

## 1. DEFINITIONS AND INTERPRETATION

### 1.1 In these Conditions of Sale:

“we” or “us” or “our” means Pump Technology Services Pty Ltd (ABN 62 009 213 772) trading as KETO Pump Technology Services and having its principal place of business at 55 Alacrity Place, Henderson, Western Australia 6166;

“you” or “your” means the person who is party to the Contract with us;

“Australian Consumer Law” means Schedule 2 of the *Competition and Consumer Act 2010* (Cth);

“Business Day” means, in respect of any notice to be served under or in connection with the Contract, any day (other than a Saturday, Sunday or public holiday) in Perth, Western Australia;

“Contract” means the contract for the supply by us of the Goods and/or Services to you (as varied from time to time), constituted by the parts described in the condition 2;

“Customer Inputs” means any inventions, documents, images, photographs, drawings, specifications, schematics, models, data, test results, computer software, prototypes and materials provided, created or disclosed by you to us in connection with the Contract;

“Intellectual Property Rights” means all intellectual property rights including rights in relation to patents, rights to inventions, copyright and related rights, moral rights, trademarks and service marks, trade names, business names and domain names, rights in get-up and trade dress, goodwill and the right to sue for passing off or unfair competition, rights in designs, rights in computer software, semiconductor or circuit layout rights, database rights, moral rights, rights to use, and protect the confidentiality of, confidential information (including knowhow and trade secrets) and all other intellectual property rights, in each case whether registered or unregistered and including all applications and rights to apply for and be granted, renewals or extensions of, and rights to claim priority from, such rights and all similar or equivalent rights or forms of protection which subsist or will subsist now or in the future in any part of the world;

“Goods” means all goods which may be supplied by us pursuant to the Contract, including those which may be specified on the Order and those which may be supplied in the course of performing Services;

“Goods Warranty” means the warranty granted under condition 13.1;

“GST” means goods and services tax or similar value added tax levied or imposed in Australia under the GST Law or otherwise on a supply;

“GST Law” has the same meaning as in the GST Act;

“GST Act” means the *A New Tax System (Goods and Services Tax) Act 1999* (Cth);

“Other Services” means any installation, inspection, testing and/or commissioning services (if any) which we may perform under the Contract, including those which may be specified on the Order;

“Order” means our written confirmation of your order for the Goods and/or Services, which is usually called “Order Acknowledgment” and refers to these Conditions of Sale;

“Place of Delivery” the place to which the Goods are to be delivered, as specified in the Order or as subsequently agreed by the parties in writing;

“Price” means the price for the Goods and/or Services in question;

“Repair Item” means an item of your plant or equipment on which we are to perform Repair Services;

“Repair Services” means:

(a) any works and services which may be performed by us pursuant to the Contract to repair, replace, maintain, overhaul or calibrate the Repair Item, or individual components of the Repair Item, including by the manufacture or acquisition, and installation, of parts and materials, including those which may be described in the Order and as may further be described in the Contract; and

(b) any other minor works, services, parts, consumables and components as may be necessary for or incidental to the performance of the services referred to in paragraph (a) of this definition;

“Repaired Item” means the Repair Item on which we have completed the Repair Services;

“Services” means (a) the Installation Services and/or (b) the Repair Services as set out in the Order;

“Services Warranty” means the warranty granted under condition 13.2;

“Specification” means, in respect of any Goods and/or Services, any specification for such Goods and/or Services referred to in the Order or otherwise agreed in writing by the parties, and includes any Customer Inputs with which, by the terms of the Contract, we or the Goods and/or the Services are required to comply;

“Warranty” means the Goods Warranty or the Services Warranty, as the context requires; and

“Warranty Period” means the period of 12 months from:

- (a) in the case of Goods, the date of delivery of the Goods or of the Repaired Item into which we may have incorporated them (as applicable);
- (b) in the case of Other Services, the date on which the Other Services are completed; and
- (c) in the case of Repair Services, the date we notify you that the Repair Services have been completed or the Repaired Item is available for collection.

### 1.2 Furthermore:

- (a) a person includes a natural person, corporate or unincorporated body (whether or not having separate legal personality);
- (b) by the “parties”, we mean you and us and a reference to a party includes its personal representatives, successors or permitted assigns;
- (c) the masculine gender shall import the feminine and the singular shall import the plural and, in both cases, vice versa;
- (d) any phrase introduced by the terms including, include, in particular or any similar expression shall be construed as illustrative and shall not limit the sense of the words preceding those terms;
- (e) a reference to writing or written includes faxes and emails;
- (f) a reference to an obligation upon a party having done or omitted to some act or thing shall be deemed to include a reference to an obligation upon a third party doing or omitted to do such act or thing on that party’s behalf; and
- (g) a reference to \$ is to Australian currency unless denominated otherwise.

## 2. BASIS OF CONTRACT

### 2.1 The Contract is constituted by:

- (a) the Order;
- (b) these Conditions of Sale;
- (c) any applicable Specification;
- (d) any other documents referred to in the Order; and
- (e) your acceptance of the Order in accordance with condition 3.3.

2.2 For the purposes of interpretation, the constituent parts of the Contract shall rank in the order above, with the Order being of the highest rank, these Conditions of Sale being of the second highest rank and so on. In the event of any ambiguity or conflict between any term or condition of any of the constituent parts of the Contract, those of the higher ranking part shall prevail over those of the lower ranking part.

2.3 These Conditions of Sale apply to the Contract to the exclusion of any other terms that you may seek, or may already have sought, to impose or incorporate, or which are implied by trade, custom, practice or course of dealing. Any purchase order previously issued by you merely constituted an invitation by you to us to offer to supply the Goods and/or Services. It does not form part of the Contract and no contract shall come into force until we have issued the Order. You are responsible for ensuring that the terms of the Order and any applicable Specification are complete and accurate.

2.4 Any photographs, diagrams, drawings, images and illustrations contained in our catalogues or brochures are produced for the sole purpose of giving an approximate idea of the Goods described in them. They shall not form part of the Contract or have any contractual force.

## 3. EFFECT OF ORDER

3.2 We shall only be bound by an order if it is issued on our standard Order form and signed by one of our duly authorised representatives.

3.3 The Order constitutes an offer by us to sell the Goods and/or Services specified in the Order to you subject to these Conditions of Sale. You are deemed to have accepted the offer by conduct if you proceed with the purchase of the Goods and/or Services specified in the Order. Accordingly, your acceptance of the Order shall establish a contract for the sale and purchase of the Goods and/or Services on these Conditions. Any counter-offer made by you to purchase the Goods and/or Services on other conditions shall only be validly accepted if such acceptance is in writing and signed by one of our duly authorised representatives.

3.4 By signing and returning the acknowledgement copy of the Order form or by any other conduct consistent with your acceptance of the Order under law (including, without limitation, continuing to instruct us in connection with delivery of the Goods or performance of the Services), you will be deemed to have accepted the Order on these Conditions of Sale.

## 4. STATUS OF QUOTATIONS AND PRICES

4.2 Unless otherwise specifically stated, our quotations are merely quotations and do not constitute an offer capable of acceptance. Furthermore, unless otherwise specifically stated, any prices we quote:

- (a) are only effective for the particular transaction contemplated by the relevant quotation and, accordingly, subsequent changes to, among other

- things, the quantity, quality or specification of goods to be supplied, the scope of services to be performed, the identity of the purchaser or the delivery location may alter the price;
- (b) are, subject to our rights to increase the price in certain circumstances (see section entitled "Price" below), only valid for 30 days (inclusive);
- (c) exclude GST and all other taxes, duties and levies that may be applicable to the supply of the goods or services in question;
- (d) exclude the costs of delivery; and
- (e) are, in the case of itemised quotations for the supply of goods, for a single item only (not pairs or batches).
- 4.3 We reserve the right to withdraw our tender submission and quotations, without any liability to you or any other person, any time prior to becoming party to a legally binding contract for the supply of the relevant goods and/or services.
- 4.4 We may elect, in our absolute discretion, to charge a minimum order charge of \$140 (exc. GST) in respect of Orders for Goods of less than \$140 (exc. GST).
- 5. SUPPLY**
- 5.1 In consideration for you paying the price for the Goods and/or Services, we shall supply the Goods to you and/or perform the Services for you in accordance with the Contract.
- 5.2 We reserve the right to amend the Specification for any Goods, if required by any applicable statutory or regulatory requirements. If this happens, we will inform you without undue delay and, in any event, prior to dispatch of such Goods.
- 6. CANCELLATION OF ORDERS**
- 6.1 Once the Contract is in force, your order for the Goods and/or Services cannot be cancelled, in whole or in part, without our express consent. We reserve the right to withhold such consent for any reason.
- 7. DELIVERY**
- 7.1 Unless otherwise stated in the Order, all Goods and Repaired Items shall be delivered to you EXW ("ex-works") in accordance with the INCOTERMS, published by the International Chamber of Commerce 2010 Edition, and you shall be responsible for (at your own expense) collecting the Goods or Repaired Items from our premises within 14 days of us notifying you that they are ready for collection. If you fail to do so, we shall be entitled to charge you for storing the Goods or Repaired Items pending collection, in accordance with our published list of charges then in force. We shall be deemed to have delivered the Goods or Repaired Items upon placing them into your custody or that of your servants.
- 7.2 Where the Order states that we are to deliver to the Goods or the Repaired Items to some other location, we shall deliver them to the Place of Delivery. In the case of international supplies of Goods or Repaired Items the relevant version of the International Commercial Terms published by the International Chamber of Commerce (better known as the "INCOTERMS") specified on the Order shall apply. The price of delivery shall be as stated in the Order or as otherwise agreed between us in writing. You shall be responsible for unloading the Goods from our carrier's vehicle and shall compensate us for any unreasonable delay in doing so after the time our carrier's vehicle arrives at the Place of Delivery.
- 7.3 We reserve the right to withhold any delivery if you become subject to any insolvency proceedings or if we have reasonable grounds to form the opinion that your credit worthiness or credit standing have deteriorated to a material extent.
- 7.4 Although we always strive to ensure deliveries are made on time, any dates or timescales quoted for delivery are to be treated as estimates only and are not binding.
- 8. TITLE, RISK AND PPSA**
- 8.1 You shall not obtain valid title to, or ownership of, any Goods until you have paid for the Goods in full. Until that time, we shall retain title and ownership to the Goods.
- 8.2 In the event that you fail to pay in full for any Goods by the due date for payment, we reserve the right to require you to deliver up the Goods and/or to retake possession of such Goods and you hereby authorise us and our representatives, servants, agents and employees to, (except in case of emergency) having given reasonable notice to you and at reasonable hours, enter upon any premises owned or occupied by you at which such Goods are located or stored for the purpose of retaking possession.
- 8.3 In the event that, prior to paying for the Goods, you sell them to a third party or incorporate them into other goods by means of some manufacturing or construction process, you shall hold in trust for us such part of the proceeds of sale of the Goods (or that part of the goods into which the Goods have become incorporated) as relates to the unpaid price for the Goods.
- 8.4 In the case of Goods or Repaired Items to be delivered ex-works from our premises, risk in the Goods or Repaired Items shall pass to you upon you or your servants taking custody of them. In all other cases, risk in the Goods or the Repaired Items shall pass to you upon delivery at the Place of Delivery.
- 8.5 All scrap and unused material, including any part removed from Repair Items, becomes our property.
- 8.6 Terms used in conditions 8.6 – 8.8 that are defined in the *Personal Property Securities Act 2009* (Cth) ("PPSA") have the same meaning as in the PPSA where the context permits. You acknowledge and agree that in each case we have a purchase money security interest attaching to the Goods to secure the payment of the Price.
- 8.7 By taking delivery of Goods you agree that a security agreement covers the Goods as set out in these provisions. You must, if requested by us, effect (including by registration) a continuing security interest in our favour in any Goods that are disposed of by you on credit terms, to better protect our security interests. For these purposes, "registration" includes responding to any amendment demand and preparing and filing any financing change statement.
- 8.8 The following provisions of the PPSA do not apply – section 95 (notice of removal of accession, to the extent that it otherwise requires us to give a notice to you), section 130 (notice of disposal, to the extent that it otherwise requires the us to give a notice to you), section 132(3)(d) (statement of account), section 132(4) (statement of account if no disposal), section 135(1)(a) (notice of retention, to the extent that it otherwise requires us to give notice to you), and section 143 (reinstatement). You waive your right under section 157 PPSA to receive a notice in relation to any registration event in connection with any collateral that is commercial property.
- 9. SUPPLY OF SERVICES**
- General**
- 9.1 Any Services we perform under the Contract shall be performed by persons who have sufficient skills, knowledge, experience and qualifications to perform them.
- 9.2 Any dates or timescales quoted by us for the performance and completion of the Services are indicative only and are not legally binding, and we will not be liable for any loss or damage suffered or caused by any delay or alleged delay in performing and completing the Services.
- 9.3 Where any part of the Services are to be performed at any location other than our own premises, you will procure that we and our servants are:
- (a) granted access to the relevant location at the appointed time, or if there is no appointed time, during normal business hours at the relevant location, provided we have given reasonable prior notice of arrival;
- (b) provided with and access to basic utilities and amenities, such as electricity, water or gas supplies and telecommunications line;
- (c) provided with all necessary lighting, power sources, personal protective equipment relevant to the work environment and any other things;
- (d) granted all such permits, licenses, consents and authorisations, as may be reasonably necessary to enable us and our servants to perform the Services, including to enable the start-up and testing (if relevant) of any Goods or Repaired Items (as the case may be).
- 9.4 If we are unable to perform the Services completely or in part for reasons attributable to your actions or inactions, including because you fail to fulfil your obligations under condition 9.3, we are entitled to terminate the Contract and you must pay the costs which have accrued to that time.
- 9.5 Unless the Order or, in the absence of being set out in the Order, our written quotation expressly states otherwise, the price for any of the Services to be performed at any location other than our own premises does not include the cost of travelling (including our servants' time and vehicle kilometres) from our workshop to the premises at which the Services are to be performed and return. If the Services are to be performed at a location other than our own premises, we reserve the right to recharge to you any travel, accommodation, meal and incidental costs incurred by us or our servants in performing the Services, and also charge you an administration fee of 20% of all such costs.
- Repair Services**
- 9.6 Subject to clause 9.7, the Repair Services to be performed are limited to the works, services and provision of parts and materials described in the Order.
- 9.7 (a) If during the performance of the Repair Services we discover further defects in the Repair Item which:
- (i) could not reasonably have been discovered by us during any inspection that we undertook of the Repair Item at the time of providing our quotation for the Repair Services; or
- (ii) were not described in the Order,
- and which we consider require repair or replacement, we will inform you in writing and provide you with a revised quotation before we perform any further repair or replacement services.
- (b) If the Repair Services are being performed in our workshop, you must provide your instructions regarding our revised quotation within 2 Business Days. If you do not provide us with your instructions within this period, we may elect to either:
- (i) complete the Repair Services described in the Contract, in which event we will notify you of any modification or limitation to the Warranty

that we consider necessary as a result of the residual defect in the Repair Item; or

- (ii) give you notice terminating the Repair Services, in which event we will issue you with an invoice for the Repair Services performed up to the date of termination. We will only exercise this right if we reasonably consider that completion of the Repair Services will not render the Repair Item operable or will result in the operation of the Repair Item being unsafe.
  - (c) If the Repair Services are being performed at your premises, you must decide immediately as to whether and to what extent the further repair or replacement services are to be performed. If you reject the revised quotation in this event, we may refuse the further performance of the Repair Services, in which case you must pay for the Repair Services performed prior to our refusal and all associated travelling expenses.
- 9.8 The Repair Services do not, and our obligation under condition 9.7 to inform you about further defects in need of repair or replacement does not, extend to any other item of equipment to which the Repair Item is attached or into which the Repair Item is integrated.
- 9.9 If, despite our reasonable efforts and our compliance with condition 9.1:
- (a) the cause of any defect in the Repair Item cannot be determined; or
  - (b) the defect cannot be remedied for any reason beyond our control, including:
    - (i) by reason of the unavailability of necessary spare parts; or
    - (ii) that we determine that the Repair Item is damaged beyond economic repair; or
    - (iii) because you refuse to accept the necessary scope of the repair,
- and if these circumstances could not have been recognized at the time of the Order, we are entitled to terminate the Contract and you must pay the costs which have accrued to that time.
- 9.10 Delivery of Repair Item to our premises:
- (a) If the Repair Services are to be performed at our workshop, you must package the Repair Item properly and appropriately for the protection and suitable delivery to and unloading of the Repair Item at our workshop. We are able to unload items at our workshop either by forklift (to a maximum weight of 2,500 kilograms) or by overhead crane (to a maximum weight of 5,000 kilograms). If any other unloading mechanism is required (including because your packaging does not permit unloading by available methods), we will endeavour to arrange a suitable mechanism and all costs associated with the unloading will be invoiced to you.
  - (b) The delivered Repair Item must be accompanied by a complete list (delivery note) of the parts which are included in the delivery.
  - (c) The risk of accidental loss of or damage to the Repair Item will only pass to us upon delivery of the Repair Item into our workshop.
- 10. PRICE**
- 10.1 The Price shall be the price set out in the Order or, in the absence of being set out in the Order, in our written quotation, or in the absence of a quotation, in our published price list in force at the date of acceptance of your Order. If any price is quoted as "estimated", that price is an estimate only and is not binding. If the actual price exceeds the estimated price by more than 10%, we will provide you with a further estimate of the price as soon as we become aware of the discrepancy.
- 10.2 Unless otherwise explicitly stated, the Price excludes GST and all other taxes, duties and levies that may be applicable to the supply of the Goods or Services in question. To the extent that any such taxes, duties or levies are applicable to the transaction, you shall be liable to pay them in addition to the Price.
- 10.3 The Price is exclusive of the costs and charges of packaging, insurance and transport of the Goods or the Repaired Items, which you shall also be liable for. Pallets supplied by us will be invoiced at a minimum value of \$20 each. Where exchange or return occurs, a credit will be issued.
- 10.4 An extra charge will be made for returnable containers and special shipping devices (such as oil barriers, tarpaulins, and shaft clamps) where they are consigned to you. A refund will be made if returned in good condition to the factory, or other points designated by us, within 90 days from the date of original shipment (charges prepaid).
- 10.5 We may, by giving notice to you at any time before delivery, increase the Price to reflect any increase in the cost of the Goods and/or Services that is due to:
- (a) any factor beyond our control (including foreign exchange fluctuations, increases in taxes and duties, and increases in labour, materials and other manufacturing costs);
  - (b) any request by you to change the delivery date(s), quantities or types of Goods ordered, the Specification for any Goods or the scope or nature of the Services;
  - (c) any delay caused by your instructions or your failure to give us adequate or accurate information or instructions, or any delay or additional cost caused by any other act or omission by you or your personnel; or

- (d) time lost or additional travel incurred by reason of industrial action whether at your premises or otherwise, or for time spent in attending any site inductions or by reason of any delays caused by interactions with other activities at your premises.

## **11. PAYMENT TERMS**

- 11.1 Unless the Order specifies otherwise, you must pay in full for Goods prior to dispatch or collection (as the case may be) and for Services prior to them being performed.
- 11.2 Any expenses incurred by us in recovery of debts are to be met by you, including legal expenses on a full indemnity basis.
- 11.3 Any sums to be paid by you under the Contract must be paid without any deduction or withholding and you shall not be entitled to assert any credit, set-off or counterclaim against us in order to justify withholding payment of any such amount in whole or in part. We may at any time, without limiting any other rights or remedies we may have, set off any amount you owe us against any amount we owe you, under the Contract or any other.
- 11.4 Without prejudice to our other remedies under the Contract, we shall be entitled to charge interest at the rate of 8% per annum above the prevailing National Australia Bank Business Lending Base Rate, calculated daily, on all overdue sums which you owe us from the due date to the actual date of payment.

## **12. INTELLECTUAL PROPERTY**

- 12.1 You hereby acknowledge that nothing in the Contract shall be deemed to transfer any Intellectual Property Rights in any Goods or Services to you or to create any license in your favour in respect of any Intellectual Property Rights owned and/or licensed by us. We shall own the Intellectual Property Rights in any documents, information, reports, formulae, materials, manuals inventions, diagrams, schematics, drawings, specifications, test results, data, software, images, artwork, photographs, blueprints and things that we create, conceive of, provide or disclose in connection with the Contract.
- 12.2 You shall defend, hold harmless and indemnify us (on demand) against all losses, damages, costs, claims, expenses (including legal expenses) and liabilities incurred by us, or for which we may become liable, in connection with any allegation, suit, demand, action or legal proceeding made against us for actual or alleged infringement of the Intellectual Property Rights of any third party arising out of or in connection with:
- (a) our use of or compliance with any Customer Inputs; or
  - (b) designing or manufacturing any Goods and/or performing any Services to meet the requirements of any Customer Inputs.
- 12.3 You hereby grant us an irrevocable, royalty-free, sub-licensable, transferable worldwide license in respect of any Customer Inputs and any of your Intellectual Property Rights as we require for the purpose of enabling us to comply with our obligations under the Contract. To the extent that the Intellectual Property Rights in any Customer Inputs are owned by any third party, you hereby warrant that you have procured (at your own expense) for us from such third party a license in respect of such Customer Inputs to enable us to comply with our obligations under the Contract.

## **13. WARRANTIES**

### **Goods Warranties**

- 13.1 Subject to this condition 13, we warrant that the Goods (other than Goods excluded from the scope of this warranty, as identified below) will:
- (a) be free from defects in materials and workmanship; and
  - (b) conform with their description in all material respects and any applicable Specification.

### **Services Warranty**

- 13.2 Subject to this condition 13, we warrant that the Services will be free from defects in workmanship.

### **Rectification**

- 13.3 In event of a breach of the warranties in conditions 13.1 and/or 13.2 we will, at our option, either:
- (a) in the case of Goods, do any one of the following:
    - (i) repair such Goods so as to make them non-defective or conformant (as the case may be); or
    - (ii) replace such Goods with non-defective or conformant Goods; or
    - (iii) pay the cost of replacing the Goods; and
  - (b) in the case of Services, do any one of the following:
    - (i) reperform the Services; or
    - (ii) pay the cost of having the Services performed again by a third party.

### **Conditions**

- 13.4 Our obligations under condition 13.3, and any warranties provided by law, are (to the extent permitted by law) conditional upon:
- (a) you notifying us of the defect or non-conformity within 7 days of becoming aware of same and, in any event, within the Warranty Period;

- (b) you providing us with a reasonable opportunity to perform all appropriate tests on allegedly defective or non-conformant Goods, Repaired Items or Services (as the case may be); and
  - (c) if we request that you do so, you returning the allegedly defective or non-conformant Goods or the allegedly defective Repaired Item to one of our designated service centres within 14 days of our request.
- 13.5 If, at our request, you return Goods or Repaired Items which are alleged to be defective or non-conformant to one of our service centres, we shall reimburse you in respect of all packing and transportation costs reasonably and properly incurred by you after we have determined that the Goods are in fact defective or non-conformant or the Service is in fact defective.
- 13.6 Any defective or non-conformant Goods which we replace will become our property upon delivery of the replacement Goods, which will be delivered to your site free of charge.
- 13.7 If we choose to repair defective or non-conformant Goods, or to re-perform defective Services, we may elect to do so either at one of our designated service centres or in situ. If we elect to repair such Goods or re-perform such Services in situ, we shall arrange a repair appointment with you and you shall procure that we and our servants are granted access to the location at which the Goods are or the Repaired Item is situated at the appointed time. You acknowledge that several repair appointments may be required to implement a successful repair or re-performance.
- 13.8 The:
- (a) Goods Warranty will apply to Goods which have been repaired or replaced just as it applied to the defective or non-conformant Goods that were replaced or repaired except that the Warranty Period shall expire on the later of:
    - (i) six months from the date of delivery of the replacement Goods or from the date of repair (as the case may be); and
    - (ii) the date that the original Warranty Period on the defective Goods which were replaced or repaired (as the case may be) would have expired; and
  - (b) Services Warranty will apply to Services which have been re-performed or re-supplied just as it applied to the defective Services that were re-performed or re-supplied except that the Warranty Period shall expire on the later of:
    - (i) six months from the date the re-performance or re-supply of the Services is completed (as the case may be); and
    - (ii) the date that the original Warranty Period on the defective Services which were re-performed or re-supplied (as the case may be) would have expired.

#### Exceptions

- 13.9 To the fullest extent permitted by law, we shall not have any liability to you in respect of a Warranty under these Conditions of Sale, or any other warranty at law, where:
- (a) the defect arises as a result of fair wear and tear, wilful damage by or negligence of anyone (other than us or our servants), or abnormal storage or working conditions;
  - (b) the defect arises because you failed to follow our oral or written instructions as to the storage, commissioning, installation, use and maintenance of the Goods or (in the absence of such instructions) good trade practice regarding the same;
  - (c) the defect results from the Goods having been in any way tampered with or altered by anyone other than one of our own employees or authorised representatives, unless with our permission;
  - (d) the defect arises as a result of damage caused in the course of loading, unloading or transportation of the Goods except where such damage is caused by our acts or omissions or that of our servants;
  - (e) the defect results from the incorporation of, or failure of, parts in the Goods that were specified by you or were not supplied by us; or
  - (f) the defect results from the use or incorporation of Customer Inputs; or
  - (g) with respect to Repair Services and Remanufacturing Services, the defect results from our compliance with your instructions or your failure or refusal to follow our recommendations.
- 13.10 Goods manufactured and/or supplied to us by third parties are excluded from the coverage of the Goods Warranty and the Services Warranty unless we have affixed our branding to them. However, the manufacturer of such goods may give you the benefit of its own warranty.

#### No Performance Guarantee or Testing

- 13.11 You hereby acknowledge and agree that, because the performance of a pump on site will be influenced by many factors which are beyond our control, we do not warrant or guarantee that Goods supplied or Repaired Items returned by us will be capable of any particular standard of performance. Any information in our published sales, marketing and technical literature, or made orally or writing, by our sales representatives which relate to the performance of any Goods or Repaired Items are made in good faith and believed to be accurate in

the context of the operating conditions within our own testing facilities but are only to be considered as indicative (i.e. non-binding) as regards the performance of any Goods or Repaired Items in any other conditions.

- 13.12 If you request any performance testing of any Goods or any Repaired Item, we will use reasonable endeavours to undertake such testing as you request (which may require the engagement of third parties and the transport of the Goods or the Repaired Item to and from their premises), and you must pay to us or reimburse us, as the case may be, for all costs and expenses incurred in connection with such testing, plus an administration fee of 20%.
- 13.13 If we undertake or arrange any performance testing of any Goods or any Repaired Item at your request, the results of any performance test will not:
- (a) render the Goods defective or non-compliant, or the Repair Services or the Repaired Item defective;
  - (b) impose on us any obligation to repair or replace the Goods or to undertake any further repair services on the Repaired Item; or
  - (c) permit you to terminate the Contract or withhold payment, or be released from your obligation to pay, for the Goods or the Repair Services.

#### 14. LIMITATION OF LIABILITY

- 14.1 We acknowledge that, in some circumstances, you will have rights under the Australian Consumer Law or other laws which cannot be excluded, modified or restricted. These rights may relate to conditions, warranties, undertakings and guarantees which apply in relation to the Goods or Services. Nothing in these Conditions of Sale (including this limitation of liability condition) is intended to exclude, modify or restrict these rights.
- 14.2 Nothing in these terms and conditions shall be construed or interpreted as an attempt to exclude or limit our liability for any matter that cannot be limited or excluded by law.
- 14.3 Without prejudice to the foregoing, we shall not have any liability for indirect, special or consequential losses or any of the following losses, regardless of whether same may be classified as direct or indirect losses:
- (a) loss of profit; loss of revenue; loss of use; loss of goodwill or reputation;
  - (b) loss of anticipated savings and loss of production.
- 14.4 Without prejudice to the foregoing, our entire liability under or in connection with the Contract (whether under contract, in tort, under statute or otherwise) shall be limited to the aggregate Price paid by you in respect of all Goods and Services supplied under it.
- 14.5 Nothing in the Contract shall be construed as releasing you from any duty you have at law to mitigate your losses.
- 14.6 All conditions, warranties, terms, undertakings, representations and obligations, whether expressed or implied, and whether arising under statute, common law, equity, custom, trade usage or otherwise (including without limitation, any implied condition, warranty, term or representation as to the correspondence of the Goods or Repaired Items with any description or as to merchantable quality, fitness for any purpose or safety of the Goods or Repaired Items, or operating performance where such performance is conditional on empirical factors or on the whole installation or on the individual or overall operation or on the skills of an operator), whether made known or not and our liability (if any) to compensate or indemnify any person or persons in respect of the foregoing, are expressly excluded or limited to the fullest extent permitted by law.

#### 15. RETURNS POLICY

- 15.1 We only accept Goods for return at our absolute discretion and only if the Goods and their packaging are in original condition, and free from damage and blemishes.
- 15.2 We reserve the right to charge you a minimum handling charge of 15% of the price of the returned Goods, or \$50, whichever is greater.

#### 16. DEFAULT

- 16.1 You will be in default if any of the following occurs:
- (a) you are in breach of the Contract or of any other contract that we may have with you and, in the case of a breach capable of remedy, you fail to remedy same to our reasonable satisfaction within 7 days of being requested to do so;
  - (b) we have not received payment for any Goods or Services by the due date for payment;
  - (c) you suspend, threaten to suspend, cease or threaten to cease to carry on all or substantially the whole of your business;
  - (d) you suspend, or threaten to suspend, payment of your debts, or are unable to pay your debts as they fall due or you admit your inability to pay your debts, or you are deemed by the law of any applicable jurisdiction to be unable to pay your debts;
  - (e) you commence negotiations with all or any class of your creditors with a view to rescheduling any of your debts, or you make a proposal for or you enter into any compromise or arrangement with your creditors, other than where these events take place for the sole purpose of a scheme whereby you will undergo a solvent amalgamation with one or more other companies or you will undergo a solvent reconstruction;

- (f) a petition is filed, a notice is given, a resolution is passed, or an order is made, for or in connection with you being wound up, other than for the sole purpose of a scheme whereby you will undergo a solvent amalgamation with one or more other companies or you will undergo a solvent reconstruction;
- (g) an application is made to court, or an order is made, for the appointment of an administrator over you or if a notice of intention to appoint an administrator over you is given or if an administrator is appointed over you;
- (h) a person becomes entitled to appoint a receiver over you or your assets or a receiver is appointed over you or your assets; or
- (i) any event occurs, or proceeding is taken, with respect to you in any jurisdiction to which you are subject that has an effect equivalent or similar to any of the events mentioned in (e) to (h) above.

16.2 If you default, or we reasonably believe that you are about to default and we notify you accordingly, without limiting any other rights or remedies available to us, we may:

- (a) cancel or suspend all further deliveries under the Contract and/or under any other contract between us and you;
- (b) treat the Contract and any other contract we may have with you as having been repudiated by you and terminate the Contract and/or such other contracts immediately upon giving you notice;
- (c) exercise our right (explained above) to retake possession of any Goods which are in your possession but to which title has not passed to you;
- (d) without notice to you, withdraw or vary any credit facilities we have provided to you; and/or
- (e) without notice to you, make all monies owing by you to us under the Contract and/or any other contract we have with you immediately due and payable.

#### **17. ENTIRE AGREEMENT**

17.1 The Contract constitutes the whole agreement and understanding between us and you and supersedes any previous arrangement, understanding or agreement between us and you relating to the subject matter of the Contract. You acknowledge that, in entering into the Contract, you have not relied on any statement, representation, assurance or warranty (whether made negligently or innocently) other than those expressly set out in the Contract. You agree that all liability for and remedies in respect of any representations are excluded except as expressly provided in the Contract. Nothing in this condition shall limit or exclude any liability for fraud.

#### **18. FORCE MAJEURE**

18.1 We shall not be liable for any failure or delay in performing our obligations under the Contract to the extent that such failure or delay is caused by a Force Majeure Event. A "Force Majeure Event" means any event beyond our reasonable control, including strikes, lock-outs or other industrial disputes (whether involving our own workforce or a third party's), failure of energy sources or transport networks, acts of God, war, terrorism, riot, civil commotion, interference by civil or military authorities, national or international calamity, armed conflict, malicious damage, breakdown of plant or machinery, nuclear, chemical or biological contamination, sonic boom, explosions, collapse of building structures, fires, floods, storms, earthquakes, loss at sea, epidemics or similar events, natural disasters or extreme adverse weather conditions, or default of our suppliers or subcontractors.

#### **19. NOTICES**

19.1 Any notice which is required to be given to a party under or in connection with the Contract shall be in writing, addressed to that party at its address specified in the Order, its principal place of business or such other address as that party may have specified to the other party in writing in accordance with this condition, and shall be delivered personally, sent by pre-paid post, commercial courier, fax or email. A notice or other communication shall be deemed to have been received:

- (a) if delivered personally, when left at the appropriate address;
- (b) if sent by pre-paid post, at 9.00 am on the fifth Business Day after posting;
- (c) if delivered by commercial courier, on the date and at the time that the courier's delivery receipt is signed;
- (d) if sent by fax or email, 48 hours after successful transmission.

19.2 The provisions of this condition 19 shall not apply to the service of any proceedings or other documents in any legal action.

#### **20. NO WAIVER**

20.1 No failure or delay by us in exercising any right, power or privilege to which we are entitled shall operate as a waiver nor shall any single or partial exercise of any such right, power or privilege preclude any other or further exercise. The terms of the Contract and obligations and acknowledgments hereunder may only be waived or modified by us by an agreement in writing between the parties hereto.

#### **21. SEVERANCE**

21.1 In the event of any part of the Contract becoming void or unenforceable, then that part shall be severed from the Contract and the remaining terms and conditions hereof shall remain in full force and effect.

#### **22. APPLICABLE LAW**

22.1 The Contract and any disputes or claims arising out of or in connection with it or its subject matter or formation (including non-contractual disputes or claims) are governed by and construed in accordance with the laws of the State of Western Australia, Australia. The parties irrevocably agree to submit to the non-exclusive jurisdiction of the Courts of Western Australia and any court which may hear appeals therefrom.

#### **23. SURVIVAL**

23.1 Conditions 8, 12, 14, and any other conditions of the Contract which, by their nature, should survive termination, shall survive the termination or expiration of the Contract.