

# Standard Conditions of Contract for Sale and Repair of Goods

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1. Definitions	
In these conditions:	
<b>Contract</b>	means the contract between the seller and the purchaser comprising these Standard Conditions and, where applicable, the quotation, the Order, an invoice, delivery docket and or any other document setting out the payment terms for the Goods and Spare Parts including a Retention of Title Agreement;
<b>Goods</b>	means the goods and/ or equipment supplied by the seller to the purchaser including but not limited to mining, construction, compaction, screening and forestry equipment and attachments and accessories related thereto;
<b>Manufacturer</b>	means the maker and makers of the goods (or any part of the goods) to which this Contract relates.
<b>Non-recoverable costs</b>	means the costs not recovered by the Seller upon the subsequent sale of the Goods and include but not limited to Purchaser specific components, attachments and options, assembly costs, storage costs, handling costs, transport costs, shipping and demurrage costs and holding costs including interest.
<b>Order</b>	means the order for the supply of Goods and/or Spare Parts;
<b>PPSA</b>	is the <i>Personal Property Securities Act 2009 (Cth)</i> and 'Register,' 'Purchase Money Security Interest,' 'Security Agreement,' 'Security Interest,' 'Verification Statement' and 'Financing Statement' will have the meanings for those terms as defined in the PPSA.
<b>Price</b>	Means the Order Price or the Quoted Price;
<b>Purchaser</b>	means the party purchasing the goods, or having the goods repaired as set out in the Order or the Quotation;
<b>Quotation</b>	means a quotation given by the Seller to the Purchaser in relation to the Goods and the Repairs;
<b>Repairs</b>	means the repairs or servicing of the Goods/or Spare Parts carried out by the Seller
<b>Seller</b>	means Hitachi Construction Machinery (Australia) Pty Ltd ABN 000 080 179
<b>Spare Parts</b>	means the spare parts supplied by the Seller to the Purchaser;

## 2. The Contract

This Contract becomes legally binding when either the Purchaser has provided to the Seller an executed Order and the seller has provided to the Purchaser written acceptance of the Order, or the Seller and Purchaser enter into a written agreement for the supply of the Goods and Spare Parts. Until the Seller has notified the Purchaser in writing of its acceptance of the Order or the parties enter into a written agreement for supply of the Goods and Spare Parts, the Seller may, without incurring any liability, revise or withdraw any Quotation provided to the Purchaser.

## 3. Online Sales of Spare Parts

The Purchaser can buy Spare Parts online by visiting the Seller's Website.

- a. These terms and conditions apply to purchase of Spare Parts through the Seller's Website.
- b. Notwithstanding clause 2, if the Purchaser buys Spare Parts online through the Seller's Website, the terms of this Contract become legally binding on the Purchaser when the Purchaser submits an Order for Spare Parts through the Seller's Website.

## 4. Specifications

If before the manufacture of the Goods (whether before or after the Seller's acceptance) the manufacturer modifies its specifications the modified specifications shall be substituted for any specification in the Quotation and;

- a. The Purchaser shall accept the Goods as manufactured in accordance with the modified specification in satisfaction of the Seller's obligations under the Contracts;

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- b. The Purchaser shall pay any increase in the manufacture's Prices resulting from such modifications.

## 5. Price and Payment

- a. Unless otherwise stated in writing the price:
- for the Goods as set out in the Quotation (**Quotation price**) is for delivery at the place specified in the Quotation and is payable without discount or allowance;
  - for the Spare Parts as set out in the Order (**Order price**) is for delivery at the place specified in the Order and is payable without discount or allowance;
  - for the repair of Goods and/or Spare Parts as set out in the Quotation (**Quotation price**)
- b. The Purchaser must pay to the Seller in addition to the Price:
- All taxes, duties and charges whatsoever imposed by any government or other authority and payable in respect or by reason of the sale, repair or delivery of the Goods or Spare Part thereof, including charges for import, export or currency licences, sales, packaging costs, turnover or purchase taxes and duties of customers and excise; and
  - if requested by the Seller acting reasonably, the amount of any increase in the cost to the Seller of supplying, repairing or deliver the Goods and Spare Parts or any part of the Goods occurring after the date of the Order for any reason whatsoever including changes in manufacturers' prices, rates of exchange, landing charges and port dues and the cost of carriage, insurance and handling.
- c. The Purchaser must pay the Price to the Seller:
- In the case of a sale of Goods, on or prior to the delivery of the Goods; and
  - in the case of a sale of Spare Parts and a repair of Goods, within 30 days from the end of the month in which the Invoice is dated, and the Purchaser will not be entitled to withhold payment or make any deduction from the Price in respect of any set-off, counter-claim or dispute.
- d. If the Purchaser fails to pay the Price the Seller will be entitled to charge interest on the Price from the date when due until payment at the rate of two per centum per annum above the maximum overdraft rate of the Seller's bankers for the time being in force.
- e. The Seller may accept payment via credit card. The Purchaser must advise the Seller in advance of the intended credit card usage to confirm if the Seller has the facility to accept credit card payment. Credit Cards accepted include Visa and MasterCard only. A fee of 1.25% of the total value, including GST, will be charged.

## 6. Delivery

- a. Unless otherwise stated in writing the Purchaser must take delivery of the Goods and Spare Parts within 7 days of notification from the Seller that the Goods and Spare Parts are ready for delivery. The Seller will be under no obligation to make delivery before payment of the Price in full.
- b. If the Purchaser does not take delivery of the Goods and Spare Parts in accordance with clause 6(a), the Purchaser must provide to the Seller a revised delivery date for the Seller to review.
- c. If the Seller accepts the revised delivery date in writing, the Purchaser is required to pay the Price (and any additional charges as per clause 5(b)) to the Seller in full and take delivery of the Goods and Spare Parts on or prior to the revised delivery date.
- d. If:
- the Seller does not accept the revised delivery date and an alternative revised delivery date cannot be mutually agreed upon between the parties within 10 business days; or
  - the Purchaser fails to comply with clause 6(c),
- the Seller may, at its sole discretion, cancel the Order or reallocate the Order to a later delivery of the Goods and Spare Parts, where after clause 11 will apply.

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## 6. Delivery

- e. The Seller will be under no liability whatsoever to the Purchaser for loss, injury or damage of any kind (including consequential loss of any kind) arising out of delay in or failure to make delivery of the Goods or Spare Parts by reason of any cause whatsoever, including any act, omission, negligence or wilful default of the Seller or its servants or agents, or any breach by the Seller, its servants or agents of this Contract.
- f. Where this Contract concerns the sale of Spare Parts the Purchaser may within 28 days following delivery at its own cost return such Spare Parts to the Seller provided the Seller consents in writing to such return (and the Seller will have no obligation to give such consent) and the Purchaser must pay to the Seller:
  - i. where the Spare Parts are returned to the Seller within 14 days of the date of delivery, an amount equal to 10% of the invoice amount; and
  - ii. where the Spare Parts are returned to the Seller between 14 and 28 days of the date of delivery, an amount equal to 15% of the invoice amount.

## 7. Risk

- a. The risk of loss or damage to the Goods and Spare Parts passed to the Purchaser's from the occurrence of first in time of any of the following events:
  - i. the passing of property and title in the Goods and Spare Parts to the Purchaser in accordance with clause 10(a);
  - ii. the physical delivery of Goods and Spare Parts to the Purchaser; and
  - iii. the physical delivery of the Goods and Spare Parts to a carrier or other bailee whether named by the Purchaser or not.
- b. If the Purchaser fails to pay the Price and any other amounts payable under this Contract the Seller will be entitled to give the Purchaser 7 days prior written notice that the Seller intends to retake possession of the Goods and Spare Parts and sell or resell the Goods and Spare Parts. If the Purchaser fails within that period to pay the Price and any other amounts payable under this Contract the Seller will be entitled to retake possession of the Goods and Spare Parts (and for that purpose the Purchaser grants an irrevocable licence to the Seller to enter upon any premises where the Goods and Spare Parts may be situate) and to sell or resell the Goods and Spare Parts (and for that purchase, in the case of a repair of Goods and Spare Parts, the Purchase irrevocably appoints the seller as attorney for sale) and apply the proceeds in reduction of any claim which the Seller has against the Purchaser.
- c. The Seller will be under no obligation to give the Purchaser the notice referred to in Section 35(3) of the Sale of Goods Act 1923 (NSW).

## 8. Manufacturer's Warranty

The Seller will use its best endeavours to furnish to the Purchaser as soon as is practicable after acceptance of the Order copies of all express guarantees, warranties and indemnities (if any) given or offered by the manufacturer of the Goods and Spare Parts or any part thereof.

## 9. Liability

- a. To the fullest extent permitted by law, any liability of the Seller to the Purchaser including but not limited to the liability for special, consequential or incidental damages or for breach of any term, condition, warranty, undertaking, inducement, guarantee or representation whether express, implied, statutory or otherwise relating to this Contract or to the Goods and Spare Parts will be limited at the Seller's option, to any one or more of the following:
  - i. the replacement of Goods and Spare Parts or the supply of equivalent Goods and Spare Parts;
  - ii. the repair of the Goods and Spare Parts;
  - iii. the payment of the cost of replacing the Goods and Spare Parts or acquiring equivalent Goods and Spare Parts; or
  - iv. the payment of the cost of having the Goods and Spare Parts repaired.

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## 9. Liability

- b. To the fullest extent permitted by law and subject to clause 9(a), the Seller will under no circumstances be liable to the Purchaser for any loss, damage or expense, sustained or incurred by the Purchaser or any other party, whether direct or indirect, special, consequential, incidental or punitive losses or damages whether in contract, tort (including without limitation negligence), equity, under statute or on any other basis, and whether or not such loss or damage was foreseeable. The term "consequential damages" will include, but not be limited to, economic loss including actual or anticipated profits, business interruption, loss of use, revenue, reputation and/or data, costs incurred, and loss or damage to property or equipment.

## 10. Reservation of Title

- a. Property in and title to the Goods and Spare Parts remains with Seller until the Purchaser has paid Seller the price of the Goods and Spare Parts as shown on the Invoice and any other money that the purchaser may owe to Seller at any time on any account.
- b. The Purchaser may sell or otherwise dispose of the Goods and Spare Parts in the ordinary course of the Purchaser's business
- c. Where the Purchaser disposes of the Goods and Spare Parts before payment to Seller, the sale proceeds of such disposal are the property of Seller and the Purchaser holds the proceeds on trust for Seller.
- d. In addition to clause 10(c), in the event of sale of the Goods and Spare Parts to a customer the Purchaser in his position as a fiduciary must assign to the Seller the benefit of any claim against the customer.
- e. The Seller may enter the Purchaser's premises or elsewhere within business hours and seize any Goods and Spare Parts which have not been paid for by the due date stated on the invoice without the Seller having to give notice to the Purchaser.
- f. While the Goods and Spare Parts remain the property of the Seller, the Purchaser agrees:
  - i. to store the Goods and Spare Parts separately at the Purchaser's premises so they can be easily identified;
  - ii. to only dispose of the Goods and Spare Parts in the ordinary course of the Purchaser's business;
  - iii. to not cause the Goods and Spare Parts to lose their identifiable character or be intermingled with other goods in any way by any process of its own or by a third party, except with Seller's prior written consent;
  - iv. other than disposal of the Goods and Spare Parts in the ordinary course of the Purchaser's business, that it has no right or claim to any interest in the Goods and Spare Parts to secure any liquidated or unliquidated debt or obligation that Seller owes to the Purchaser;
  - v. that it cannot claim any lien over the Goods and Spare Parts;
  - vi. to not create any absolute or defeasible interest in the Goods and Spare Parts in relation to any third party except with the Seller's prior written consent;
  - vii. to provide Seller access to the premises where the Goods and Spare Parts are stored to enable the Seller to inspect and/or seize the goods; and
  - viii. to:
    - A. not allow any person (other than the Seller) to have or acquire any Security Interest in the Goods and Spare Parts;
    - B. insure the Goods and Spare Parts for their full insurable value or replacement value (whichever is higher) with an insurer licensed or authorised to conduct the business of insurance in the place where the Purchaser carries on business; and
    - C. not remove, deface or obliterate any identifying mark or number on any of the Goods and Spare Parts. These terms and conditions will apply to each Order, Invoice and any commercial transaction concerning the supply of any Goods and Spare Parts by the Seller to the Purchaser.

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## 11. Order Cancellation Fee

- a. If:
- i. the Purchaser cancels the Order for the supply of Goods before delivery; or
  - ii. the Seller cancels the Order or reallocates the Order to a later delivery of the Goods or Spare Parts in accordance with clause 6(d),
- the Purchaser must pay the Seller a cancellation fee.
- b. The cancellation fee shall be assessed by the Seller and includes, without limitation:
- i. 15% of the Price of the Goods subject to the cancelled or reallocated Order;
  - ii. the Price for any Goods and Services already supplied;
  - iii. costs associated with the transport and holding of the Goods;
  - iv. demobilisation, handling and freight costs;
  - v. any non-recoverable costs associated with the cancelled or reallocated Order;
  - vi. administration fee and charges; and
  - vii. losses arising from third parties in connection with the Order.
- c. The Purchaser must pay the cancellation fee to the Seller within 14 days of the Seller submitting an invoice with supporting documentation to the Purchaser for that fee

## 12. PPSA

The purchaser:

- a. acknowledges that the Contract constitutes a Security Agreement for the purposes of the PPSA;
- b. grants a Security Interest to the seller in:
  - i. all Goods and Spare Parts supplied under the Contract;
  - ii. all Goods and Spare Parts (and their proceeds) previously supplied by the Seller to the Purchaser (if any and only to the extent that the Purchaser owes the Seller's monies with respect to those goods); and
  - iii. all future Goods and Spare Parts (and their proceeds) supplied by the Seller to the Purchaser;
- d. acknowledges that Seller may register its security interest in the Goods and Spare Parts (and their proceeds) as a Purchase Money Security Interest on the Register;
- e. will execute documents and do such further acts and things and provide such further information as may be required by the seller to enable registration of the Security Interest granted to the seller on the Register or perfect or correct any registration;
- f. acknowledges and agrees that where the PPSA applies with respect to the Goods and Spare Parts and to any action taken by seller in relation to the goods, it:
  - i. agrees sections 116(2), 120, 125, 142 and 143 of the PPSA will not apply; and
  - ii. waives its right to receive any notices under the PPSA (including the notice of a Verification Statement) unless the notice required by the PPSA cannot be excluded; and
- g. agrees to only authorise disclosure of information under section 275(7)(c) or request information under section 275(7)(d) if the Seller approves.

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## 13. General

- a. This Contract will be construed and governed in all respects by the laws of the State of New South Wales and each party submits to the non-exclusive jurisdiction of the courts of New South Wales.
- b. Where the Purchaser has provided the Seller with a nominated email address the Seller may send any notices to the Purchaser by emailing it to that email address.
- c. In the event that any provision of this Contract is held invalid or unenforceable, the remaining provisions of this Contract will remain in full force and effect.
- d. The Seller may, from time to time and without notice to the Purchaser vary these standard conditions of contract for sale and repair of Goods.
- e. The Purchaser shall not assign its rights or obligations under this Contract without prior written consent of the Seller.
- f. No failure or delay by the Seller to exercise any right or remedy provided under this Contract or by law shall constitute a waiver of that or any other right or remedy, nor shall it preclude or restrict the further exercise of that or any other right or remedy. No single or partial exercise of such right or remedy shall preclude or restrict the further exercise of that or any other right or remedy.
- g. This Contract constitutes the entire agreement between the Seller and the Purchaser and supersedes any previous agreement relating to the Goods and Spare Parts.