

## **1 Definitions**

- 1.1 "Company" shall mean Melbourne Tippers (VIC) Pty Ltd T/A Melbourne Tippers & Plant Hire, its successors and assigns or any person acting on behalf of and with the authority of Melbourne Tippers (VIC) Pty Ltd T/A Melbourne Tippers & Plant Hire.
- 1.2 "Customer" shall mean the Customer or any person acting on behalf of and with the authority of the Customer.
- 1.3 "Guarantor" means that person (or persons), or entity who agrees herein to be liable for the debts of the Customer on a principal debtor basis.
- 1.4 "Equipment" shall mean Equipment supplied on hire by the Company to the Customer (and where the context so permits shall include any supply of services) and is as described on the invoices, quotation, authority to hire, or any other work authorisation forms as provided by the Company to the Customer.
- 1.5 "Minimum Hire Period" shall mean the Minimum Hire Period as described on the invoices, quotation, authority to hire, or any other forms as provided by the Company to the Customer.
- 1.6 "Price" shall mean the cost of the hire of the Equipment as agreed between the Company and the Customer subject to clause 4 of this contract.

## **2 The Commonwealth Trade Practices Act 1974 ("TPA") and Fair Trading Acts ("FTA")**

- 2.1 Nothing in this agreement is intended to have the effect of contracting out of any applicable provisions of the TPA or the FTA in each of the States and Territories of Australia, except to the extent permitted by those Acts where applicable.

## **3 Acceptance**

- 3.1 Any instructions received by the Company from the Customer for the hire of Equipment and/or the Customer's acceptance of Equipment supplied on hire by the Company shall constitute acceptance of the terms and conditions contained herein.
- 3.2 Where more than one Customer has entered into this agreement, the Customers shall be jointly and severally liable for all payments of the Price.
- 3.3 Upon acceptance of these terms and conditions by the Customer the terms and conditions are irrevocable and can only be amended with the written consent of the Company.
- 3.4 The Customer shall give the Company not less than fourteen (14) days prior written notice of any proposed change of ownership of the Customer or any change in the Customer's name and/or any other change in the Customer's details (including but not limited to, changes in the Customer's address, facsimile number, or business practice). The Customer shall be liable for any loss incurred by the Company as a result of the Customer's failure to comply with this clause.

## **4 Price And Payment**

- 4.1 At the Company's sole discretion the Price shall be either;
  - (a) as indicated on invoices provided by the Company to the Customer in respect of Equipment supplied on hire; or
  - (b) the Company's quoted Price (subject to clause 4.2) which shall be binding upon the Company provided that the Customer shall accept in writing the Company's quotation within thirty (30) days.
- 4.2 The Company reserves the right to change the Price in the event of a variation to the Company's quotation.
- 4.3 At the Company's sole discretion payment for approved Customers shall be thirty (30) days following the end of the month in which the invoice is dated.
- 4.4 Time for payment for the Equipment shall be of the essence and will be stated on the invoice or any other forms. If no time is stated then payment shall be due seven (7) days following the date of the invoice.
- 4.5 The date upon which the Customer advises of termination shall in all cases be treated as a full day's hire.
- 4.6 Payment will be made by cash, or by cheque, or by bank cheque, or by credit card – excluding Diners and Amex (plus a surcharge of up to two and a half percent (2.5%) of the Price), or by direct credit, or by any other method as agreed to between the Customer and the Company.
- 4.7 GST and other taxes and duties that may be applicable shall be added to the Price except when they are expressly included in the Price.

## **5 Hire Period**

- 5.1 Hire charges shall commence from the time the Equipment arrives at the Customer's nominated address and continue until the Customer notifies the Company that the Equipment is available for collection, and/or until the expiry of the Minimum Hire Period, whichever last occurs.

## **6 Delivery Of Equipment**

- 6.1 At the Company's sole discretion delivery of the Equipment shall take place when the Customer takes possession of the Equipment at the Customer's nominated address (in the event that the Equipment is delivered by the Company or the Company's nominated carrier).
- 6.2 At the Company's sole discretion the costs of Delivery are included in the Price.
- 6.3 Delivery of the Equipment to a third party nominated by the Customer is deemed to be delivery to the Customer for the purposes of this agreement.
- 6.4 The Customer shall be responsible for free access by the Company to the site on which the Equipment is located. If there are any delays due to free access not being available then the Customer shall be responsible and shall reimburse the Company for all lost hire fees associated with the Equipment being unavailable. The Customer shall also be responsible for all other expenses and costs incurred by the Company due to delays in access to the Equipment. The off-hire receipt will be issued when the Equipment is picked up by the Company or returned to the Company's premises.
- 6.5 The failure of the Company to deliver shall not entitle either party to treat this contract as repudiated.

6.6 The Company shall not be liable for any loss or damage whatever due to failure by the Company to deliver the Equipment (or any of it) promptly, or at all, where due to circumstances beyond the control of the Company.

## **7 Risk**

7.1 The Company retains property in the Equipment nonetheless all risk for the Equipment passes to the Customer on delivery.

7.2 The Customer accepts full responsibility for the safekeeping of the Equipment and indemnifies the Company for all loss, theft, or damage to the Equipment howsoever caused and without limiting the generality of the foregoing whether or not such loss, theft, or damage is attributable to any negligence, failure, or omission of the Customer.

7.3 The Customer will insure, or self insure, the Company's interest in the Equipment against physical loss or damage including, but not limited to, the perils of accident, fire, theft and burglary and all other usual risks and will effect adequate Public Liability Insurance covering any loss, damage or injury to property arising out of the Equipment. Further the Customer will not use the Equipment nor permit it to be used in such a manner as would permit an insurer to decline any claim.

7.4 The Customer accepts full responsibility for and shall keep the Company indemnified against all liability in respect of all actions, proceedings, claims, damages, costs and expenses in respect of any injury to persons or damage to property arising out of the use of the Equipment during the hire period however arising and whether or not arising from any negligence, failure or omission of the Customer or any other persons.

## **8 Title**

8.1 The Equipment is and will at all times remain the absolute property of the Company.

8.2 If the Customer fails to return the Equipment to the Company then the Company or the Company's agent may enter upon and into land and premises owned, occupied or used by the Customer, or any premises where the Equipment is situated as the invitee of the Customer and take possession of the Equipment, without being responsible for any damage thereby caused.

8.3 The Customer is not authorised to pledge the Company's credit for repairs to the Equipment or to create a lien over the Equipment in respect of any repairs.

## **9 Defects**

9.1 The Customer shall inspect the Equipment on delivery and shall within forty eight (48) hours notify the Company of any alleged defect, shortage in quantity, damage or failure to comply with the description or quote. The Customer shall afford the Company an opportunity to inspect the Equipment within a reasonable time following delivery if the Customer believes the Equipment is defective in any way. If the Customer shall fail to comply with these provisions the Equipment shall be presumed to be free from any defect or damage. For defective Equipment, which the Company has agreed in writing that the Customer is entitled to reject, the Company's liability is limited to either repairing or replacing the Equipment, except where the Customer has hired Equipment as a consumer within the meaning of the Trade Practices Act 1974 (Cwth) or the Fair Trading Acts of the relevant state or territories of Australia, and is therefore also entitled to, at the consumer's discretion either a refund of the hire price of the Equipment, or repair of the Equipment, or replacement of the Equipment.

## **10 Warranty**

10.1 No Warranty is provided by the Company in respect of the condition of the Equipment or its fitness for any particular purpose. The Customer shall indemnify and hold harmless the Company in respect of all claims arising out of use of the Equipment.

## **11 Customer's Responsibilities**

11.1 The Customer shall:

(a) notify the Company immediately by telephone of the full circumstances of any mechanical breakdown or accident. The Customer is not absolved from the requirements to safeguard the Equipment by giving such notification;

(b) satisfy itself at commencement that the Equipment is suitable for its purposes;

(c) operate the Equipment safely, strictly in accordance with the law, only for its intended use, and in accordance with any manufacturer's instruction whether supplied by the Company or posted on the Equipment;

(d) ensure that all persons operating or erecting the Equipment are suitably instructed in its safe and proper use and where necessary hold a current Certificate of Competency and/or are fully licensed to operate the Equipment and shall provide evidence of the same to the Company upon request;

(e) comply with all occupational health and safety laws relating to the Equipment and its operation;

(f) on termination of the hire, the Customer shall deliver the Equipment complete with all parts and accessories clean and in good order as delivered, fair wear and tear accepted, to the Company;

(g) not alter or make any additions to the Equipment including but without limitation altering, make any additions to, defacing or erasing any identifying mark, plate or number on or in the Equipment or in any other manner interfere with the Equipment.

11.2 Immediately on request by the Company the Customer will pay:

(a) all costs of repairing any damage caused by the ordinary use of the Equipment up to an amount equal to 10% of the new list price of the Equipment;

(b) the cost of repairing any damage to the Equipment caused by the negligence of the Customer or the Customer's agent;

(c) the cost of repairing any damage to the Equipment caused by vandalism, or (in the Company's reasonable opinion) in any way whatsoever other than by the ordinary use of the Equipment by the Customer.

## **12 Cancellation**

- 12.1 In the event that the Customer cancels delivery of the Equipment the Customer shall be liable for any loss incurred by the Company (including, but not limited to, any loss of profits) up to the time of cancellation.

## **13 Default & Consequences Of Default**

- 13.1 Interest on overdue invoices shall accrue daily from the date when payment becomes due, until the date of payment, at a rate of two and one half percent (2.5%) per calendar month (and at the Customer's sole discretion such interest shall compound monthly at such a rate) after as well as before any judgment.
- 13.2 In the event that the Customer's payment is dishonoured for any reason the Customer shall be liable for any dishonour fees incurred by the Company.
- 13.3 If the Customer defaults in payment of any invoice when due, the Customer shall indemnify the Company from and against all costs and disbursements incurred by the Company in pursuing the debt including legal costs on a solicitor and own client basis and the Company's collection agency costs.
- 13.4 Without prejudice to any other remedies the Company may have, if at any time the Customer is in breach of any obligation (including those relating to payment) the Company may repossess the Equipment as per clause 8.2, or suspend or terminate the supply of Equipment to the Customer and any of its other obligations under the terms and conditions. The Company will not be liable to the Customer for any loss or damage the Customer suffers because the Company has exercised its rights under this clause.
- 13.5 If any account remains overdue after thirty (30) days then an amount of the greater of \$20.00 or 10.00% of the amount overdue (up to a maximum of \$200) shall be levied for administration fees which sum shall become immediately due and payable.
- 13.6 Without prejudice to the Company's other remedies at law the Company shall be entitled to cancel all or any part of any order of the Customer which remains unperformed in addition to and without prejudice to any other remedies the Company may have and all amounts owing to the Company shall, whether or not due for payment, become immediately payable in the event that:
- any money payable to the Company becomes overdue, or in the Company's opinion the Customer will be unable to meet its payments as they fall due; or
  - the Customer 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
  - a receiver, manager, liquidator (provisional or otherwise) or similar person is appointed in respect of the Customer or any asset of the Customer.

## **14 Security And Charge**

- 14.1 Despite anything to the contrary contained herein or any other rights which the Company may have howsoever:
- where the Customer and/or the Guarantor (if any) is the owner of land, realty or any other asset capable of being charged, both the Customer and/or the Guarantor agree to mortgage and/or charge all of their joint and/or several interest in the said land, realty or any other asset to the Company or the Company's nominee to secure all amounts and other monetary obligations payable under the terms and conditions. The Customer and/or the Guarantor acknowledge and agree that the Company (or the Company's nominee) shall be entitled to lodge where appropriate a caveat, which caveat shall be released once all payments and other monetary obligations payable hereunder have been met.
  - should the Company elect to proceed in any manner in accordance with this clause and/or its sub-clauses, the Customer and/or Guarantor shall indemnify the Company from and against all the Company's costs and disbursements including legal costs on a solicitor and own client basis.
  - the Customer and/or the Guarantor (if any) agree to irrevocably nominate constitute and appoint the Company or the Company's nominee as the Customer's and/or Guarantor's true and lawful attorney to perform all necessary acts to give effect to the provisions of this clause 14.1.

## **15 Privacy Act 1988**

- 15.1 The Customer and/or the Guarantor/s agree for the Company to obtain from a credit reporting agency a credit report containing personal credit information about the Customer and Guarantor/s in relation to credit provided by the Company.
- 15.2 The Customer and/or the Guarantor/s agree that the Company may exchange information about the Customer and the Guarantor/s with those credit providers either named as trade referees by the Customer or named in a consumer credit report issued by a credit reporting agency for the following purposes:
- to assess an application by the Customer; and/or
  - to notify other credit providers of a default by the Customer; and/or
  - to exchange information with other credit providers as to the status of this credit account, where the Customer is in default with other credit providers; and/or
  - to assess the credit worthiness of the Customer and/or Guarantor/s.
- 15.3 The Customer consents to the Company being given a consumer credit report to collect overdue payment on commercial credit (Section 18K (1) (h) Privacy Act 1988).
- 15.4 The Customer agrees that personal credit information provided may be used and retained by the Company for the following purposes and for other purposes as shall be agreed between the Customer and Company or required by law from time to time:
- the provision of Equipment on hire; and/or
  - marketing of services by the Company, its agents or distributors in relation to the Equipment; and/or
  - analysing, verifying and/or checking the Customer's credit, payment and/or status in relation to provision of Equipment on hire; and/or

- (d) processing of any payment instructions, direct debit facilities and/or credit facilities requested by Customer; and/or
  - (e) enabling the daily operation of Customer's account and/or the collection of amounts outstanding in the Customer's account in relation to the hire of the Equipment.
- 15.5 The Company may give information about the Customer to a credit reporting agency for the following purposes:
- (a) to obtain a consumer credit report about the Customer; and/or
  - (b) allow the credit reporting agency to create or maintain a credit information file containing information about the Customer.
- 16 Building and Construction Industry Security of Payment Act 2002**
- 16.1 At the Company's sole discretion, if there are any disputes or claims for unpaid Equipment then the provisions of the Building and Construction Industry Security of Payment Act 2002 may apply.
- 16.2 Nothing in this agreement is intended to have the affect of contracting out of any applicable provisions of the Building and Construction Industry Security of Payment Act 2002 of Victoria, except to the extent permitted by the Act where applicable.
- 17 General**
- 17.1 If any provision of these terms and conditions shall be invalid, void, illegal or unenforceable the validity, existence, legality and enforceability of the remaining provisions shall not be affected, prejudiced or impaired.
- 17.2 These terms and conditions and any contract to which they apply shall be governed by the laws of Victoria and are subject to the jurisdiction of the courts of Victoria.
- 17.3 The Company shall be under no liability whatever to the Customer for any indirect loss and/or consequential loss and/or expense (including loss of profit) suffered by the Customer arising out of a breach by the Company of these terms and conditions.
- 17.4 In the event of any breach of this contract by the Company the remedies of the Customer shall be limited to damages. Under no circumstances shall the liability of the Company exceed the Price.
- 17.5 The Customer shall not be entitled to set off against or deduct from the Price any sums owed or claimed to be owed to the Customer by the Company.
- 17.6 The Company may license or sub-contract all or any part of its rights and obligations without the Customer's consent.
- 17.7 The Company reserves the right to review these terms and conditions at any time. If, following any such review, there is to be any change to these terms and conditions, then that change will take effect from the date on which the Company notifies the Customer of such change.
- 17.8 Neither party shall be liable for any default due to any act of God, war, terrorism, strike, lock-out, industrial action, fire, flood, storm or other event beyond the reasonable control of either party.
- 17.9 The failure by the Customer to enforce any provision of these terms and conditions shall not be treated as a waiver of that provision, nor shall it affect the Customer's right to subsequently enforce that provision.