

## TERMS AND CONDITIONS - GERRARD HYDRAULICS

### 1. Definitions

In these Conditions the following words shall have the following meanings:

"**Ancillary Charges**" means all costs of packaging, taxes, duties and other imposts and all other costs associated with the manufacture and delivery of the Goods;

"**Company**" means the company which from time to time shall trade under the business name of **Gerrard Hydraulics**;

"**Conditions**" means the terms and conditions hereof;

"**Contract**" means the agreement between the Company and the Purchaser created by acceptance of the Quotation of the Purchaser;

"**Goods**" means the item or items specified in the Quotation;

"**Purchaser**" means the person, firm or company who or which accepts the Quotation and to whom the Quotation is addressed;

"**Quotation**" means the quotation overleaf;

"**Quotation price**" means the price quoted in the Quotation for Goods or Services or such other price as may be varied by the Company from time to time pursuant to clause 4;

"**Services**" means the performance of any work by the Company for the Purchaser with or without the supply of Goods (including without limitation the giving of any instructions or advice, carrying out any overhaul repairs maintenance or servicing of any Goods or other equipment, transport or carriage of any Goods or storage of any property whatsoever for the Purchaser or in connection with the performance of any work);

"**TPA**" means the Trade Practices Act 1974 (as amended).

"**Validity Period**" means the period for which the Quotation Price remains valid as stated on the face hereof.

### 2. Acceptance

The Quotation constitutes an offer subject to the Conditions which may be accepted by the Purchaser in writing or orally.

### 3. Payment

3.1 The Purchaser shall pay to the Company the Quotation Price and all Ancillary Charges within thirty (30) days of acceptance of the offer by the Purchaser ("the Payment Period") but payment by the Purchaser shall not prejudice any claim for shortages in quantity or supply of goods not contracted for provided that written notice of the claim is received by the Company within seven (7) days after receipt of the Goods by the Purchaser.

3.2 If, at the expiration of the Payment Period, the Purchaser has failed to pay in full the Quotation Price and all Ancillary Charges, the Purchaser shall pay to the Company interest at the rate of EIGHTEEN PERCENT (18%) per annum on any outstanding unpaid balance of the Quotation Price and Ancillary Charges, such interest to be computed from the expiration of the Payment Period until payment of the outstanding unpaid balance in full.

### 4. Variation of Price

4.1 The Quotation Price is based on the costs of materials, services, labour, employer's liability and third party insurance and other statutory obligations ruling at the date of the Quotation ("the Costs").

4.2 If the Quotation is not accepted within the Validity Period, then the Quotation Price may be increased by the Company ("the Varied Quotation Price") by notice in writing to the Purchaser to take account of any increase in the Costs.

4.3 The Purchaser shall pay the difference between the Varied Quotation Price to the Purchaser within seven (7) days of receiving such notification.

### 5. Delivery of Goods

5.1 The Goods will be, at the option of the Purchaser:

- (a) collected by the Purchaser from the Company's store;
- or
- (b) delivered by the Company to the Purchaser to a point of delivery notified in writing by the Purchaser to the Company ("the Delivery Point").

5.2 The Purchaser will attend and will be entitled to examine the Goods at their collection or at the Delivery Point provided that any signature by the Purchaser on the Company's delivery or receipt form shall constitute unqualified acceptance of the Goods by the Purchaser.

5.3 If the Purchaser is not present at the Delivery Point at the time of delivery of the Goods, the Company is entitled to refuse to deliver the Goods, in which case the Purchaser shall be liable for all transport costs incurred by the Company, provided that if the Company elects to deliver the Goods to the unattended Delivery Point, delivery shall be deemed to constitute unqualified acceptance of the Goods by the Purchaser.

### 6. Passing of Risk

The Goods are at the Purchaser's risk as and from the time when the Goods leave the Company's store.

### 7. Passing of Property

7.1 The Goods shall remain in the ownership of the Company until the Purchaser has paid in full the Quotation Price, the Ancillary Charges, and all other moneys owing to the Company by the Purchaser howsoever arising (collectively referred to as "the Moneys Owing").

7.2 If the Company delivers the Goods or any part thereof prior to the Purchaser paying in full the Moneys Owing to the Company, the Purchaser agrees with the Company:

- (a) to keep the Goods as fiduciary owner for the Company, and shall store the goods separately from property belonging to the Purchaser; and
- (b) if the Purchaser:
  - (i) makes produces or manufactures a new object from the Goods, whether finished or not;
  - (ii) incorporates or mixes the Goods with other goods; or
  - (iii) the Goods become part of other goods.

("the New Goods") the ownership of the New Goods immediately passes to the Company at the moment of the event or single operation by which the Goods are converted into, are incorporated or mixed, or become part of the New Goods and the Purchaser shall keep the New Goods as fiduciary owner for the Company and shall store the New Goods separately from property belonging to the Purchaser.

7.3 Notwithstanding clause 7.2, prior to paying in full the Moneys Owing to the Company the Purchaser may sell the Goods or the New Goods to a third party ("the Third Party") in the ordinary course of its business and deliver the Goods or the New Goods to the Third Party provided that:

- (a) where the Purchaser is paid by the Third Party, the Purchaser shall hold the whole of the proceeds of sale on trust for the Company and shall forthwith pay the proceeds, or such part thereof necessary to pay in full the Moneys Owing to the Company; and
- (b) where the Purchaser is not paid by the Third Party, the Purchaser shall assign his claim against Third Party, in respect of the sale of the Goods or the New Goods to the Third Party, to the Company upon notice in writing by the Company being given to the Purchaser requesting such assignment.

7.4 For the purchase of giving effect to and perfecting the assignment referred to in sub-clause 7.3(b) above, the Purchaser hereby irrevocably appoints the Company and each and every one of the directors and other officers of the Company jointly and severally the attorney of the Purchaser.

7.5 The Purchaser and the Company agree that the provisions of this clause 7 apply notwithstanding any agreement between the Company and the Purchaser pursuant to which the Company provides credit to the Purchaser.

7.6 For the purposes of this clause 7, where any cheque, note or other negotiable instrument is forwarded by the Purchaser to the Company on account of any Moneys Owing, those Moneys Owing shall not be deemed to have been paid until such cheque, note or other negotiable instrument if cleared through the Company's bank account.

### 8. Insurance of Goods

The Company shall not be under any obligation to insure the Goods.

### 9. Default

9.1 The following events shall be "Events of Default":

- (a) if the Purchaser fails to pay the Quotation Price and all Ancillary Charges (or any part thereof) by the expiration of the Payment Period referred to in clause 3.1 or fails to pay the difference between the Varied Quotation Price and the Quotation Price within the period referred to in clause 4.3;
- (b) where the Purchaser is a company, a receiver and manager is appointed to all or any of the Purchaser's assets, or a winding up petition is presented or a resolution is passed for the winding up of the Purchaser or an official manager or provisional liquidator is appointed;
- (c) if the Purchaser ceases to carry on its business or is unable to pay its debts as and when they fall due, or
- (d) where the Purchaser is an individual, the Purchaser commits an act of bankruptcy or becomes a bankrupt or enters into any deed of assignment, deed of arrangement or composition with his creditors.

9.2 If an Event of Default occurs, the Company is entitled to:

- (a) if the Company has delivered the Goods or any part thereof to the Purchaser,
  - (i) enter upon any property owned or occupied by the Purchaser, with or without vehicles or equipment, retake possession of the Goods, and re-sell the Goods; and
  - (ii) cancel the Contract and sue for damages; or

- (b) if the Company has not delivered the Goods or any part thereof to the Purchaser cancel the Contract and sue for damages.

### 10. Non-Returns

Subject to clauses 3.1, 12.2 and 12.4 any Goods which do not ordinarily form part of the Company's stock, and which are acquired, obtained or manufactured by the Company in order to fulfil its obligation pursuant to this Contract, are non-returnable to the Company.

### 11. Returns

Subject to clauses 3.1, 12.2, and 12.4 and Goods which ordinary form part of the Company's stock and in respect of which the Purchaser makes a claim against the Company will not be accepted by the Company for return to it unless the Purchaser states its claim in writing within thirty (30) days after receipt of the Goods by the Purchaser, and the Company approves in writing the return of the Goods, and provided that the Goods being returned:

- (a) specify the Company's authority by which they are returned;
- (b) are properly packaged and labelled, and if any such Goods are mixed with other goods or are not properly packaged or labelled, any credit which may be given will be reduced by the cost of putting the Goods into saleable condition;
- (c) remain at the Purchaser's risk until they are delivered to the Company's store;
- (d) are returned by prepaid transport; and
- (e) will be subject to a handling charge determined by the Company.

### 12. Liability of Company

12.1 Subject to clause 12.2, all rights, duties, liabilities, terms, covenants and warranties implied at law or pursuant to any State or Federal legislation in respect of the Company, the Goods and the Services are hereby excluded, to the extent that such exclusion is lawful.

12.2 Any liability of the Company arising from breach of a condition or warranty implied by Part V Division 2 TPA (not being a condition or warranty implied by Section 69 TPA) shall be limited to:

- (a) in the case of Goods -
  - (i) replacement of the Goods or the supply of equivalent goods;
  - (ii) repair of the Goods;
  - (iii) payment of the cost of replacing the Goods or acquiring equivalent goods; or
  - (iv) payment of the cost of having the Goods repaired; and
- (b) in the case of Services -
  - (i) supplying of the Services again; or
  - (ii) payment of the cost of supplying the Services again,wholly at the discretion of the Company.

12.3 The Purchaser undertakes that the Goods are not being acquired for personal domestic or household use or consumption by the Purchaser (or any other party) with the result that the provisions of Part V Division 2A TPA shall not apply to the Company.

12.4 Notwithstanding sub-clause 12.2 in the event that any defect in the manufacture of or the materials in the Goods becomes apparent within six (6) months of the date of delivery of the Goods or such other period agreed by the Company in writing, the Company shall repair or replace or cause to be repaired or replaced, at a location specified in writing by the Company, the faulty Goods provided that:

- (a) notice in writing specifying the defect is received by the Company within six (6) months of the date of delivery of the Goods or such other period agreed by the Company in writing; and
- (b) the Purchaser proves to the satisfaction of the Company that:
  - (i) the defect specified became apparent while the defective Goods remain the property of either the Company or the Purchaser and are in the possession of the Purchaser;
  - (ii) the Goods were properly stored, maintained and otherwise protected from all risks of exposure;
  - (iii) the operation and maintenance of the Goods and of any plant or machinery in or with which the Goods may operate has been observed and performed in a proper workmanlike and technically proficient manner;
  - (iv) all instructions for the use and maintenance of the Goods have been complied with;
  - (v) the Goods have not been subject to repair by the Purchaser or by any other person excepting the Company's servants or agents; and
  - (vi) the defect in the Goods is not caused by any act or omission outside the Company's control.
- (c) the Purchaser shall arrange for the delivery of the Goods to the location nominated by the Company at the Purchaser's risk;
- (d) the Company shall be liable for the cost of repairing or replacing the defective Goods only and the Purchaser shall be liable for all other costs and expenses incurred, including transport and insurance costs;
- (e) if the defective Goods are unable to be transported by the Purchaser to the location nominated by the Company the Purchaser shall be liable for all costs and expenses incurred by the Company in attending at the site at which the defective Goods are located (including but without limiting the generality of the foregoing, all travelling expenses, meals, accommodation and man hour rates for attendance at the site by the Company's employees) until the Company notifies the Purchaser in writing, that in its sole and absolute discretion it accepts responsibility for any or all of such costs and expenses as being part of the cost of repairing or replacing the defective Goods.

12.5 All warranties and representations made by the Company its servants or agents whether expenses or implied and whether collateral or antecedent to this Contract are expressly excluded.

### 13. Failure to Deliver

The Company shall not be under any liability whatsoever to the Purchaser for loss, injury or damage of any kind whatsoever arising out of:

- (a) delay in or failure to make delivery of the Goods or any part thereof; or
- (b) delay in or failure to provide the Services or any part thereof,

including (but without limiting the generality of the foregoing) consequential loss of any kind, whether the same be due to any act, omission, negligence or willful default of the Company or its servants or agents, any breach by the Company its servants or agents of any term hereof, or any cause beyond the Company's control.

### 14. Force Majeure

14.1 Notwithstanding the provisions of clause 13 and in addition thereto, if there shall be delay in or failure to make delivery of the Goods or any part thereof; or to provide the Services or any part thereof; or to provide the Services or any part thereof which is caused by any cause beyond the Company's control, the Company is entitled to:

- (a) terminate the Contract by seven (7) days notice in writing to the Purchaser; or
- (b) extend the time for its performance by notice in writing to the Purchaser.

14.2 Upon expiration of the seven (7) days notice referred to in sub-clause 1(a) above the Contract shall terminate and the Purchaser shall not have any claim against the Company in respect of such termination, but the Purchaser shall remain liable for and pay to the Company a portion of the Quotation Price proportionate to the price of the Goods delivered and the Services provided pursuant to the Contract, and any Ancillary Charges actually incurred by the Company up to the date of such termination.

### 15. Ownership of Tools

All tools, jigs, dies and other equipment made or acquired by the Company for the purpose of executing this Contract shall be and remain the property of the Company.

### 16. Lien

In addition to any right of lien to which the Company may be entitled by law, it shall be entitled to a general lien on all Goods of the Purchaser in the Company's possession (although such Goods or some of them may have been paid for) for the unpaid price of any other goods sold and delivered to the Purchaser by the Company under the same or any other contract.

### 17. Patents

17.1 The Purchaser hereby indemnifies the Company in respect of all liability claims and demands arising from any infringement by the Purchaser of any patent belonging to any person in any item or process forming part or whole of the Goods, or in which the Goods are placed.

17.2 Unless agreed otherwise, the Company shall be entitled to use for its own purposes any schemes, circuits or other items of equipment produced by the Company for the Purchaser pursuant to this Contract in respect of which the Purchaser has obtained a patent, notwithstanding such patent.

### 18. Conditions to Preval

The Conditions shall prevail over all other written or oral terms and conditions except to the extent that the Company, by one of its duly authorised officers, has agreed in writing to the amendment of the Conditions.

### 19. Disputes

In the event of a dispute between the Company and the Purchaser arising out of or in connection with this Contract, the Company shall be entitled to elect to refer the dispute to either an expert or arbitrator or the appropriate court, for resolution.

### 20. Time of Essence

Time is of the essence in respect of the payment of the Quotation Price and the Ancillary Charges.

### 21. Proper Law

This Contract shall be governed by the laws of the State of Western Australia.