

1. INTERPRETATION

In these Terms:

"Agreement" means each Order Form, read together with these Terms (each forming a separate agreement for the provision of Goods and/or Services by KAESER to the Customer).

"Business Day" means any day (other than a Saturday, Sunday or a public holiday) in Melbourne, Australia.

"Change of Control" means any change in 'control' of the Customer as that term is defined in section 50AA of the Corporations Act.

"Corporations Act" means the *Corporations Act 2001* (Cth).

"Customer" means the party named in an Order Form (and its representatives, successors and permitted assigns), and may include a KAESER authorised distributor of the Goods.

"Customer Payment" has the meaning given in clause 4.6(b).

"Extended Warranty" has the meaning set out in KAESER's Warranty Conditions.

"Delivery" means the actual physical delivery of the Goods in the manner described in clause 8.2.

"Intellectual Property" means all copyright, patents, trademarks, names, formulae, specifications, confidential information and all modifications, improvements and enhancements (whether registrable or not) owned by KAESER or any of its Related Bodies Corporate in respect of the Goods and/or the Services.

"Goods" means the goods specified in an Order Form.

"GST" has the same meaning as in the GST Law.

"GST Law" has the meaning given to that term in the *A New Tax System (Goods and Services Tax) Act 1999* (Cth).

"KAESER" means KAESER Compressors Australia Pty Ltd ACN 050 198 895 and its representatives, successors and permitted assigns.

"KAESER Payment" has the meaning given in clause 4.6(a).

"KAESER's Warranty Conditions" means the warranty conditions of KAESER in respect of the Goods, available at section 10, as may be updated by KAESER from time to time.

"Normal Warranty" has the meaning set out in KAESER's Warranty Conditions.

"Order Form" means a written request (in the form agreed by KAESER) for Goods and/or Services to be supplied by KAESER to the Customer.

"PPSA" means the *Personal Property Securities Act 2009* (Cth).

"PPSR" means the Personal Property Securities Register established pursuant to the PPSA.

"Price" means the price payable for the Goods and/or the Services as described in clause 3.4.

"Privacy Act" means the *Privacy Act 1988* (Cth).

"Related Body Corporate" has the meaning given to that term in the Corporations Act.

"Services" means the services provided by KAESER at the request of the Customer in respect of the Goods, including any services set out in an Order Form.

"Specified Distributor Account" means a bank account nominated by KAESER, used for the sole purpose of receiving payments on behalf of Customer and KAESER (as applicable).

"Terms" means these Terms and Conditions of Sale as amended by KAESER from time to time in accordance with clause 15.4.

2. APPLICATION OF AGREEMENT

2.1 Unless otherwise agreed by KAESER in writing, each Order Form (read together with these Terms) will form a binding Agreement between KAESER and the Customer when KAESER accepts the Order Form in writing. The Customer acknowledges that these Terms apply to the purchase and sale of any Goods and/or Services between KAESER and the Customer, to the exclusion of all other terms or conditions (including any purchase order terms or similar provided by the Customer) except as otherwise agreed in writing by the parties.

2.2 The descriptions, illustrations and explanations of the Goods and/or Services as set out in any quotation, catalogues, price lists and other advertising material provided or otherwise made available by KAESER do not form part of this Agreement and are not binding on KAESER. The Customer is responsible for ensuring that the Goods and/or the Services are fit for their intended application or purpose.

3. ORDER FORMS AND PRICES

3.1 Any quote provided by KAESER to the Customer for the Goods and/or the Services is valid for 30 days from the date of issue unless otherwise stated on the quote. The Customer acknowledges and agrees that a quote is an invitation to place an Order Form with KAESER and does not commit KAESER to providing any Goods or Services.

3.2 Any Order Form placed by the Customer is an offer to purchase the Goods and/or Services set out in that Order Form on these Terms. KAESER may in its discretion reject in whole or in part any Order Form submitted by the Customer. An Order Form submitted by the Customer and accepted by KAESER in accordance with clause 3.3 cannot be cancelled without KAESER's consent (which may be given or withheld at KAESER's discretion). Where KAESER consents to the Customer cancelling an Order Form, a cancellation fee will be payable by the Customer to KAESER as follows:

- (a) where the Order Form has been cancelled within 30 days of the date of submission by the Customer of the Order Form, the amount notified by KAESER (acting reasonably) as the costs it has incurred (or expects to incur) as a result of the cancellation up to a maximum amount equal to 20% of the total value of the Order Form; or
- (b) where the Order Form has been cancelled after the date referred to in clause 3.2(a) but prior to Delivery, the amount notified by KAESER (acting reasonably) as the costs it has incurred (or expects to incur) as a result of the cancellation up to a maximum amount equal to 50% of the total value of the Order; or
- (c) where the relevant Goods the subject of the Order Form are non-standard items (e.g., not built for stock or otherwise built to the Customer's specifications), any amount equal to 100% of the total value of the Order Form.

3.3 An Order Form will only be deemed accepted by KAESER once KAESER communicates acceptance to the Customer in writing (including by electronic means).

3.4 The Price of the Goods and/or the Services will be as set out in an Order Form and any Price set out in an Order Form is exclusive of:

- (a) GST;
- (b) transportation and Delivery costs; and
- (c) any other duty or impost.

3.5 The Customer must pay KAESER, in addition to the Price, an amount equal to any GST which KAESER must pay for any supply under the Terms and any other charges relating to the matters detailed in clause 3.4(b) and (c) as notified by KAESER to the Customer in advance (whether on the Order Form or otherwise).

3.6 Where there is any change in the costs incurred by KAESER in relation to the supply of the Goods and/or the Services, KAESER may (acting reasonably) increase the Price in order to take account of any such change, and notify the Customer of the increase in writing. If the Customer does not object to the increase within 2 Business Days (by notice in writing to KAESER), it will be deemed to have accepted the increased Price.

3.7 The Customer is solely liable for all bank fees and charges associated with the payment of KAESER's invoices.

4. PAYMENT

4.1 Subject to clause 4.2, payment for the Goods and/or Services must be made in full on or prior to dispatch and otherwise in accordance with the payment terms as set out on an Order Form. If stated on an Order Form, the Price may be paid by the Customer in instalments.

4.2 If KAESER agrees in writing to supply the Goods and/or Services on credit, payment must be made in full within 30 days of the date of the relevant invoice..

4.3 Payment shall not be deemed to have been made by the Customer until funds have cleared in the Specified Distributor Account. The Customer must not set off against, or deduct from the Price, any sums owed or claimed to be owed by KAESER to the Customer, and the Customer must not withhold payment of any amount because part of that invoice is in dispute. If the Customer disputes an invoiced amount (whether in whole or in part), Customer will pay the invoiced amount in full and promptly notify KAESER of the amount the Customer believes is due for payment.

4.4 KAESER may refuse, cancel or change any provision of credit to the Customer at any time.

4.5 If the Customer orders the Goods and/or Services in excess of any credit limit agreed by KAESER, KAESER may require the Customer to make payment of the amount which exceeds the credit limit immediately.

4.6 Payments to the Specified Distributor Account will be received, held and paid on the basis:

- (a) as to the amount invoiced by KAESER, for the benefit of KAESER ("KAESER Payment"); and
- (b) as to any overpayment, held on trust as and for the benefit of the Customer ("Customer Payment"). The Customer Payment must be electronically transferred by KAESER to the Customer within 2 Business Days of receipt in the Specified Distributor Account of the full amount invoiced or each instalment of the amount invoiced.

4.7 If any payment is received directly by the Customer (e.g. where the Customer, in its capacity as a KAESER authorised distributor has placed an order for Goods and/or Services on behalf of one of its customers) which should have been made into the Specified Distributor Account, the Customer receives it on trust for KAESER and must immediately pay the full amount of the payment to the Specified Distributor Account and notify KAESER in writing that it has done so.

4.8 Any variation to these payment terms will not be valid unless expressly agreed in writing and signed by KAESER.

5. PAYMENT DEFAULT

5.1 If the Customer defaults on payment by the due date of any amount payable to KAESER, or where provision of credit is cancelled by KAESER for any reason, then all money which would become payable by the Customer to KAESER at a later date on any account, becomes immediately due and payable without the requirement of any notice to the Customer, and KAESER may, without prejudice to any other remedy available to it:-

- (a) charge the Customer compounding interest on any sum due at the prevailing rate pursuant to the *Penalty Interest Rates Act 1983* (Vic) from the due date until the date of payment in full;
- (b) charge the Customer for all expenses and costs (including legal costs and disbursements on a full indemnity basis) reasonably incurred by it in taking whatever action it deems appropriate to recover any sum due;
- (c) cease or suspend supply of any further Goods or Services to the Customer until such time as all outstanding amounts have been paid in full;
- (d) by notice in writing to the Customer, terminate any Agreement with the Customer so far as unperformed by KAESER; without effect on the accrued rights of KAESER under any Agreement; and/or
- (e) set-off Customer Payments held in the Specified Distributor Account against the amount owing by the Customer to KAESER; without effect on the accrued rights of KAESER under any Agreement.

5.2 To the extent permitted by law, clauses 5.1(c), (d) and (e) may also be relied upon, at the option of KAESER:

- (a) where the Customer is an individual and becomes bankrupt or enters into any scheme of arrangement or any assignment or composition with or for the benefit of his or her creditors or any class of his or her creditors generally; or
- (b) where the Customer is a corporation and it enters into any scheme of arrangement or any assignment or composition with or for the benefit of its creditors or any class of its creditors generally, or has a liquidator, provisional liquidator, administrator, receiver or receiver and manager appointed, or any action is taken for, or with the view to, the liquidation

(including provisional liquidation), winding up or dissolution without winding up of the Customer.

5.3 If clause 5.2(a) or clause 5.2(b) applies, the Customer is entitled only to the Customer Payment portion of such funds which are held by KAESER in the Specified Distributor Account. The Customer has no right or entitlement to the KAESER Payment portion.

6. PASSING OF TITLE IN GOODS AND PPSA

6.1 Until full payment in cleared funds is received by KAESER for Goods supplied by it to the Customer, title and property in the Goods remain vested in KAESER and do not pass to the Customer.

6.2 The Customer grants and KAESER may register on the PPSR, a security interest (as that term is defined in section 12 of the PPSA) in all and any sale of Goods under this Agreement, including but not limited to intellectual property and all other present or after-acquired property.

6.3 The Customer and KAESER agree to contract out of the PPSA in accordance with section 115 of the PPSA to the extent that the section applies for the benefit of, and does not impose a burden on, KAESER. The Customer waives its right to receive a copy of any financing statement (as that term is defined in section 10 of the PPSA) or any financing change statement (as that term is defined in section 10 of the PPSA) registered by KAESER in respect of the security interest created by these terms and conditions.

6.4 The Customer agrees to execute any documents, provide all relevant information and co-operate fully with KAESER to ensure that KAESER has a perfected security interest in the personal property charged and, if applicable, a purchase money security interest (as that term is defined in section 14 of the PPSA).

6.5 The Customer agrees to give KAESER at least 10 Business Days' written notice of any proposed Change of Control or any other change in the Customer's structure or management including any sale or disposition of any part of the business of the Customer, any change in directorships, shareholders or management or change in partnership or trusteeship.

6.6 The Customer agrees that, until all monies owing to KAESER are paid in full, it shall not sell or grant any other security interest in the Goods (excluding sales in the ordinary course of business where the Customer is a KAESER authorised distributor).

6.7 The Customer agrees to reimburse KAESER for all costs and/or expenses incurred or payable by KAESER in relation to registering, maintaining or releasing any financing statement or any other document in respect of any security interest under this Agreement.

6.8 KAESER may, without notice, enter any premises where it suspects the Goods may be and remove them, notwithstanding that they may have been attached to other goods not the property of KAESER, and for this purpose the Customer irrevocably licenses KAESER to enter such premises and also indemnifies KAESER from and against all costs, expenses and liabilities suffered or incurred by KAESER in connection with any claims, demands or actions brought against KAESER by any third party arising from KAESER's exercise of its rights under this clause 6.8.

7. RISK AND INSURANCE

7.1 The risk in the Goods and all insurance responsibility for theft, damage or otherwise in respect of the Goods will pass to the Customer immediately upon Delivery.

7.2 The Customer assumes all risk and liability for loss or damage or injury to any persons, or to property of the Customer or any third parties, arising out of the use or possession of any of the Goods, except to the extent caused or contributed to by KAESER.

7.3 Notwithstanding clause 7.1, if the Goods remain on KAESER's premises or with a carrier due to the failure by the Customer to take Delivery, risk in the Goods shall transfer to the Customer from the date and time of the attempted Delivery and KAESER may charge the Customer for additional expenses incurred for storage and handling of the Goods.

8. DELIVERY

8.1 KAESER will, at the Customer's cost arrange for the Delivery of the Goods to the address specified in an Order Form or to another location agreed in writing between KAESER and the Customer. KAESER will designate the route and means of transportation in its discretion.

8.2 Delivery of the Goods is taken to occur at the time that (as applicable):

- (a) KAESER (or its nominated carrier) unloads the Goods at the specified address; or
- (b) the Customer (or its nominated representative) takes possession of the Goods at KAESER's premises.

8.3 Where KAESER is responsible for delivering the Goods to a specified address, the Customer must ensure that it (or its nominated representative) is available to accept Delivery and that KAESER or its nominated carrier has clear and free access to the relevant premises. To the extent permitted by law, KAESER will not be liable for any damage caused to the premises as a result of the Delivery except to the extent such damage arises out of KAESER's (or its nominated representative's) negligence or wilful misconduct.

8.4 KAESER's delivery record or collection notice shall be prima facie proof of the contents stated therein.

8.4 Any timeframe or date for Delivery of the Goods or provision of the Services stated by KAESER (whether on an Order Form or otherwise) is intended as an estimate only and is not a contractual commitment. KAESER will use all reasonable endeavours to meet any estimated dates for Delivery of the Goods or completion of the Services. KAESER reserves its right to vary Delivery or completion dates as reasonably necessary and may, at its discretion, Deliver the Goods in instalments.

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8.6 The Customer irrevocably indemnifies KAESER against any and all loss or damage suffered by KAESER as a result of any failed Delivery, including any costs and expenses incurred in relation to storage of the Goods and costs of redelivery, except to the extent caused or contributed to by KAESER.

9. INTELLECTUAL PROPERTY

9.1 The Customer acknowledges that it has no proprietary right or interest in the Intellectual Property.

9.2 The Customer must not register or record or attempt to register or record anywhere in the world the Intellectual Property or any part thereof or any patents, inventions, trademarks or designs derived from or similar to the Intellectual Property or aid or abet anyone else in doing so.

9.3 The Customer must not at any time create, sell, manufacture or process any products using or taking advantage of the Intellectual Property.

9.4 Any Intellectual Property provided to the Customer by KAESER in connection with the Goods or the Services remains the exclusive property of KAESER and must be returned to KAESER on demand and shall not be copied or communicated to any third party without the express prior written consent of KAESER.

10. LIABILITY & WARRANTIES

10.1 Subject to clause 10.9, to the maximum extent permitted by law, and except as expressly set out in these Terms or KAESER's Warranty Conditions, all express or implied guarantees, warranties or representations relating to the Goods and the Services are excluded.

10.2 If any implied guarantee, warranty or representation cannot be excluded at law but can be limited, then KAESER's liability for breach of such guarantee, warranty or representation is limited to (at KAESER's option):

- (a) replacement or repair of the Goods or reprovision of the Services; or
- (b) the payment of the cost of replacing or repairing the Goods or reprovision of the Services.

10.3 To the extent permitted by law, neither party is liable for any indirect or consequential losses or expenses suffered by the other party howsoever caused, including but not limited to loss of turnover, loss of profits, loss business or loss of goodwill.

10.4 The Customer irrevocably indemnifies KAESER against any claim brought against KAESER by any third party arising out of or any way connected with the Customer's use of the Goods or Services, or, where the Customer is a KAESER authorised distributor, the Customer's sale of the Goods to any of its customers, except to the extent caused or contributed to by KAESER.

10.5 KAESER will not be liable for any loss or damage suffered by the Customer where KAESER cancels or suspends the supply of the Goods or the Services in accordance with these Terms.

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10.7 To the extent permitted by law, KAESER shall not be liable to the Customer in respect of any reasonable variation between any sample displayed to the Customer and the Goods actually supplied to the Customer.

10.8 The Customer acknowledges and agrees that any performance or output figures supplied in respect of the Goods are estimates only and KAESER is not liable to the extent the performance of the Goods does not conform to the estimated output figures.

10.9 Nothing in these Terms is to be interpreted as excluding, restricting or modifying or having the effect of excluding, restricting or modifying the application of any State or Federal legislation applicable to the sale of Goods or the provision of Services which cannot be excluded, restricted or modified.

10.10 Subject to clauses 10.1, 10.2 and 10.3, KAESER's maximum aggregate liability to the Customer under or in any way connected with any Agreement is limited to the total amount paid by the Customer to KAESER under that Agreement except that nothing in this clause 10.10 will limit KAESER's liability in respect of death, personal injury or property damage caused by KAESER's negligence or wilful misconduct.

10.11 KAESER's Warranty Terms form part of this Agreement and the Normal Warranty (and not the Extended Warranty) applies in respect of the Goods unless stated otherwise on an Order Form or agreed by the parties in writing. Unless stated otherwise on an Order Form or agreed by the parties in writing, the relevant warranty period (as set out in the KAESER's Warranty Terms) commences on the date the Goods are commissioned or the date which is 12 weeks from the date of dispatch of the Goods from KAESER, whichever occurs first.

11. RETURNS

11.1 The Customer must thoroughly inspect the Goods upon Delivery and must, within 3 Business Days of Delivery, notify KAESER in writing of any defects, shortages, damage (including transport damage) or other inconsistency with an Order Form and give KAESER a reasonable opportunity to inspect the Goods and investigate the cause of the relevant issue. If the Customer fails to give notice in

- accordance with clause 11.1, then the Customer is deemed to have accepted the Goods and, subject always to clause 10.9, may not return them.
- 11.3 Where the Customer gives notice within the timeframe specified in clause 11.1, KAESER must first grant a written return acceptance to the Customer before the Customer arranges return/exchange of any Goods.
- 11.4 Where KAESER grants a written return acceptance under clause 11.3, KAESER may at its option replace the affected Goods (with delivery costs to be borne by KAESER) or refund the Customer any Price (or part thereof) paid by the Customer in respect of the affected Goods.
- 11.5 In all other circumstances, KAESER may, in its absolute discretion refuse to accept returned Goods. If KAESER does allow the Customer to return Goods, it may require the Customer to pay a handling fee of 15% of the Price in respect of the returned Goods plus any applicable delivery costs.
- 11.6 KAESER will not under any circumstances accept any Goods for return that:
- are not in their original condition and packaging;
 - have been altered in any way; or
 - have not been handled, stored or installed in accordance with KAESER's instructions.
- 11.7 KAESER will not accept return/exchange of any Goods made to order (e.g., items not built for stock or otherwise built to the Customer's specifications) for change of mind.
- 12. CANCELLATION OF ORDER FORM BY KAESER**
- 12.1 If, through circumstances beyond the reasonable control of KAESER, it is unable to effect Delivery of the Goods or provide the Services, then KAESER may cancel the relevant Order Form (even if it has already been accepted by KAESER in accordance with clause 3.3) and, in this case, KAESER will promptly notify the Customer of the cancellation and refund any amounts paid by the Customer in respect of that Order Form in relation to Goods or Services not supplied.
- 13. PRIVACY AND DATA**
- 13.1 KAESER is bound by the Privacy Act, as amended from time to time, and takes all reasonable steps to ensure that all personal information (as that term is defined in the Privacy Act) obtained by it in connection with these Terms is appropriately stored, used, disclosed, transferred and destroyed in accordance with the Australian Privacy Principles.
- 13.2 KAESER requires that the Customer comply with the Australian Privacy Principles in connection with any personal information supplied to it by KAESER.
- 13.3 The Customer acknowledges and agrees that the Goods may contain embedded hardware (**Hardware**) that can transmit machine data, such as diagnostic, maintenance, use and machine identification data (**Machine Data**) to KAESER and its Related Body Corporate in Germany.
- 13.4 The Customer irrevocably consents to KAESER and its Related Bodies Corporate collecting, storing, processing and otherwise using the Machine Data, worldwide and at no cost, in perpetuity, for the purpose of:
- troubleshooting product issues;
 - quality assurance purposes;
 - research or development of KAESER products and services; and
 - any other purposes agreed by the parties.
- 13.5 If the Customer sells the Goods, it must notify KAESER of the name and contact details of the purchaser of the Goods and must also notify the purchaser of the matters set out in clauses 13.3 – 13.4 prior to the time of sale.
- 14. FORCE MAJEURE**
- 14.1 KAESER shall not be liable for breach of an Agreement if and to the extent that fulfilment of a term or condition has been prevented, hindered or delayed by force majeure, and in this case, time for fulfilment of such a term shall be extended for such period as is reasonable in all the circumstances.
- 14.2 For the purposes of this clause 14 "force majeure" means any event or circumstances beyond KAESER's reasonable control, including without prejudice to the generality of the foregoing, pandemics, strikes, fires, explosions, lock-outs, trade disputes, injunction, accident to plant or machinery, shortage of any material, riots, act of terrorism, civil commotion, war, interruption of transport, inability to obtain supplies, emergency, destruction or damage due to natural forces, fire, flood, explosion, and compliance with orders or requests of any national or local authority.
- 15. MISCELLANEOUS**
- 15.1 These Terms and any Agreement are governed by the laws of Victoria and the parties agree to submit to the exclusive jurisdiction of the courts and tribunals of Victoria, the Federal Court of Australia, and of courts entitled to hear appeals from those courts and tribunals.
- 15.2 Failure by KAESER to enforce any of its rights under these Terms on any occasion shall not be construed as a waiver of its rights under these Terms.
- 15.3 If any term or condition is unenforceable it must be read down so as to be enforceable, or if it cannot be read down, the term or condition may be severed from these Terms without affecting the enforceability of the remaining Terms.
- 15.4 The Customer acknowledges that KAESER may amend these Terms from time to time. If KAESER makes a change to these Terms, that change will take effect for any future Agreements from the date on which KAESER notifies the Customer of such change in writing. The Customer will be deemed to have accepted such changes for future Agreements if it submits an Order Form after it has been notified of the changes.
- 15.5 This Agreement is the entire agreement between the parties and supersedes all previous understandings and agreements between them relating to its subject matter.
- 15.6 If either party believes that a dispute has arisen in connection with these Terms, it must notify the other party setting out details of the dispute ("**Dispute Notice**"). The representatives of each party must participate in good faith negotiations to attempt to reach resolution of the dispute within 20 Business Days of the date of the Dispute Notice. If resolution cannot be reached within this timeframe, then either party may, by written notice to the other, submit the dispute for mediation administered by the Resolution Institute and the mediation will be conducted in accordance with the Resolution Institute Mediation Rules ("**Rules**") which set out the procedure to be adopted, the process of selection of the mediator and the costs involved and the Rules are taken to be incorporated into these Terms. Any mediation will take place in Melbourne, Australia. Unless otherwise agreed by the parties, each party will bear its own costs of dispute resolution. A party may not commence any court, tribunal or other similar proceedings unless it has first complied with the process set out in this clause 15.6 except that nothing in this clause 15.6 is to be taken as preventing any party from seeking interlocutory relief in respect of a dispute.
- 15.7 KAESER may license, assign or subcontract all or any of its rights and obligations under these Terms without the Customer's consent. The Customer must not license, assign or subcontract all or any of its rights or obligations under these Terms without KAESER's prior written consent (which must not be unreasonably withheld).
- 15.8 These Terms apply to the provision of Goods and/or Services by KAESER to the Customer. Without limiting the ways in which the Customer may become bound by these Terms, these Terms may be accepted by the Customer by:
- signing these Terms as indicated at the end of this document;
 - signing another document, for example, a quote or Order Form;
 - clicking a button on a computer screen or other device indicating the Customer's acceptance of these Terms.