

## Malabant Pty Ltd t/as Zoom Hydraulics (ACN 610 347 941)

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P O Box 6271, Clifford Gardens, QLD 4350

### TERMS and CONDITIONS

These Terms and Conditions will prevail and take precedence over any terms and conditions provided by the Customer, and such terms and conditions will have no legal effect and will not constitute part of these Terms and Conditions (even if Zoom accepts or fulfils the Customer's Order).By requesting, ordering, purchasing or receiving delivery of any Goods or Services the Customer is deemed to have accepted these Terms and to have agreed that they apply to the exclusion of all other, unless agreed in writing.

#### 1. Definitions and Interpretation

(a) In these Terms and Conditions:

**Zoom** means Malabant Pty Ltd t/as Zoom Hydraulics ACN 610 347 941.

**Customer** means the party to whom a Quotation is provided by Zoom or by whom an Order is placed with Zoom for Goods and/or Services.

**Goods** mean the materials, equipment and/or goods supplied by Zoom.

**GST** means the tax imposed by *A New Tax System (Goods and Services Tax) Act 1999* and related tax imposition Acts of the Commonwealth of Australia.

**Order** means any order placed by the Customer for the Goods and/or Services to be supplied by Zoom, whether in writing or orally.

**Price** means the cost of the Goods and/or Services as agreed between Zoom and the Customer.

**Quotation** means any quotation issued by Zoom for Goods and/or Services.

**Services** mean the services provided or to be provided to a Customer.

**Site** means the location where the Services are to be performed, or the location where the Goods are to be delivered, as nominated by the Customer.

**Specifications** mean the drawings, scope of work and/or description of the Goods and/or Services as stated in writing by the Customer to Zoom.

(b) In these Terms and Conditions, unless the context requires otherwise:

- any reference to a party includes its successors and permitted assigns;
- headings are for convenience only and have no legal effect;
- the singular includes the plural and vice versa; and
- "including" and similar words do not imply any limitation.

#### 2. Quotation and Order

(a) Quotations are valid for a period of 30 days.

(b) Quotations may be amended or withdrawn at any time by Zoom before acceptance by the Customer.

(c) Any Quotation containing a provision to supply Goods ex-stock is subject to fulfilment of prior contracts at the date of the Order.

(d) The placement of an Order resulting from a Quotation (or otherwise) is deemed to be an Order incorporating these Terms and Conditions notwithstanding any inconsistencies which may appear in the Customer's Order or documentation.

#### 3. Price

(a) Prices do not include delivery of the Goods to the Site or GST, unless otherwise stated in the Quotation.

(b) If Zoom is required to attend the Site, in addition to Zoom's fees for providing the Services, the Customer will be liable for payment of:

- travel time at the agreed rate or as notified by Zoom;
- travel costs (including air fares, car hire, accommodation and meals) at cost plus 15%; and
- any costs incurred by Zoom arising from a requirement to be inducted prior to entering the Site (including medical tests and accreditations).

#### 4. Deposit

If the Customer has an approved open account with Zoom, where Zoom places an Order for:

- non-stocked/capital Goods on behalf of a Customer; or
- Goods to be shipped from an overseas supplier,

the Customer will pay a minimum-security deposit of 25% of the Price of the ordered Goods. The security deposit will be deducted from the total Price of the Goods.

#### 5. Payment

(a) If the Customer does not have an approved open account with Zoom:

- the Customer will pay a minimum-security deposit of 100% of the Price of the ordered Goods where Zoom places an order for:
  - non-stocked/capital Goods on behalf of a Customer; or
  - Goods to be shipped from an overseas supplier;
- all sums due in relation to Goods are payable on delivery of the Goods. Payment will constitute acceptance of all Goods, and Zoom will not be liable for any claim by the Customer for any cost, loss, damage, expense or short delivery unless Zoom is notified in writing within 48 hours of receipt of the Goods by the Customer; and
- all sums due in relation to Services are payable on provision of the estimate by Zoom to the Customer. Payment will constitute the Customer's instruction to Zoom to commence the Services.

(b) Subject to clause 4, if the Customer has an approved open account with Zoom, invoices are payable by the Customer 30 days after the end of the month of the date of the invoice, unless otherwise agreed.

(c) If payment is not made on a timely basis, interest on the unpaid balance from time to time outstanding will accrue from the due date until paid in full at a rate of 1.8% per month, without prejudice to Zoom's other rights in respect of late or nonpayment.

(d) The Customer will pay all cost and expenses (including legal costs on an indemnity basis) incurred by Zoom and/or its agents in respect of the Customer, whether relating to any debt, possession of Goods and/or otherwise.

#### 6. GST

If GST is imposed on any supply made under or in accordance with these Terms and Conditions, the recipient of the taxable supply must pay to Zoom an additional amount equal to the GST payable on or for the taxable supply. Payment of the additional amount will be made:

(a) at the same time as payment for the taxable supply is required to be made in accordance with these Terms and Conditions; or

(b) within 30 days after the date of any invoice or notice from Zoom requesting such payment.

#### 7. Cancellations and Restocking Fees

(a) Orders cannot be cancelled by the Customer under any circumstances without Zoom's prior written consent and except upon terms which will indemnify Zoom against all loss.

(b) Excluding any defective items, neither all nor any part of an Order may be returned to Zoom without prior written agreement of Zoom.

(c) Zoom reserves the right to charge a minimum restocking fee of 10% or \$50 (whichever is the greater) of the full invoiced amount in respect of Goods returned by the Customer provided the returned Goods are in the same condition as they were upon delivery to the Customer by Zoom.

(d) Zoom reserves the right to recover the delivery fee if charged.

#### 8. Title & Risk of Loss

(a) Title to the Goods and any materials used in the supply of Services will pass to the Customer upon receipt of payment for the Goods.

(b) Subject to clause 9(c), the risk of loss or damage to the Goods passes to the Customer on the date and at the time that:

- the Goods are collected from Zoom; or
- where Zoom is responsible for the delivery, the Goods are delivered to the Site.

#### 9. Delivery

(a) Unless otherwise agreed, Zoom accepts no responsibility or duty to deliver but may agree to deliver at its discretion, without liability and at the Customer's cost.

(b) Zoom reserves the rights to deliver the Goods by instalments. Any delivery times notified to the Customer are estimates only. If the Customer requests Zoom to postpone delivery of the Goods beyond the delivery date or dates specified in the Order, Zoom may agree to do so if the Customer agrees to pay an additional fee for such postponement.

(c) If Zoom does not receive delivery instructions sufficient to enable Zoom to dispatch the Goods within 14 days of the Customer being notified that the Goods are ready for delivery, the Customer will from the 15<sup>th</sup> day after notification:

- be deemed to have taken delivery of the Goods;
- be liable for storage charges, payable monthly on demand; and
- assume risk in the Goods.

#### 10. Performance of Services on Site

(a) Where the Services are to be performed on Site, the Customer takes full responsibility for the adequacy, stability and safety of all operations and methods necessary for the performance of the Services. Any losses suffered by Zoom associated with work stoppage by Zoom on the ground of the Customer's noncompliance with any health, safety and environment requirements will be the Customer's liability.

(b) The Customer agrees to allow Zoom, its employees, consultants and agents access to as much of the Site as is necessary for the purpose of performing the Services.

(c) Zoom will not be liable for any damage or destruction to property located on the Site except such damage or destruction that occurs due to Zoom's willful misconduct, and the Customer releases and indemnifies Zoom from and against all claims of any kind in respect of such damage or destruction.

(d) Zoom reserves the right to perform the Services in instalments and invoice separately for such instalments without regard to subsequent provision of Services.

(e) In the event of a dispute, the Customer agrees that Zoom may enter upon any premises under the Customer's control for the purposes of recovering any Goods and, in entering such premises, the Customer agrees that Zoom and its authorised representatives will not be trespassers.

#### 11. Warranties

(a) Zoom will perform the Services with due skill and care.

(b) For Goods sold and manufactured by Zoom:

- Zoom warrants that the Goods will be of an acceptable quality; and
- if any defect appears within:
  - 12 months from the date the Goods are delivered to, or collected by, the Customer; or
  - 90 days from when the Services are performed, then:
    - Zoom Customer must promptly notify Zoom of the defect in writing and Zoom will, at Zoom's discretion, repair, replace or refund the Price of the Goods or Services; and
    - the cost associated with delivering the Goods to and from Zoom will be the responsibility of the Customer.

(c) The warranties in clause 11(b) will not apply to, and Zoom is not liable in respect of loss and damage arising from:

- defects or damage resulting from normal wear and tear, negligence, willful misconduct, improper use, abuse, neglect, improper installation repair or alteration (other than by Zoom), abnormal conditions of temperature dirt or corrosive matter, operation above rated capacities, electrical or other overload, unsuitable lubricants, dismantling or accident, or damage caused

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by unforeseen events;

(ii) use of the Goods beyond the parameters set in the Specifications; and

(iii) Goods which are modified, maintained or repaired by any person not authorised to do so by Zoom.

(d) These warranties are in addition to other rights and remedies that are available to the Customer at law. Zoom's goods come with guarantees that cannot be excluded under the Australian Consumer Law. The Customer is entitled to a replacement or refund for a major failure and for compensation for any other reasonably foreseeable loss or damage. The Customer is also entitled to have the goods repaired or replaced if the goods fail to be of acceptable quality and the failure does not amount to a major failure.

(e) All other warranties are excluded to the extent permitted at law.

#### 12. Representation

(a) The Customer agrees that the Goods manufactured by Zoom or for which Zoom is the sole Australian distributor, will not be exhibited by any person, firm or company at any show, exhibition or trade fair without prior written consent from Zoom. The Customer warrants that such Goods will not be misrepresented in any way to the detriment of Zoom as to their origin or source of import.

(b) The Customer is responsible for ensuring that the Goods and/or Services comply with any requirements of law or as required by any statutory authority and will not rely on Zoom's skill or judgement in relation to any particular purpose for which the Goods and/or Services are supplied other than as specified by the Customer to Zoom.

#### 13. Personal Property Securities Act 2009 ("PPSA")

(a) For the purposes of this clause 13, the terms 'financing statement', 'financing change statement', 'security agreement' and 'security interest' have the meanings set out in the PPSA.

(b) The Customer acknowledges and agrees that:

(i) these terms and conditions constitute a security agreement for the purposes of the PPSA; and

(ii) a security interest is taken in all Goods previously supplied by Zoom to the Customer (if any) and all Goods that will be supplied in the future by Zoom to the Customer during the continuance of the parties' relationship.

(c) The Customer agrees to do anything (including obtaining consents, signing or Zoom any further documents, and/or providing any further information) which Zoom asks and considers necessary for the purposes of:

- ensuring that the security interest is enforceable, perfected and otherwise effective; and/or
- enabling Zoom to apply for any registration, complete any financing statement, financing change statement or give any notification, in connection with the security interest; and/or
- Zoom exercising its rights in connection with the security interest.

(d) Everything that Zoom is required to do under this clause 13 is at the Customer's expense.

(e) The Customer waives any rights it may have:

- to receive notices under sections 95, 118, 121(4), 129, 130, 132(3)(d), 132(4), 134(1) and 135 of the PSSA; and
- under sections 142 and 143 of the PPSA.

(f) The Customer agrees to keep separate those Goods for which payment has been made from Goods for which payment has not been made.

(g) The parties agree that sections 96 and 117 of the PPSA do not apply to these terms and conditions.

#### 14. Assignment and Subcontracting

(a) The Customer may not assign its rights, duties and obligations under these Terms and Conditions without Zoom's prior written consent.

(b) Zoom may sub-contract the performance of any part of its obligations under these Terms and Conditions to any third party or assign any of its rights or obligations under these Terms and Conditions.

#### 15. Liability and Indemnity

(a) To the extent permitted by law, in the case of all Goods and/or Services supplied by Zoom, Zoom is not liable:

- for any transport, installation, removal, labour or other costs; or any loss or damage to the Goods in transit; or
- to the Customer or any other party for any direct, indirect, consequential or inconsequential injury loss or damage whatsoever by reason of any delay in delivery, deterioration, deficiency or other fault or harm in the Goods and/or Services supplied by or on behalf of or in any arrangement with ZOOM and whether or not due to the negligence of Zoom its servants or agents.

(b) To the extent permitted by law, Zoom's total liability in connection with these Terms and Conditions:

- is limited at Zoom's option to one of the following:
  - in the case of the supply of Goods: (1) replacement, repair or resupply of the Goods; or (2) the cost of replacing, repairing or resupplying the Goods;
  - in the case of the supply of Services: (1) supplying the Services again; or (2) the cost of supplying the Services again;
- but will not exceed the Price paid by the Customer under these Terms and Conditions.

#### 16. Termination

(a) Zoom may terminate an Order immediately if the Customer:

- breaches any of its obligations under these Terms and Conditions and it does not remedy such breach within a reasonable time as requested by Zoom in writing; or
- becomes insolvent, is wound up or a receiver or creditor is appointed over any part of the Customer's business.

(b) Upon termination, the Customer will pay Zoom for all costs incurred with the termination up to the date of termination.

#### 17. Force Majeure

Zoom is not liable for failing to comply with these Terms and Conditions as a result of events beyond Zoom's control (including earthquakes, cyclones, floods, fires, lightning, storms or other acts of God, blowouts, strikes or industrial disputes, riots, terrorist acts, civil disturbances, breakages of machinery or industrial conditions or arising out of any other unexpected or exceptional cause, delays in transportation and dispositions or orders of governmental authority, but shall not include lack of funds nor economic hardship). If such events cause a delay in the supply of the Goods and/or Services, the Customer agrees to:

(a) extend any timeframes specified in the Order to accommodate the delay;

(b) pay Zoom any additional fees incurred by Zoom to complete the Services, as agreed between the parties; and

(c) pay Zoom standby rates (at the published hourly rates) if Zoom personnel are retained on Site.

#### 18. Confidentiality

The Customer will treat as confidential all information, data, drawings, specifications, samples and documentation supplied by Zoom relating to the Goods and/or Services, and will not disclose them to any third party without the prior written consent of Zoom unless such information is:

- a matter of public knowledge;
- lawfully available from another source;
- disclosed as may be necessary in accordance with the PPSA for the security interest to be perfected; or
- disclosed as may be required by law.

#### 19. Ownership of Intellectual Property

(a) All intellectual property created by Zoom relating to the Goods and/or Services is from the time of creation, owned by Zoom.

(b) Zoom grants to the Customer a non-exclusive, royalty-free licence to use Zoom's intellectual property to the extent such materials form part of, or are integral to, the Goods and/or Services.

(c) The Customer must not remove any branding, patent, copyright or other proprietary notices incorporated on or in the Goods by Zoom.

(d) The Customer will obtain the prior written consent of Zoom before placing any other trade mark, company name, brand name or private label on the Goods.

(e) The Customer will not use the trade mark, company name or brand name relating to any product of which Zoom is a distributor for sales or marketing purposes, unless with the prior written consent of Zoom.

(f) The Customer at all times indemnifies Zoom, its officers, employees and agents, from and against all loss, damage, costs and expenses (including legal costs) arising out of the infringement or alleged infringement of any intellectual property, because of the purchase, possession or use of the Goods or the outcomes of the Services.

#### 20. Governing Law

These Terms and Conditions are governed by, and construed in accordance with the laws of Queensland. The parties agree to submit to the non-exclusive jurisdiction of the courts of Queensland. The provisions of the United Nations Convention on Contracts for the International Sale of Goods are expressly excluded from these Terms and Conditions.

#### 21. Notices

All notices and consents relating to these Terms and Conditions must be in writing.

#### 22. General

(a) These Terms and Conditions contain the entire understanding between the parties concerning the Goods and/or Services and supersedes all prior communications.

(b) These Terms and Conditions may not be amended or varied except in writing and signed by the parties.

(c) The failure of either party to enforce any provisions under these Terms and Conditions will not waive the right of such party thereafter to enforce any such provisions.

(d) If any term or provision of these Terms and Conditions is held by a court to be illegal, invalid or unenforceable under the applicable law, that term or provision will be severed from these Terms and Conditions and the remaining terms and conditions will be unaffected.