



**Phoenix Plant Services Pty Ltd**  
**ACN 657 865 140**  
**("Phoenix Plant Services")**  
**Trading Terms and Conditions**

These Trading Terms & Conditions ("**Terms**") apply (unless otherwise previously agreed in writing) to the supply of Services by Phoenix Plant Services to a Customer from time to time. Any supply of Services by Phoenix Plant Services to the Customer made after the date of acceptance of these Terms is a supply pursuant to the supply agreement constituted by these Terms and the relevant order as accepted by Phoenix Plant Services ("**Agreement**"). Any such supply does not give rise to a new or separate agreement unless otherwise specified.

## **1. Interpretation**

In these Terms unless the contrary intention appears:

- 1.1 "**Additional Charges**" means all amounts, other than the Price, payable by the Customer to Phoenix Plant Services arising from or in connection with the supply of the Services, including without limitation all delivery charges, replacement part costs, handling and storage charges, GST, stamp duty, interest, legal and other costs of recovery of unpaid money and all other government imposts.
- 1.2 "**Customer**" means the person to or for whom the Services are to be supplied by Phoenix Plant Services.
- 1.3 "**Services**" means the services provided by Phoenix Plant Services and includes any goods provided by Phoenix Plant Services to Customer.
- 1.4 "**Serviced Property**" means the Customer's vehicle, plant or other equipment which is the subject of the Services, or to which Services have been rendered, or which may be affected by, or relate to, the delivery of the Services.
- 1.5 "**Phoenix Plant Services**" means Phoenix Plant Services Pty Ltd ACN 657 865 140.
- 1.6 "**PPSA**" means the *Personal Property Securities Act 2009* (Cth).
- 1.7 "**Price**" means the price payable for the Services as charged by Phoenix Plant Services.

## **2. Order for Services**

- 2.1 By placing an order for Services or otherwise accepting these terms or acting in a manner that would indicate acceptance or acting in a manner consistent with these Terms, you agree to be bound by the Agreement, including these Terms
- 2.2 The Agreement supersedes any prior agreement with Phoenix Plant Services with regard to the Services, unless otherwise agreed in writing.
- 2.3 No request for Services by the Customer is binding on Phoenix Plant Services unless otherwise agreed in writing.
- 2.4 Phoenix Plant Services reserves the right to refuse any order, in full or in part, by notifying the Customer in writing or by delivering the Services to the Customer.
- 2.5 No order which has been accepted in whole or in part by Phoenix Plant Services can be cancelled by the Customer without first obtaining the written approval of Phoenix Plant Services, which it may refuse in its absolute discretion. In that event, the Customer will be liable for all losses incurred (whether direct or indirect) by Phoenix Plant Services as a result of that cancellation, including but not limited to, a cancellation fee which may not exceed the Price.

## **3. Warranties and Limitation of Liability**

- 3.1 Phoenix Plant Services' liability under the Agreement is limited to the full extent permissible by law and in relation to the Services is, at Phoenix Plant Services' option, limited to either;
  - 3.1.1 supplying the Service again; or
  - 3.1.2 paying the reasonable costs of having the Services supplied again.
- 3.2 Any warranties implied or granted under the Agreement shall not apply if Phoenix Plant Services has provided advice that is not followed in full by the Customer.

- 3.3 To the full extent permitted at law, all other warranties (whether implied or otherwise) not set out in these Terms are excluded from the Agreement.
- 3.4 Phoenix Plant Services is not liable in contract, tort (including, without limitation, negligence or breach of statutory duty) or otherwise to compensate Customer for:
- 3.4.1 any increased costs or expenses;
  - 3.4.2 any loss of profit, revenue, business, contracts or anticipated savings;
  - 3.4.3 any loss or expense resulting from a claim by a third party; or
  - 3.4.4 any special, indirect or consequential loss or damages of any nature whatsoever
- caused by Phoenix Plant Services' failure or delay in delivering the Services.

#### **4. Delivery**

- 4.1 The dates and times quoted for delivery of the Services are estimates only. Phoenix Plant Services accepts no liability for any failure or delay in delivery of the Services by those dates or times. The Customer is not relieved of any obligation to accept and/or pay for the Services because of any delay in delivery of the Services. The Services may be delivered in instalments at the discretion of Phoenix Plant Services. If Phoenix Plant Services is unable to deliver the Services in part or solely due to any act or omission by the Customer, then Phoenix Plant Services may charge the Price and refuse to deliver the Services.
- 4.2 The Customer must inspect the Services on completion and notify Phoenix Plant Services within two (2) business days, in writing, of any evident defect, shortage or failure to comply with the description or quote or relevant order. On request, the Customer must allow Phoenix Plant Services to inspect the Services and re-deliver/repair the Services.

#### **5. Price and Payment**

- 5.1 The Customer must pay the Price and the Additional Charges to Phoenix Plant Services by the due date in the Invoice rendered to the Customer, and if no date is provided then upon delivery of the Services. Phoenix Plant Services reserves the right to require the Customer to pay a deposit or the whole of the Price as a condition of acceptance of the Customer's order.
- 5.2 If the Customer is in default of this Agreement and/or fails to pay any amount payable under the Agreement by the due date for payment, Phoenix Plant Services may, without prejudice to its other rights under this Agreement or at law:
- 5.2.1 withhold any further deliveries of Services under the Agreement with the Customer, and/or
  - 5.2.2 cancel the Agreement it may have with the Customer for the delivery of Services; and/or
  - 5.2.3 charge interest at 8% above the Reserve Bank of Australia's target cash rate at the time of delivery of the Services; and/or
  - 5.2.4 charge an administrative fee for following up on any outstanding payments; and/or
  - 5.2.5 charge to the Customer any and all costs incurred by Phoenix Plant Services arising from or in connection with the recovery of the outstanding amounts.
- 5.3 All amounts payable by the Customer under the Agreement must be paid without deduction, set-off or counterclaim of any kind.
- 5.4 Phoenix Plant Services reserves the right to vary the Price, if:
- 5.4.1 the Customer requests, a variation of the Services which Phoenix Plant Services accepts; or
  - 5.4.2 additional work or Services are required because of any difficulties identified on commencement of the Services which were not made known to Phoenix Plant Services by the Customer before commencing delivery of the Services (including but not limited to, further faults which are found on disassembly and/or further inspection);
  - 5.4.3 there is an increase in the cost of labour and/or parts necessary for delivery of the Services which is beyond Phoenix Plant Services' control.
- 5.5 If Phoenix Plant Services is required to store the Customer's Serviced Property or where the Services or the Customer's Serviced Property are not collected within 1 business day of Phoenix Plant Services notifying the Customer that they are ready for collection, then Phoenix Plant Services (at its sole discretion) may charge a daily storage fee.

- 5.6 For roadside or onsite assistance, a minimum call-out fee shall be applicable, which shall be increased for any after-hours call-outs, irrespective of whether or not the repair goes ahead.
- 5.7 All tow and/or salvage fees incurred by Phoenix Plant Services will be charged to the Customer as part of the Additional Charges.
- 5.8 If Phoenix Plant Services has been requested by the Customer to diagnose a fault that requires disassembly and/or testing, all associated costs in that regard will be charged to the Customer irrespective of whether or not the repair goes ahead.
- 5.9 If Phoenix Plant Services is required to deliver the Services at the Customer's nominated address, then the Customer shall be liable for and pay all costs incurred by Phoenix Plant Services from the time it departs from, and until it returns to, Phoenix Plant Services' premises (including but not limited to, mileage and time calculated at Phoenix Plant Services' rates, from time to time, and any Services purchased as part of the Services).

## **6. Retention of Title and Lien**

- 6.1 Phoenix Plant Services retains ownership, title and property in any parts supplied by Phoenix Plant Services and in the proceeds of sale of those parts until Phoenix Plant Services receives payment, in full, for the Services and all sums due and owing by the Customer to Phoenix Plant Services on any account.
- 6.2 Phoenix Plant Services exercises a lien over any Serviced Property upon which the Services are performed until such a time as all outstanding amounts payable by the Customer are paid, and such rights are as per and in addition to clause 10.
- 6.3 The Customer is deemed to be in default immediately upon the happening of any of the following events (without limiting other events which may result in default):
  - 6.3.1 any payment to Phoenix Plant Services is not made promptly on or before the due date for payment; or
  - 6.3.2 the Customer ceases to carry on business, or stops or suspends payment to Phoenix Plant Services, or states its intention of so doing or is unable to pay its debts as they fall due, or if any cheque or bill of exchange drawn by the Customer payable to Phoenix Plant Services is dishonoured.
- 6.4 If the Customer is in default, then without prejudice to any other rights which Phoenix Plant Services may have at law or under this Agreement, Phoenix Plant Services and/or its agents may without notice to the Customer enter the Customer's premises or any premises under the control of the Customer for purposes of recovering parts supplied by Phoenix Plant Services, and using them as it sees fit; and/or exercising its lien.
- 6.5 If the Customer uses the Serviced Property in some manufacturing or construction process of its own or that of some third party, or sells them, then the Customer must hold a part of the proceeds of such manufacturing or construction or sale process in trust for Phoenix Plant Services. Such part must be no less than the amount owing by the Customer to Phoenix Plant Services at the time of the receipt of such proceeds by the Customer. The Customer will pay Phoenix Plant Services such funds held in trust on the demand of Phoenix Plant Services.
- 6.6 Separately, the Customer hereby charges all its right, title and interest to and in the proceeds of sale of the Collateral (as defined in the PPSA) as original collateral, or any of it, in favour of Phoenix Plant Services.

## **7. PPSA**

- 7.1 Defined terms in this clause have the same meaning as given to them in the PPSA.
- 7.2 Phoenix Plant Services and the Customer acknowledge that these Terms constitute a Security Agreement and entitle Phoenix Plant Services to claim:
  - 7.2.1 a Purchase Money Security Interest ("**PMSI**") in favour of Phoenix Plant Services over the Collateral supplied or to be supplied to the Customer as Grantor pursuant to these Terms; and
  - 7.2.2 a security interest over the proceeds of sale of the Collateral referred to in (7.2.1) as original collateral.
- 7.3 The parts supplied or to be supplied under the Agreement, and/or the Serviced Property fall within the PPSA classification of "Other Goods" acquired by the Customer pursuant to the Agreement.
- 7.4 The Proceeds of sale of the Collateral referred to in clause 7.2.1 falls within the PPSA classification of

“Account”.

- 7.5 Phoenix Plant Services and the Customer acknowledge and agree that Phoenix Plant Services, as Secured Party, is entitled to register its Security Interest in the Collateral supplied or to be supplied to Customer pursuant to the Agreement and in the relevant Proceeds.
- 7.6 To the extent permissible at law, the Customer:
- 7.6.1 waives its right to receive notification of or a copy of any Verification Statement confirming registration of a Financing Statement or a Financing Change Statement relating to a Security Interest granted by the Customer to Phoenix Plant Services.
  - 7.6.2 agrees to indemnify Phoenix Plant Services on demand for all costs and expenses, including legal costs and expenses on a solicitor / Customer basis, associated with the:
    - i. registration or amendment or discharge of any Financing Statement registered by or on behalf of Phoenix Plant Services; and
    - ii. enforcement or attempted enforcement of any Security Interest granted to Phoenix Plant Services by the Customer;
  - 7.6.3 agrees that sections 130 and 143 of the PPSA will not apply to the Agreement or the Security under the Agreement;
  - 7.6.4 agrees to waive its right to do any of the following under the PPSA:
    - i. receive notice of removal of an Accession under section 95;
    - ii. receive notice of an intention to seize Collateral under section 123;
    - iii. object to the purchase of the Collateral by the Secured Party under section 129;
    - iv. receive notice of disposal of Collateral under section 130;
    - v. receive a Statement of Account if there is no disposal under section 132(4);
    - vi. receive a Statement of Account under section 132(3)(d) following a disposal showing the amounts paid to other Secured Parties and whether Security Interests held by other Secured Parties have been discharged.
    - vii. receive notice of retention of Collateral under section 135;
    - viii. redeem the Collateral under section 142; and
    - ix. reinstate the Security Agreement under section 143.
- 7.7 All payments received from the Customer must be applied in accordance with section 14(6) (c) of the PPSA.

## **8. Risk**

- 8.1 If Phoenix Plant Services retains ownership of the parts under clause 6 then, where Phoenix Plant Services is supplying parts only, all risk for the parts shall immediately pass to the Customer on delivery and the Customer must insure the parts on or before delivery. Delivery of the parts shall be deemed to have taken place immediately at the time that the Customer or the Customer's nominated carrier takes possession of the parts at Phoenix Plant Services' premises. If the Customer requests Phoenix Plant Services to leave the parts outside Phoenix Plant Services' premises for collection, then such parts shall be left at the Customer's sole risk.
- 8.2 The Customer acknowledges that Phoenix Plant Services is only responsible for the Services supplied by Phoenix Plant Services. If any other component in the repaired Serviced Property fails, Phoenix Plant Services shall not be liable for any loss or damage to the Serviced Property or to the Services that is caused, directly or indirectly, by the failed component.
- 8.3 Irrespective of whether the Customer orders Phoenix Plant Services to fully repair the Serviced Property and any other assertion to the contrary, Phoenix Plant Services do not warrant that their Services will result in the Serviced Property being in fully functioning condition. In the event that Phoenix Plant Services have made their best efforts to repair the Serviced Property, the Price and any applicable Additional Charges are still due and payable.
- 8.4 Phoenix Plant Services shall not be liable for any loss of or damage to the Serviced Property, its accessories or contents while it is being serviced, driven or operated as part of or in connection with the Services (including, in the event of a call-out: it shall be the Customer's responsibility to remain with the Serviced Property to ensure its security), unless caused by the willful negligence of Phoenix Plant Services or its

employees.

- 8.5 It is the Customer's responsibility to ensure that the Serviced Property is insured against all possible damage (including, but not limited to, the perils of accident, fire, theft and burglary and all other usual risks) at all times whilst stored at Phoenix Plant Services' premises. The Customer acknowledges and agrees that the Serviced Property is at all times stored and repaired at the Customer's sole risk.
- 8.6 The Customer indemnifies and is responsible for any and all damage or loss to property or personnel of Phoenix Plant Services whilst they are on the Customer's site, unless caused by the willful negligence of Phoenix Plant Services or its employees.

## **9. Cancellation**

Phoenix Plant Services may cancel the Agreement at any time prior to providing the Services to the Customer. Phoenix Plant Services shall not be liable for any loss or damages whatsoever arising from such cancellation.

## **10. Unpaid Seller's Lien**

- 10.1 If the Customer has left any item/s (including any Serviced Property) with Phoenix Plant Services for repair, modification, exchange or for Phoenix Plant Services to perform any other service in relation to the item/s and Phoenix Plant Services has not received all moneys owing to it by the Customer under the Agreement, then until all such moneys are paid to it in full, Phoenix Plant Services shall have:
  - 10.1.1 a lien over those item/s; and
  - 10.1.2 the right to retain, sell or dispose of those item/s, provided that such sale or disposal is undertaken in accordance with any applicable legislation.
- 10.2 The lien of Phoenix Plant Services shall continue despite the commencement of any proceedings or judgment for any moneys owing to Phoenix Plant Services having been obtained against the Customer.

## **11. Trustee Capacity**

If the Customer is the trustee of a trust (whether disclosed to Phoenix Plant Services or not), the Customer warrants to Phoenix Plant Services that:

- 11.1.1 the Customer enters into this Agreement in both its capacity as trustee and in its personal capacity;
- 11.1.2 the Customer has the right to be indemnified out of trust assets;
- 11.1.3 the Customer has the power under the trust deed to enter into this Agreement; and
- 11.1.4 the Customer will not retire as trustee of the trust or appoint any new or additional trustee without first advising Phoenix Plant Services in writing.

## **12. Indemnity**

To the full extent permitted by law, the Customer will indemnify Phoenix Plant Services and keep Phoenix Plant Services indemnified from and against any liability, losses and/or damages which Phoenix Plant Services may sustain arising directly or indirectly from or in connection with any breach of any of the Agreement by the Customer and/or its representatives.

## **13. General**

- 13.1 The Agreement, including these Terms is to be construed in accordance with the laws of the State of New South Wales and the Commonwealth of Australia. The parties submit to the non-exclusive jurisdiction of the Courts of New South Wales, Australia and any courts which may hear appeals from those courts in respect to any proceedings in connection with the Agreement.
- 13.2 These Terms read with the relevant order contain all of the terms and conditions of the Agreement between the parties with regard to the Services and may only be varied by agreement in writing between the parties.
- 13.3 Any terms or conditions found to be void, unenforceable or illegal may, to that extent, be severed from the Agreement.
- 13.4 No waiver or failure to exercise a right or remedy by Phoenix Plant Services will be considered to imply or constitute a further waiver by Phoenix Plant Services of the same or any other term, condition, right or remedy.
- 13.5 Phoenix Plant Services may, at its sole discretion, licence, sub-contract or assign all or any part of its rights and/or obligations under the Agreement without first being required to obtain the Customer's consent.
- 13.6 The Customer may not transfer any rights and/or obligations under the Agreement without Phoenix Plant

Services' prior written consent.

- 13.7 The Customer acknowledges and agrees that Phoenix Plant Services may:
- 13.7.1 retain any components replaced during the provision of the Services; and
  - 13.7.2 retain all proceeds obtained from the sale of such components; and
  - 13.7.3 take photos of any Services (including photos of the Serviced Property) and use them in promotional and/or other material used by Phoenix Plant Services.