the Customer has paid the Price in full.
- 18.2 The Company shall retain property in the Products notwithstanding that the risk in the Products passes to the Customer at the time of delivery.
- 18.3 Until the Customer has paid the Price in full to the Company:
  - 18.3.1 the Customer holds the Product as a fiduciary bailee of the Company;
  - 18.3.2 the Customer must store the Products so that they are clearly identified as the property of the Company.
  - 18.3.3 the Customer must not allow the Product to become the subject of any security interest,

subject to the following:

- 18.3.4 the Customer may, sell the Products to third parties in the ordinary course of business provided that the Customer must hold all proceeds of such sub-sales in trust for the Company; and
- 18.3.5 if the Company requires, the Customer must assign to the Company all its rights to any claims it may have against third parties arising from any sub-sale of the Products by the Customer.
- 18.4 The Company may, in the event that any payments in respect of the Products are not paid by the due date, or any other failure by the Customer to perform its obligations under the Contract, take possession of the Products and resell the same and, for such

purposes the Company or its duly authorised representative may and is hereby authorised to enter upon the Customer's premises for the purpose of removing those Products and taking possession of the same.

## **19. MARKS**

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The Customer shall not remove, obscure, alter or tamper with any plate, trade or other identification mark, name or number on the Products.

## **20. INTELLECTUAL PROPERTY**

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- 20.1 The Customer acknowledges that the sale and purchase of Products under the Contract does not confer on the Customer any licence or rights under any intellectual property relating to the Product, including without limitation patents, registered designs, trade marks, copyright and engineering data design which is the property of the Company.
- 20.2 The Customer must not copy, reproduce, distribute, publish or communicate any intellectual property or confidential information about or belonging to the Company to any third party without the Company's prior written consent.
- 20.3 The Customer warrants that any design or instruction furnished to the Company by the Customer shall not be such as will cause the Company to infringe any intellectual property of any third party in the execution of the Customer's order.
- 20.4 The obligations under this clause 21 are continuing obligations and will survive the termination of the Contract.

## **21. SUBCONTRACTING**

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The Company reserves the right to sub-contract the production, manufacture or supply of the whole or any part of the Products or the Service or both or of any materials or services to be supplied.

## **22. TERMINATION**

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The Company may terminate the Contract:

- 22.1 immediately if the Company gives the Customer written notice of a breach of the Contract and the Customer fails to rectify the breach within 5 Business Days; or
- 22.2 immediately if an Insolvency Event happens to the Customer.

## **23. NOTICES**

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- 23.1 A notice given under the Contract must be in writing and may be served:
- 23.1.1 personally on the party;
- 23.1.2 by being left at the party's current address;
- 23.1.3 by being posted to a party at its current address;
- 23.1.4 by facsimile to the party's current number;
- 23.1.5 by email to the party's current email address.

- 23.2 If the party to be served is a company, the notice or other communication may be served on it at the company's registered address.

23.3 A notice is taken to be received:

23.3.1 if served personally, or left at the person's address, upon service;

23.3.2 if posted within Australia to an Australian address, 2 Business Days after posting and in any other case, 7 Business Days after posting;

23.3.3 if transmitted by facsimile, subject to clause 23.3.5, at the time indicated on the sender's transmission report;

23.3.4 if served by email, subject to clause 23.3.5, at the time the email containing the notice left the sender's email system, unless the sender receives notification that the email containing the notice was not received by the recipient; and

23.3.5 if received after 5.00pm in the place of receipt or on a day which is not a Business Day, at 9.00am on the next Business Day.

## **24. GOVERNING LAW**

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The Contract shall be governed by and construed in accordance with the laws of Victoria. Each party irrevocably and unconditionally submits to the non-exclusive jurisdiction of the courts of Victoria and waives any right to object to proceedings being brought in those courts.

## **25. INTERPRETATION**

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- 25.1 The Contract constitutes the whole understanding between the parties in relation to the subject matter it deals with. It can only be varied by the written agreement of the parties.
- 25.2 If a provision of the Contract is held to be illegal, invalid, void or unenforceable, that provision must either:
- 25.2.1 be read down so that it does not have the above effect; or
- 25.2.2 if it is not possible to read down the provision, be severed from the Contract.
- 25.3 A reference to the singular includes the plural and vice versa.
- 25.4 If the Customer consists of more than one person or body corporate, the Contract binds all of them jointly and each of them separately.
- 25.5 The relationship between the Company and the Customer is of an independent contractor and principal. No partnership, joint venture or agency is created by the Contract.
- 25.6 A single or partial exercise or waiver of a right relating to the Contract does not prevent any other exercise of that right or the exercise of any other right.

25.7 No party will be liable for any loss or expenses incurred by another party caused or contributed to by the waiver, exercise, attempted exercise, failure to exercise or delay in the exercise of a right.

25.8 Time is of the essence as regards all dates, periods of time and times specified in the Contract.